TO REMAIN.

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DECLARATION

I declare that this thesis is the product of my independent research conducted under the guidance of my supervisor. The thesis has not been submitted or presented, either in whole or in part, for the award of any degree in any university or institution of learning. I further declare that all anti-plagiarism rules have been complied with and all sources consulted or referred to have been duly acknowledged as appropriate.

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SUMMARY

An undeniable inroad made into the regulation of property ownership has been the requirement that evictions may only take place with the permission of a court of law. In the South African context, this requirement has been further augmented by the “just and equitable” measure. This means that not only are evictions only allowed on the basis of a court order, and but also only to the extent that a court has exercised a “just and equitable” discretion.

The exercise of the just and equitable discretion has resulted in three distinct types of eviction orders. The first of these orders are those 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 looks for alternative land to resettle the occupiers. The second, are instances in which a court grants an eviction but, for whatever reason, enforcement becomes impracticable, resulting in unlawful occupants remaining on private property that belongs to someone else. The third type of orders are those instances where a court denies an eviction application, enabling unlawful occupiers to indefinitely remain on land that belongs to someone else.

In this thesis I look into the fact of remaining as a consequence of the third type of order. The effect of the court decision not to grant the eviction order results in the practical situation of the unlawful occupier remaining on such land. The unlawful occupier remains on land belonging to another notwithstanding the fact there is no countervailing right to do so.

While the intervention to bring evictions under the ambit of justness and equitability more so in an unequal and deprived society such as South Africa is laudable, the failure of the courts to address the legality and tenure security posed by the eviction order not to evict despite unlawfulness of occupation having been established negates the good intention. In this regard, I contend that hesitancy to address the legitimacy and tenure security of this identified fact of remaining has to do with the structure and approach to the law, which supports indifference and detachment. This indifference and detachment minimise the law's (constricted) inherent capacity to remedy the asserted problem of tenure insecurity.

Key Words: Land, Reform, Property, Tenure, Claim, Equitable, Ownership, Rights, Remain, Interest.

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We may make our plans, but God has the last word. – Proverbs 16.

This was never meant to happen. How could that be? Where would I have come to be comfortable with the notion that this, too, is possible? Is it an exaggeration to say that having been born to parents with no formal tertiary education, this is the fulfilment of my forefathers' wildest dreams? To whom does this belong?

I certainly have no right to claim that this was the product of my talents. This thesis's successful completion was made possible by several people. I am quite proud to mention a few of them here.

I would like to thank Professor Danie Brand for the opportunity to work under his enlightening supervision. His consistent, compassionate, and fatherly guidance has resulted in yet another milestone. While I will remember this journey for the tumultuous periods associated with this level of study, I consider myself fortunate to have benefited from Danie's dedication in developing young and upcoming property law experts.

Elizabeth, my amazing sister. This is as much yours as it is anyone else's who wants to claim it based on parental responsibility. Thank you for committing your time and resources to everything I have set out to do.

Wilbert, my brother. It is because of your earlier Masters' degree that I saw the prospect of one day attaining the same. In that regard, thank you for setting the foundation for this accomplishment. A torch bearer's duty is to pave way for those who come behind him. As I now carry the torch in this one aspect of life, I can only hope that I may do so in a way that inspires others.

To my nieces, Megan and Madison. This too is possible!

To my family at the Free State Centre for Human Rights. Thank you for the input and insights over the years. Each and every one of you has in their own way made the journey that much more rewarding and wholesome.

Lastly, to my late parents. As life would have it, I cannot celebrate this with you. Neither can I share with you my anxieties about the future. What I can do, however, is reflect on the life we shared together. After all, I have done this consistently over the years — if not to remain true to our identity, then to cope with the tragedy of loss. In our identity lies an important value and lesson. In the midst of life's imperfection, the difference between those who have and those who do not have is chance and not so much ingenuity. Chance to escape the structural pitfalls that entrap our existence as a people. It is only by chance that I write these words on such a momentous occasion. It is, however, deliberate that I have chosen to use this chance to attempt to write us out of the wait for chance.

I dedicate this milestone to you. Let this be a tribute to a life well lived. May your beloved spirits find eternal peace.

eDube, eMhlanga!

The world changes, revolutionaries die, and the children forget. Nizilibel'uba nizalwa ngobani – Thandiswa Mazwai

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CHAPTER 1

INTRODUCTION

1.1 Research problem

In this thesis, I examine the position of unlawful occupiers who remain on land belonging to private landowners owing to a court application for their eviction having been denied, because it would be unjust and inequitable to evict. I describe and critically look into the legal nature of the position of such unlawful occupiers and the manner in which once established, such a position, counter-relates to the ownership rights of the landowner. This is the main research problem.

I engage this main problem against the background of a broader issue, that relates to two assumptions. My initial assumption is that little has been done, whether through research or the courts, to determine the legal position of an unlawful occupant who remains on private land after an eviction application is denied for the substantive reason that it would be not just and equitable to evict. I further hypothesise that the way the fact of remaining on someone else's land arises in this case, places this particular position in a class of its own.

Because it is in a class of its own, my second related assumption is that the issue at hand is exposed to the obtaining conservative approach to the development of new rights to land. This conservative approach, in part, is attributable to a deliberate reluctance to confront the socio-political and economic settlement that holds the fairly new democratic state.[1] I believe South Africa's tenure crisis stems from apartheid's racist land tenure policies, as well as private owners' common law remedies, which resulted in large-scale forced evictions.[2] Yet, I also believe it is maintained today by

[1] This does not imply that it is the only explanation. As a prominent scholar in this field pointed out to me, it is also caused by a lack of creativity and drive to develop innovative interactions with and in the land. This is a well-intended challenge that lawyers, scholars, and jurists should all accept. This thesis is an attempt in that direction.

[2] Van der Walt 2005.

apartheid-style power relations at the cost of meaningful reform.[3] This phenomenon manifests on the social and legal sphere as a tendency to maintain a fiction of neutrality concerning substantive visions of the good, to deny conflict and contestation and to emphasise unanimity.[4] This fiction of neutrality, given the long-standing apartheid-styled power dynamics, simply serves to confirm the old order.[5] It is the portrayal of rules as neutral, despite the reality that these norms are shaped by the highly contentious and politically specific ideals of freedom, equality, and the rule of law that underpin the traditional view, and are thus self-reinforcing.[6] Any attempt to change the rules in a way that contradicts these politically particular concepts of freedom and equality is easily interpreted as anti-constitutional and anti-rule-based order. This shields these norms from constitutional scrutiny, which is a violation of the constitution's provision that all law be subjected to transformation.[7] This factor, in combination with other factors not considered here, offers a plausible explanation why the transformative potential of the Constitution of the Republic of South Africa Act 108 of 1996 (hereafter Constitution) concerning land tenure reform has not fully materialised.[8] In this particular instance, it offers a reason why the courts have been hesitant to address the legitimacy and tenure security of this identified fact of remaining.

1.2 The broader problem

1.2.1 Theoretical framework

I begin this section by quoting two writers, each expressing two context related parameters fundamental to the hypothesis proffered above. I do this to underline the theoretical framework I will employ to explore the broader questions raised in this thesis.

[3] Bond 2004: Ch 1.
[4] Mouffe 1993:3-5.
[5] Brand 2009:206.
[6] Botha 2004:273.
[7] Botha 2004:273.
[8] In this thesis reference to the Constitution, or the 'new'/'current' Constitution refers to the Final Constitution of Republic of South Africa Act 108 of 1996, unless otherwise indicated. See Van der Walt 2002a.

First, Van der Walt, writing in the wake of the transition from apartheid to a liberal democratic constitutional order, argues that in order for genuine transformation to occur, the perspectives and political narrative of those without property, those on the margins, must inform the nomenclature of rights built at the heart of current property doctrine.[9] Van der Walt declares;

"Certain justice driven qualifications of and amendments to the property regime are so fundamental that they cannot be accommodated within or explained in terms of the current doctrine - they require a re-think of the system, a reconsideration of the language, the concepts, the rhetoric and the logic in terms of which we explain and justify choices for or against individual security and systemic stability in the property regime."[10]

Second, Ngcukaitobi in the preface to the book *Land Matters*;[11] (well after Van der Walt)

"While constitutionalism has developed since 1994, land redress has lagged. Constitutionalism is a state predicated on values of equality, freedom, and dignity derived from an overarching Constitution. Questions about the reasons for the failure to modify property relations, as well as the future of land reform, are being discussed with greater urgency now than they were during the first two decades of democracy."[12]

Two questions emerge from reading these extracts. It is whether the constitutional legal framework that regulates land reform has given those who work it little to no opportunity to "reimagine" and "rethink" how we relate to land rights. It is also whether those who work the constitutional legal framework given the opportunity have failed to "reimagine" and "rethink" how we relate to land rights.[13]

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[9] Van der Walt 2002a:254-289.
[10] Van der Walt 2002a:254-289.
[11] See Ngcukaitobi 2021. See also Sisulu "Hi Mzansi, have we seen justice?", https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3 (accessed on 18 April 2022) - Lindiwe Sisulu, a member of the ruling party's ANC national executive committee, argued that "Apartheid was "legal". Jim Crow laws were "legal" in the United States. Colonialism was considered "legal." Even the Nazis were "legal" in their actions. So, what does having the rule of law imply? 'After all, whose law is it anyway?'- reflecting on the Constitution's perceived failure to bring about material socioeconomic change in society after 28 years.
[12] See Ngcukaitobi 2021.
[13] See Department of Rural Development and Land Reform 2017:8-17. See also Statistics South Africa 2012. The stats show that 9% of the population being white people own 72% of the farmland, 49 % of urban free-hold land, 45% of privately-owned sectional title units. A related question is, who is responsible for the reimagining or rethinking? This thesis may come across as implying that the failure

When the viewpoint is broken down into its fundamental components of land tenure, land redistribution, and land restitution, it reveals a gap between the outcome and the early aspirations.[14] Is this, however, a sign that the current constitutional legal framework has failed, or are there other conceivable causes that have come to a head individually and or collectively?

The thesis's highlighted problem relates to the framework of land tenure. The reform agenda it sets out to meet: a demand for changing the terms and conditions under which land is held, used, and traded by granting unambiguous rights in land to those who live and or work on land they do not own or have no rights to.[15] That is, has the constitutional legal framework governing the tenure reform programme failed to enable us to reimagine in unambiguous terms the manner in which we approach the recognition of non-right interests of those who live and or work on land they do not own and/or have no rights to? Whose interests are at the centre of how we relate to land and rights to land?[16]

In response to the above, it seems natural to look at the legal framework first and then the approach to the legal framework. An inhibitive framework may deter any approach, no matter how innovative it may be. In respect of the framework, the question is whether the law regulating evictions from land contains or does not contain within its text that which guarantees the security of tenure of persons without rights to land, to the extent pondered in this thesis. In terms of the approach, the question is whether the court's adopted approach sidesteps the law's inherent ability to address the security of tenure of persons without rights to land, to the extent pondered in this thesis. I grapple with these questions below.

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to rethink or reimagine is primarily with those who interpret the law. This cannot be correct. To varying degrees, those who interpret the law and those who make it are responsible.

[14] See Badenhorst *et al*. 2006:585-665, Carey Miller & Pope 2000:313-455; Mostert *et al.* 2010; Kloppers 2012:60-64, 77-85.

[15] Kloppers 2012:60-64, 77-85. This limitation is not oblivious to the interrelatedness of the three sub-categories of land reform identified above. Indeed, the level and extent of land restitution and or redistribution is bound to have a correlated positive impact on security of land tenure of those without land. For a full discussion on land tenure reform see Aliber, Maluleke, *et al*. 2013, Lahiff 2011, Hebinck and Shackleton (2011).

[16] But then again who are those without and what are their interests? I contend that this is a subject of debate even within the Black political caucus. To the extent that it remains a debate, the status quo is maintained. See Mosiua Lekota, a former freedom fighter at odds with Julius Malema, the leader of the Economic Freedom Fighters at https://www.youtube.com/watch?v=6xPTyQOnvP4.

In this account, I evaluate from a critical standpoint, the autonomy, structure, language, universality, historicity, of the law and professionalisation of South Africa's modern-day law practitioners, all of which are presumed to be largely independent of and unaffected by political, moral, customary, religious, and other variables. The aim is to emphasise the importance of recognising and accounting for inadequacies in the law, as well as how it is applied and the influence these inadequacies have on land tenure reform. Certainly, this approach is not apathetic to the potential of the constitutional framework to achieve concrete transformative goals.[17] It is motivated by the recognition that the capacity to generate truly transformative outcomes stands limited if we reflexively continue to operate in terms of its accepted methods and intuitions.[18]

In addressing the two questions above, references to perspectives that might be at odds with the critical perspective are made but the intention is not to cross doctrinal boundaries. Instead it is to draw from a variety of legitimate perspectives and arguments that can be used to evaluate rather than replace the preferred critical approach.[19] I lend my proverbial ear to Ndebele, who, in the words of Van Marle, advocates for "an angle of approach" instead of a detailed one "that would chew away at your options," in order to open space for dialogue and reflection "that leads to a return to a moment of honesty."[20]

1.2.2 The law and the approach to the law

[17] This theoretical approach involves viewing the law, as well as how it is applied by those who wield it, as replete with anti-transformative tendencies as it is with transformative ones. To understand that it is not either/or but a matter of perspective. Indeed, this is why I write, to offer 'a perspective' not 'the perspective'.

[18] Klare 1998:172.

[19] Fraser 1985:31. Nancy Fraser, writing to describe critical theory is quoted as saying, "critical theory is a theory that frames its research programme and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan though not uncritical identification." My approach aligned to this line of thought. See also Waldron 2007:12 - Jeremy Waldron bemoaningly reflects that; "The paraphernalia of thoughtlessness is legion. Clichés and jargon, stock phrases and analogies, dogmatic adherence to established bodies of theory and ideology, the petrification of ideas – these are all devices designed to relieve the mind of the burden of thought, while maintaining an impression of intellectual cultivation."

[20] Ndebele 2013:82. See also Botha 2007 in Van Marle 2009:286-301- to reflect on the underlying power dynamics that influence our approach to property relations while also acknowledging that, like every other account out there, what I will likely provide as critique or response is flawed.

In this section, I set out the analytical background to the chapters that follow. I identify and outline the factors that I believe stand in the way of achieving secure land tenure. This unavoidably leads to a postulation about what constitutes secure land tenure in the context of an unlawful occupier who remains on land that belongs to someone else after a court denies an eviction application because it would not be just and equitable to evict. I outline how, in seeking to reconcile different interests, the operating legal framework adopts neutrality and universality, which tends to favour an approach to the law that confirms, or at the very least acquiesces with the status quo.

The focus here is as much on the inadequacies in law as it is on the inadequacy of law in the hands of an unassuming agent who has to interpret and apply it. It is also the extent to which the courts (agency) exert an anti-transformative influence in their work by not considering and adjusting the anti-transformative elements of "professional sensibilities, habits of mind, and intellectual reflexes" while attempting to achieve transformative outcomes in their decisions.[21] My focus in this regard is not so much on the anti-transformative work of those that apply the law as on what makes them apply the law the way they do. The point of departure is, in part, a reconciliation with what Wilson points to as a liberal tendency that posits an epistemological scheme within which law is wielded by a fundamentally asocial individual standing outside the field to which the legal instrument is to be applied.[22] It is also an acknowledgement that those who wield the law are part of society and therefore not at all immune to its limitations.[23] It is partly to comprehend lawyers' and adjudicators' approaches to law as approaches that do not reflect absolute impartiality or a lack of outside influence.[24] In the case of South Africa, I argue that underlying power relations influence partiality and interest, leading to the entrenchment of the will of those who have, i.e., the status quo. I now proceed to add nuance to this argument.

The South African Constitution has been described as an instrument to facilitate a "transition from these grossly undesirable elements of the past to a starkly different

[21] Botha 2007 in Van Marle 2009:286-301.
[22] Wilson 2021: 24-27 - Wilson puts up an affront that the "Law is not a lever with which it is possible to move the world from the outside. Law is the lever, the world and the person who pulls it all at once."
[23] Moerane 2003:965-968.
[24] Gordon & Bruce 2016:11*;* Klare 1998.

future."[25] This future is one represented by a ringing break with the past which perpetuated inequality and irrational discrimination and arbitrary government and executive action;[26] a change in the status quo by establishing a new order;[27] and a commitment to transform our society into one in which there will be freedom, equality, and human dignity.[28] In this high sounding description, an undesirable past and a related postulation of a future that is the opposite of that past are implicit.[29]

While the commitments the Constitution endorses are laudable, its autonomy, structure, language, and universality have been condemned for fostering rupture and natality, forging a new and unconstrained future, a future not bound to the past.[30] The euphemism of natality and rupture used in this regard draws me to a familiar African custom of "imbeleko". Imbeleko is a traditional ceremony in which a new-born baby's umbilical cord and afterbirth are buried (planted) on ancestral lands as a way of connecting the new-born baby to both living and deceased family members. Unlike in the Constitution, the emphasis in "imbeleko" is on moving away from the event of birth as the determinant factor in who belongs and who does not. The emphasis is on a shared life that predates birth. Indeed, my understanding is that the constitution's drafters do not display this insight, at least not on paper. The final certification process, with all its paraphernalia, is viewed as foundational to a shared life that does not predate the certification event and in that way does not predate birth in the way that the "imbeleko" rite envisages.[31] The concept of a "post-apartheid" nation impressed upon in this regard has been criticised in modern South Africa.[32] This criticism raises two concerns. The first is that by supposedly accounting, if only partially for the past, the constitutional state considers the conflict and subsequently the struggle for interest

[25] *S v Makwanyane and Another* 1995 6 BCLR 665: para 262.
[26] *S v Mhlungu* 1995 3 SA 867.
[27] *Du Plessis and others v De Klerk* 1996 5 BCLR 658 (CC): para 157.
[28] See also *Soobramoney v Minister of Health KwaZulu Natal* 1998 1 SA 765 (CC): para 8. This affirmation supports the idea that these values did not underrun the previous dispensation something which the Constitution itself does not explicitly state.
[29] See Pieterse 2004:411–412; Bilchitz 2003; Wesson 2004:284; Bilchitz 2007; Moyo 2013. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) (hereafter *Grootboom*): para 20.
[30] The present Constitution has been criticized for failing to be both forward and backward looking, as seen by its failure to properly recognize 'Apartheid,' the past (the socio-political and economic status quo) it denounces and seeks to break from in its wording. See Sibanda 2011:482. See also Madlingozi 2017.
[31] I trace the history of property relations in South Africa in Chapter 2. That chapter's goal is to connect the past to the ongoing challenges of insecure land tenure.
[32] I do not intend to wade into a discussion on this strand of criticism but to note its existence in so far it is relevant to the point being made.

dominance to be over. The second, is that the artificial end to an interim transition prompts the closure and erases the legitimacy of claims against the past.[33]

How does this become an anti-transformative inadequacy? I contend that a Constitution that does not define in unambiguous terms the past that it seeks to break from, is more likely to result in a new "old."[34] Without a doubt, the first challenge that comes to mind is, how can we objectively assess the Constitution's effectiveness in breaking with the past, if it does not unambiguously name and define that past that it seeks to break from? What is the Constitution's true reference point? The second challenge, related to the first, is that the Constitution has resulted in a value-based democratic system. The promotion of such values in a society with multiple and disputed histories, I contend, can never be uncontested or free of dispute.[35] This contestation invites discourse on how these values should be interpreted. The discourse envelops a struggle for dominion over the past, the past as a conduit for defining society's most pressing needs and demands, as well as responses.[36] In so many ways, Mattera portrays this struggle for control over the narrative that defines the past, the past as conduit to define the most urgent demands of the present;[37]

[33] See Kesselring 2016:129. "By defining a category of victims and paying reparations to all that fall in the category, government does not only provide resources to a select few; it attempts to define and provide the public good of a post conflict politic; See Ramose 2007:320; See also Van Marle 2010:357.

[34] See Madlingozi 2017:123 Modiri 2018:300 and Dladla 2018;415.

[35] See Kontopodis 2009:5-10 - puts this point into perspective by linking the relationship between ongoing memory practices and the (re)production or (re)enactment of pasts and futures. Kontopodis emphasizes the ability of gateways, (such as the Constitution in this case) to allow for the erasure and/or exaggeration of history because they are part of ongoing memory practices, especially in a society like South Africa where a plethora of pasts, present, and futures compete for legitimacy. See also Santos 2004. The argument raised is that the understanding of the world and the way it creates and legitimates social power has a lot to do with the conceptions of time and temporality.

[36] See Fraser 1989:291-297- "… is a site of struggle where groups with unequal discursive (and non-discursive) resources compete to establish as hegemonic their respective interpretations of legitimate social needs. Dominant groups articulate need interpretations intended to exclude, defuse and/or co-opt counterinterpretations. Subordinate or oppositional groups, on the other hand, articulate need interpretations intended to challenge, displace, and/or modify dominant ones." The ultimate goal, according to Brand is to 'domesticate' poverty and need issues by neutralizing the moral and legitimacy imperative in favour of domestication - by defining poverty and need concerns as domestic rather than political, as a personal failing rather than a system failing.

[37] Mattera 2009. The destruction that apartheid inflicted on the youthful, intelligent, radical, and Black urban culture that was then taking shape is best illustrated by the story of Sophiatown. The effort to destroy Sophiatown is a reflection in numerous ways of the effort to eliminate the material and esoteric interests of the marginalised. For my purpose, I particularly highlight the attempt to intensify the devastation past the point at which a conceivable return to the Sophiatown of old through a counter-false memorialization of Sophiatown to which Don Mattera excepts to.

"Gone

Buried

Covered by the dust of defeat—

Or so the conquerors believed

But there is nothing that can

Be hidden from the mind.

Nothing that memory cannot

Reach or touch or call back."

The concern here is that standard measures introduced by the operating legal framework governing eviction from land such as non-arbitrariness, reasonableness, and justness and equitability are value-laden tests. These tests demand an interpreter to reconcile with his/her own personal and professional sensibilities, aside from the ordinary meaning of provisions and the purpose of the text as composite tools of interpretation, to make the implicit, explicit.[38] My contention is that the gravitation towards the status quo is by default when underlying power dynamics influence the direction of the discourse, where such discourse in turn influences personal and professional sensitivity to open-ended values. The gravitation towards the status quo may manifest itself in the intellectual despondency to push legal materials beyond their initial impression of constraint.[39] For my purposes, the despondency manifests as an unwillingness to define and confirm the legal position of an unlawful occupier who

[38] See Liebenberg 2005:143 - A culture of justification is meant to translate constitutional values such as that of human dignity, into rights of real people to real things as opposed to generalised, collective guarantee to reasonable policies that does not realise actual participation but merely fulfils the guarantee of an opportunity to participate in property relation.

[39] For the different kinds of plausible manifestations of this anti-transformative despondency. See Klare 1998:147, relying on Kennedy 1997; Kennedy 1996; Kennedy 1991:83; and Kennedy 1986; Van der Walt 2002c, relying on, amongst others, Cover 1986 and Cover 1983 in Brand 2009;46-72.

remains on another's land after an eviction action has been denied by a court on the substantive grounds that eviction would be unjust and equitable.[40]

Two arguments are worth revisiting in this context.

Texts, according to Klare, do not generate meaning on their own because constraint is not an intrinsic attribute of the materials. While I contend in this thesis that the Constitution itself is replete with limitations, constraint also arises from a sensory experience of the contents mediated by context, professional codes and sensitivities, and the interpreter's ability, as well as choices about how intellectual energy and resources are directed.[41] This, in turn, leads to the conclusion that legal interpretation, and hence the adjudication process, is influenced by political considerations in at least two ways. To begin with, legal work - the interpretive activities that judges, advocates, and commentators participate in - partially constitutes legal materials, acquainting them with value-laden meanings. Indeed, lawyers' perceptions of what materials are relevant to a given legal matter are shaped by their profession. Second, judges and other legal practitioners make conscious and unconscious decisions about how to use their intellectual energy and resources on a regular basis. Because these decisions are made in response to apparent gaps, conflicts, and ambiguities in the legal materials, they are based on values, perceptions, and intuitions that are not based on the legal contents.[42] As discourse on property relations envisions a tension between two opposing interests, both with counter-related purposes of retention for those who already have and attaining for those who were previously unable to attain, this facet of constraint is worth looking into.[43]

Recognizing this development necessitates admitting that the Constitution has created new opportunities for an interaction that did not exist prior to its adoption. Likewise, admitting that the Constitution has provided an opportunity involves acknowledging

[40] See Coggin 2021:1-38. The notion that Higher Courts either skim over the question or treats an entitlement as self-evident.
[41] Klare 1998:160-171.
[42] Klare 1998:160-171.
[43] Terreblanche 2002:14-21. Terreblanche notes the social and economic history of South Africa has been one of unequal distribution of power due to about the three hundred years of racial domination prior to the changes of the 1990s, but also argues that it now continues due to coalition of white economic and black political elites who have been able to gain entry to the strata of influence and instead of opening the proverbial window of opportunity they have been co-opted to exclude those on the outside.

that an opportunity remains just that, an opportunity until it is exploited through agency and steered in a specific direction. Wilson argues that if the law generates, extends, or contracts chances for action, the law's role in effecting change is at best secondary.[44] Wilson backs up his claim by pointing out that it is unreflective to point to the lack of correlation between legislative reforms and court victories on the one hand and the resultant changes in the lives of individuals who claim such outcomes.[45] The suggestion is that the law creates space for agency, those who agitate and operate within the law, taking advantage of the chances it provides, are the ones who bring about change. This is not to minimize the importance of the law as a foundation in all of this - changes would be impossible without the law and the space it creates.[46]

Accordingly, litigation and court decisions present a chance to examine agency as well as a foundation for contemplating how to reimagine agency, which is plagued with limitations of its own. These constraints, which are also related to and in part as a result of an implicit textual foundation, must be taken into consideration in the recreation, reinterpretation, and reinforcement of socio-economic rights as individual rights. It is on this basis that those without rights to land may receive immediate, meaningful, and potentially self-sustaining relief.

Wilson contends that traditional interpretations have placed too much emphasis on the formation of space and not enough on what occurs within it.[47] As a result, he maintains that those who operate within the space, through the way they frame their arguments, accelerate, or defer the breadth and scope of change, even if the law allows for something more, and therefore such ought to be accounted for, if only to maintain the space's inviolability.[48]

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[44] Wilson 2021:4-10.
[45] Wilson 2021:4-10.
[46] Mureinik 1994; Van der Walt 2001:258; Le Roux 2006:634; See Woolman *et al*. 2008:32-80. Mureinik describes the Constitution as constituting "a bridge in a divided society, "The bridge metaphor, according to Van der Walt, provides for another interpretation in which "the bridge is not only a means for traveling from one area to another," but rather a function that is tied directly to the journey it sets out to undertake. Such that “it is not the bridge itself that is significant, but the act of bridging, of linking the past and the future, reality and imagination, in order to create new ideas in the present.” There by creating a space in which competing interests can participate in the content building of the past, present, and future.
[47] Wilson 2021:1-15.
[48] Wilson 2021:1-15.

This would no less require a change in approach to one that sees property rights litigation and adjudication as a unique window of opportunity - an opportunity that is better amenable to and capable of causatively contributing to the modifiability, and reconfiguration or breaking down, of the structural constraints outlined above.

Simply put, the logic here is that the participation that may be leveraged for persons without rights to land by such litigation allows them to enter the property market (become property insiders) and use their insider status to deconstruct the property rights structure that makes participation difficult notwithstanding that is implicit in the constitutional text. To borrow and extend from the argument on the need for the inclusion of socio-economic rights in the Constitution as a basis for equal social and political participation: I advance the view that simple and formal equal opportunity, which requires nothing more than a guarantee of an opportunity for anyone who is able to take advantage of it, is insufficient. The guarantee of an opportunity must also include the conditions that allow for actual and equal participation by those to whom access is promised.[49] That is, the opportunity to influence and control the discursive and non-discursive interpretive narrative is available to everyone, but those without property (outsiders) are unable to take advantage of this opportunity. To be without property means having no status in society, no right to participate in discussions, and no ability to shape the laws governing that participation in a certain way.[50]

As a tool of analysis, I incorporate the theoretical approach as briefly outlined above in the chapters to follow.

1.3 Motivation

Since I began critically engaging South Africa's constitutional dispensation in relation to property rights, two things have always stood out to me. The first is what I term “the superficial give”, a constitutional pledge to promote the acquisition of new rights to land by those who for one reason or the other could not acquire such rights to land

[49] Haysom 1992:450-461.

[50] Wilson 2021:1-15. The extent to which the nature and structure of property rights is inclusive being a key element to ensuring that social participation is upheld in all spaces. In this regard the African proverb that says, “A man who drives his father’s car (beholden to another) is not entitled to speak in a council of men who own bicycles (beholden to no other)” comes to mind (own emphasis).

while simultaneously protecting the existing rights of those that had directly or indirectly benefitted from the unjust exclusion of others from the property system prior to the current dispensation.[51] The second is what I call 'the superficial take", prompted by a proviso allowing for the redistribution of property rights through expropriation, however, provided that where expropriation ensues it is accompanied by just and equitable compensation.[52] Simply put, my fixation with the Constitution is based on the notion that, in a society with finite resources and against the backdrop of South Africa's history of dispossession, the Constitution sets out to protect and conserve the position of those who have land while simultaneously advancing the position of those who do not have land, to gain access to land. All the while without intentionally taking the excess from those who have and giving to those who do not.[53]

Sachs AJ, as he was then, highlighted the impact of this notion in *Port Elizabeth Municipality v Various Occupiers*,[54] (hereafter *PE Municipality*);

> "The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognized by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not to be arbitrarily deprived…"

Prior to the Constitution imposing 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 rooted in a tradition that gave a private owner the unrestricted right to exclude all else through the *rei vindicatio*.[55] As a result, the current Constitution is viewed as

[51] Sec. 25 of the Constitution. See Walker 2008 for a full discussion on the complex history of not only dispossession but also social change: see chapter 2 below. See also sec. 26 of the Constitution- which aims to protect and guarantees the right of access to adequate housing, which can be interpreted as a right to not be without it.

[52] Sec. 25 of the Constitution. 'Just and equitable compensation' has long been associated with 'market related' compensation, which, in my opinion, ignores the element of loss. As efforts to retain sec. 25 compete with those to revise and create express provision for expropriation 'without compensation,' the little-known synonym 'nil compensation' has entered the discourse. It remains to be seen whether this will obtain in practical cases. For a full discussion see Sibanda 2019. See also Lubbe & Du Plessis 2021.

[53] See Underkuffler-Freund 2003:1033-1046 - wherein property law is described as the chosen method to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others.

[54] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (hereafter *PE Municipality*).

[55] See Muller 2013:367-396. Van der Walt 2009:60-66.

demanding a different approach. It demands an approach that promotes balance between ownership interests and non-ownership interests on a far more level playing field whenever these interests intersect.[56] This intersection has been most apparent in cases of eviction.

The legislative framework regulating evictions stipulates that a court may only make an eviction order if it is "just and equitable" in light of all relevant facts, including, but not limited to, factors specific to the landowner and the potential evictee.[57] The "just and equitable" consideration has seen the emergence of different variations of eviction orders, each with and without conditions attached thereto. In this thesis, I focus on three distinct forms of these eviction orders. The first of these are orders in which the court grants an eviction application and then suspends the order, enabling unlawful occupiers to continue on land belonging to another while the suspensive condition is in place. The second, is an instance in which a court orders an eviction, but for whatever reason, enforcement becomes impracticable, resulting in unlawful occupants remaining on land belonging to another until a solution is found. The third, in which I find interest, are those instances where a court denies an eviction application on the ground that it would be not just and equitable to evict thus enabling unlawful occupiers to remain on land that belongs to someone else.

Traditional accounts have thus far, with a few exceptions, concentrated on the interaction between the rights and obligations of owners and holders of other common law rights, as well as the state, where appropriate.[58] Instead of following that trend, in

[56] The notion of balance strikes a positive chord of change however it should be viewed as not to imply that one of two competing rights will always triumph over the other. This is because it seeks to equalize and hence sustain both positions even though there may be a strong reason for the ownership right to entirely cede to a non-ownership right. This position I argue later, further entrenches insecure land tenure. See reasoning in Botha 2003:34. See also Botha 2002:612, Botha 2004:249 and Botha 2000:561. See also Van der Walt 2001 where the characterisation of the battle between two outlooks, privilege vs change, protective vs demanding, rights vs needs, rule of law vs justice, security vs transformation as static and of no positive value is proffered.

[57] See sec. 26 of the Constitution. See also the preamble to the Extension of Security of Tenure Act 62 of 1997 (hereafter ESTA) provides: "To provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith." The relevant circumstances pondered here are espoused in Section 8(1) which make it clear that fairness plays a key role. Sec. 10(3) and sec. 11(3) of ESTA. See also sec. 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE).

[58] Wilson 2021; Van der Walt 2002a; Van der Walt 1995; Du Plessis 2013.

this thesis I urge more consideration to the interactions between private property rights and the interests of people with no legal right at all as is the case in the instance when a judge decides not to evict an unlawful occupier for "just and equitable" reasons.[59] The state of affairs therein sees the occupier who is without a right to continue to be on land belonging to someone else nonetheless enabled to remain on such land as the court which is tasked to sanction evictions by law has declined to do so. This state of affairs presents a unique case in point.

The primary purpose of this thesis is thus to explore and define the legal position of occupiers who remain on land that belongs to someone else after an eviction application has been denied by a court of law on "just and equitable" grounds. I take on this task in this thesis because the courts have thus far not sought to legally define and explore the nature of such a continued stay on land belonging to another. While courts have intervened to prevent evictions that would result in unjust and inequitable results, the failure to address the terms and conditions of such a continued stay undermines the legitimacy and security of tenure of such individuals. This failure is also indicative of the broader issue that requires further attention, that I set out above.

1.4 Methodology and approach

This study's nature necessitates a literature-based analysis of primary and secondary sources, with the former involving the use of (analysis and/or discussion of) pertinent case law and legislation and the latter involving a discussion of pertinent books, academic papers, and articles. Case law and legislation will be primarily used to demonstrate how the courts have come to deny an eviction claim on just and equitable grounds. It will also enable one to determine the efficacy of such an order and the commitment of the courts in realising the security of tenure of not only those without rights to land but relatedly those whose land is occupied unlawfully. It is therefore crucial to analyse these sources in order to posit what this instance of unlawful

[59] I am aware of two accounts that have dealt with this interaction in an analogous way; however, I acknowledge that there may be others that I am unaware of at this moment. See Van der Walt 2012b:157 and Brand & De Villiers 2021.

occupiers remaining on land belonging to another means for all parties involved and the role for the courts in realising effective relief for all parties involved.

My approach to my subject matter, which I will broadly term critically transformative, is already outlined above in my discussion of the broader issue informing my engagement with my research problem.

1.5 Qualifications

It is important to stress the points that I do not make in my thesis. I do not make the point that South Africa's property relations have remained unchanged since 1994. No one can dispute that the constitutional dispensation has corresponded with changes in South Africa's political, social, economic, and cultural landscape, as tempting as that may be. The past was less kind, the present is kinder than the past, and the objective is to make the future the kindest. However, I do make the point that such changes have not gone far enough to create a new equal society.

South Africa, I submit, is a society undergoing complex and systemic transitions at many levels of its existence. These transitions are marked by a desire to create a “new”, a new way of doing, knowing, and seeing that requires the tough act of stepping outside of oneself as an embodiment of the restrictions that necessitate transition in the first place. I make the point against a simplistic interpretation of South Africa's past and present that animates the novelty of the new South Africa - an approach to the “new” that assumes and accounts for no continued prejudice on the present by the “old”. I do not make the point that the transformative constitutional project is a project in futility. I accept that this project frames transformation as a non-ending process.

In terms of the relation between law and power dynamics in the context of South Africa, I do not seek to reduce the law to the subservience of vested economic and social interests, nor to the polity of those who operate inside it. I merely identify conservative influence, fully aware that these are only just some of many other factors to consider.

Concerning the main research problem, I do not wish to imply that this thesis will present an entire and infallible analysis of the topic. Instead, I only hope to draw attention to and add to a discourse that will develop in the future.

The method that I propose to use is that of desktop research. This methodical approach requires obtaining information from both published and unpublished sources. It is based on secondary sources of information that have previously been gathered and are easily accessible from other sources. Newspaper articles, statutes, acts, and court cases are also employed as documentary sources.

1.6 Overview of thesis

Apart from this introductory chapter, this thesis consists of five chapters.

In Chapter 2, I seek to establish what constitutes the “just and equitable” consideration in the context of eviction. I build on the general backdrop provided in Chapter 1 by examining the pre-constitutional and constitutional-era development of eviction law. I do this on a broad scale, before narrowing down to developments that outline the substantive requirement of justice and equity.

In Chapter 3, I highlight the instances in which a scenario of unlawful occupiers remaining on land that belongs to someone else despite not having a countervailing right to do so arises. Furthermore, I distinguish between instances where the fact of remaining is not that which founds the subject matter of this thesis. That is, cases in which an occupier remains on another's land as a result of an eviction order that has been granted, with the order executable on a future date and/or where the order fails to be executed on that date, as well as cases in which an eviction application has been denied on the grounds that eviction would be unjust and inequitable to evict.

In Chapter 4, I explore the potential normative legal character of a position in which an unlawful occupier remains on another's land after an eviction application has been denied on the grounds that to evict would be unjust and inequitable. In Chapter 5, I draw on the debate from Chapter 4 to consider the legal repercussions of the position's assumed legal nature on the landowner’s right to exclude.

In Chapter 6, I summarise the previous chapters' conclusions, offering closing remarks.

CHAPTER 2

ESTABLISHING THE HISTORICAL AND LEGISLATIVE CONTEXT IN WHICH A CLAIM OF AN UNLAWFUL OCCUPIER TO REMAIN ON PRIVATE PROPERTY ARISES

"Poetry never stood a chance of standing outside history

…

Suppose you want to write

of a woman braiding another woman's hair-

straight down, or with beads and shells in three strand plaits or corn rows-

you had better know the thickness

the length the pattern

why she decides to braid her hair

how it is done to her

what country it happens in

what else happens in that country

You have to know these things

…

I am thinking this in a country

where words are stolen out of mouths

as bread is stolen out of mouths

where poets do not go to jail

for being poets, but for being

dark-skinned, female, poor.

I am writing this in a time

when anything we write

can be used against those we love

where the context is never given

though we try to explain, over and over

For the sake of poetry at least

I need to know these things."[60]

2.1 Introduction

In Chapter 1, I outline the primary research problem as one of insecure land tenure arising from the undefined legal position of unlawful occupiers who remain on land belonging to another in instances where an eviction application has been denied on the grounds that it would not be just nor equitable to evict. I outline, in addition, the challenge posed by an acontextual set of laws and legal approach, and how such acontextuality can in the face of other pressures, over time, lend itself to the preservation of insecure land tenure.

Adrienne Rich demonstrates in many of her works,[61] how society's influence over race, gender, and class (the cyclical interrelation of politics with law and of law with politics) have resulted in a loss of imagination. *North American Times*, with which I have chosen to begin this chapter, highlights the challenges of identification (recognizing yourself in connection with others of your own race, gender, and class) and interpretation (making sense of one's own identity in relation to other people's identities) in a unique way; for the truth of history is liable to distortion, and the context of writing (memory) becomes blurred with the passage of time, to the point where "everything we write can be used against those we love."[62]

I am writing about the perpetuation of insecure land tenure, perpetuation characterized by law and law's approach to evictions from land. Should I know better, as Rich puts forward, where such insecurity emerges, when and how it started, and why; and who started it? What country it occurs in and what else takes place there?

The highlight of the legislation that now governs evictions in South Africa is in its deep-seated concern for interests associated with owning land on the one hand, and

[60] Rich 1983. For the purposes of this chapter, I have chosen to use only the stanzas that I find compelling, and not the entire poem.
[61] See Rich 1977 and Rich 2013.
[62] Rich 1983.

occupying land on the other.[63] This concern is, in part, predicated on the need to ensure that individuals are not evicted from land without an alternative and that landowners' interests are not taken away without due cause and process.[64] Envisioned here are three elements. The first is the necessity to prevent people from being evicted. The second is that landowners should not be deprived of the rights that come with being a landowner. The third, and most significant, qualifies the first and second, speaking to the need to reconcile the first and second. It is an element that seeks to balance the loss element inherent in the meeting of two divergent interests. It is out of this third element that the notion of being just and equitable finds space as a requirement in evictions.

The term “just and equitable” refers to both interests; that is, what is just and equitable for the landowner as well as for those who are in unlawful occupation.[65] This is an internal consideration. The term “just and equitable” also “demands a break away from a purely legalistic approach and regard to extraneous factors such as morality, fairness, social values and implications and circumstances.”[66] This is the external consideration; a consideration that demands an understanding of the broad set of rights and institutions that govern who has access to, uses, and controls land.[67] In other words, the terms and conditions upon which land is owned, used, and traded.[68] It further requires recognition, “…in a country where words are stolen from people's mouths as food is stolen from mouths”,[69] of the impact of unequal power relations in limiting equal access to being heard and, through being heard, to be seen, to have one's unique challenges (existence) understood, highlighted, and addressed. That is, it demands of us to keep in mind that “poets do not go to jail for being poets, but for being dark-skinned, female, poor.”[70]

At face value, the above breakdown of the legislation governing evictions is nothing short of a progressive stance aimed at taking account both the interests and rights of

[63] *PE Municipality*: para 14-23.
[64] Ibid.
[65] *PE Municipality*: para 33.
[66] Ibid.
[67] Hall 2003:3.
[68] Hall 2003:3.
[69] Rich 1983.
[70] Rich 1983.

those with and those without property. It stands to envisage a humane approach replete with safeguards to ensure that all interests are considered before one is evicted.[71] However, such provisions must be interpreted against the historical context. This historical context informs the demand for the orderly restoration or opening-up of secure property rights for individuals who had previously been denied access to or deprived off them.[72] The provisions also need to be interpreted against the current context, which is not unrelated to the historical context: the current context that sees the unavoidable tensions that characterize property relations. This tension is between individual rights and social responsibilities, the need to protect existing private property rights while also serving the public interest, with the future context of creating a more equal society in mind.[73] Without this context, the just and equitable requirement requiring the courts to do what courts are typically supposed to do, namely, consider all relevant factors, would appear redundant, if not odd.[74]

In this chapter, I provide an account of the historical, current, and future context of the legislation governing evictions in South Africa. In section 2.2, I provide a historical overview of pre-constitutional legal developments relating to the property relations in South Africa. In section 2.3, I provide an overview of the current legal framework regulating evictions. This is to enable the assessment of the impact that the historical developments have had on the current legal framework. It is also to better place the consideration of the internal and external factors that enclave the “just and equitable” requirement. In section 2.4, I conclude the chapter by considering the future context, namely the imperative to adopt eviction regulation that is appropriate for the equal society that is presently being imagined.

[71] *PE Municipality*: para 34. Evicted from not only the land they live on, but also from the property system. The question then becomes whether the unlawful occupants are actually part of the property system. Is South Africa's legal framework for evictions from land based on inclusion or exclusion? Anti-exclusion, in my opinion, emphasizes 'not to be without' land, whereas inclusion emphasizes 'to be with land.' I turn to the historical and current context to better grasp what the legislation represents in this regard (own emphasis).
[72] *PE Municipality*: para 15.
[73] *PE Municipality*: para 23.
[74] Ibid.

2.2 A history of law and displacement: evictions pre-1994

In *Landmarked – Land Claims & Land Restitution in South Africa*, Cherryl Walker takes a broad look at the country's historical land developments.[75] Walker detects at least two narratives in this broad approach, one of which she refers to as the master narrative: the straightforward account of forced removals.[76] Walker argues that, while forced removals from land have been a part of the history of land dispossession, this narrative is overly simplified and incomplete. It presents the history of forced removals during apartheid and before as if it were a linear process rather than a significant chapter in a much larger and more complex history of dispossession and social change.[77] Walker continues by describing the complexity as constitutive experiences of

> ".. those who both had land rights to lose and lost them through state (not private) action after June 1913, and, on the other hand, those who lost land rights as a result of private actions (e.g. farmer-initiated evictions), or by 1913 had no land rights to lose, or had moved off the land in search of other opportunities, or today hold only tenuous rights to land in the former Bantustans."[78]

Indeed, the existing polity of those that stand to remain (unlawful occupiers), comprises both those who may have been forcibly evicted from land and those who may have not been forcibly evicted from land as envisaged above. To my mind the latter is at least as important as violent dispossession for this thesis. People who were not forcibly evicted but just lost their legal rights or were unable to secure rights to land that they remained on, are more comparable to those who "remain."

As Walker also points out, the latter either did not acquire and hence had no land rights to lose or had to move off the land in order to survive (social engineering). This thesis focuses on the latter, specifically for the interaction between social and economic balances and the acquisition of rights to land that it highlights.

[75] Walker C 2008:11-27.
[76] Walker C 2008:11-27.
[77] Walker C 2008:11-27.
[78] Walker C 2008:11-27.

To recap, my argument is that the law and with it, the legal approach, allows for discursive and non-discursive contestation between unequal forces: those with interests in sustaining the status quo on the one hand (stronger), and those with interests in changing the status quo on the other (weaker). The law, and with it the approach to law, lends itself to the restrictions of considerable change as a result of the disproportionate discursive and non-discursive influence of people who may not necessarily benefit from the change.

Utilizing this lens, I now proceed to look at the history of displacement and land occupation before the constitutional dispensation was established.

2.2.1 Black land tenure and urbanisation

Aartsma narrates the early colonial history of the Cape Colony as dated from when,

> "A Land was sighted on 5 April 1652 and the ships docked the next day. Within a week of the arrival of the three ships, work had begun on the Fort of Good Hope."[79]

I find this account interesting for its capture of more than just the sighting of a geographical area. It is also interesting because it unwittingly details effort (work) intended at what can only be the displacement of what was already there. For my purposes, this view of the arrival sets out my departure in my approach to the account I give below. My interest is in the physical dispossession of land not only for the actual taking away of land or rights to land but also the taking away of land for its symbolism of a multi-faceted approach aimed at simultaneously disrupting the intellectual and economic resource base required to reclaim or acquire land.[80] By (re)acquire, I do not mean taking land from those who have it and giving it to those who do not have. I do

[79] Aartsma "*Early history of the Cape Colony, South Africa*", www.south-africa-tours-and-travel.com (accessed on 29 March 2021); Turton, "A South African Diary: Contested Identity, My Family" "Our Story, Part A: Pre-1700, www.anthonyturton.com (accessed on 29 March 2021).

[80] Terreblanche 2002:6. According to Terreblanche, the inequity in South Africa stems from a deliberate colonial legal posture in the mid-seventeenth century that saw "white farmers enriching themselves at the expense of Black people by creating political and economic power structures that entrenched their privileged position vis-à-vis Black people."

not believe this will address the problem of insecure legal tenure; rather, I believe it will merely invert it, if not, first create conflict among the majority over who gets the land and who does not.[81] In relation to the claim to remain, reacquisition concerns reclaiming space to reimagine property relations in both letter and approach—in order to resolve the problem of insecure land tenure.

Below, I go into greater detail about some of the exclusionary statutes that embodied the dispossession and displacement set out above. In detailing these exclusionary statutes, I contrast rural and urban land tenure. The distinction is used to emphasize how the former contributes to developments in the latter, rather than how rural land developments lead to the commencement of insecure urban land tenure.

2.2.2 Rural land tenure

The Glen Grey Act,[82] replaced the communal tenure pattern that was widespread among African people with an individual tenure pattern. Hall describes this as a "significant event in the disenfranchisement of Africans and the curtailment of civil and land rights."[83] This was in acknowledgement of communal land occupation as one of the tribal organization's most significant underpinnings that had to be undone.[84] More so, in view of the communal system's inextricable link to the tribal group's integrated and sustainable livelihood.[85] While it was argued that through the shift from communal to individual occupation, individuals were able to participate in free economic action without being constrained by tribal custom,[86] this development dismembered and

[81] Walker uses Anna Bohlin's concept of viewing one's relation to land through the dynamic prism of experiences, context, public discourse, social location, and time. For a full discussion see Walker 2008. See also Bohlin 2010.
[82] Act 25 of 1894.
[83] Hall 2010:75.
[84] Wiggins 1929.
[85] See also Worden 2000:54-75; Rhodes "*Speech at the Second Rereading of the Glen Grey Act to the Cape House Parliament (30 July 1894)*", https://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament (accessed on 21 February 2022). "Every Black man cannot have three acres and a cow, or four morgen and a commonage right. We have to face the question, and it must be brought home to them that in the future nine-tenths of them will have to spend their lives in daily labour, in physical work, in manual labour. This must be brought home to them eventually."
[86] Rhodes '*Speech at the Second Rereading of the Glen Grey Act to the Cape House Parliament* (30 July 1894)',https://www.sahistory.org.za/archive/glen-grey-act-native-issue-cecil-john-rhodes-july-30-1894-cape-house-parliament (accessed on 21 February 2022).

isolated the African from his or her way of life (identity), economic, intellectual, and social resource base.

The Natives Land Act was passed by the union government in support of the Glen Grey Act.[87] The Natives Land Act created the basis for territorial segregation and apartheid. For the first time, formally defined restrictions on black land ownership created a complete legal barrier between landholding by blacks and non-blacks.[88] Sec. 1(1)(a) forbade, for instance, black persons from acquiring a right to, an interest in, or servitude over land that is not "traditional" land through a sale, lease, or other acquisition.[89] Sec. (1)(1)(b) stated that outside of these "traditional" boundaries, black people could only have a right to, interest in, or servitude over land owned by another black person.[90] Africans had exclusive usage and purchasing rights to "scheduled" native lands.[91] The Natives Land Act further declared that any arrangement reached outside of the scope of sec. 1(2) was null and void from the beginning.[92]

In sum, the Natives Land Act codified a "dispossession that had begun far earlier, centuries earlier,"[93] at least as early as the Glen Grey Act. The Glen Grey Act thus endeavoured to dismember and isolate Africans for subsequent easy dispossession under the Natives Land Act and beyond. According to Bundy,[94] the Natives Land Act set-off the conditions and criteria under which future struggles between landowners and occupiers would be fought.[95] The context upon which persons like those who find themselves on land that belongs to someone else would struggle to remain, would be defined.

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[87] Act 27 of 1913. The Natives Land Act established apartheid and territorial segregation, shaping boundaries on black land ownership for the first time.

[88] See Davenport 1990:433-440. Robinson 1997:472. For a discussion of the historical context of the Natives Land Act, see Wickins 1981:105-129; Feinberg 1993. For a general discussion of land initiatives between 1913 and 1948, see Feinberg 2009; Feinberg & Horn 2009.

[89] Feinberg & Horn 2009:41-60.

[90] Feinberg & Horn 2009:41-60.

[91] Natives Land Act: sec. 1(2).

[92] Natives Land Act*:* sec. 1(4) & sec. 5(1) Any arrangement made in violation of this prohibition was invalid from the start, and punishable by a fine or imprisonment for up to six months with or without hard labour.

[93] Osorio "100 years since the Native Land Act: an interview with Ben Cousins", https://www.groundup.org.za/article/100-years-nativeland-act-interview-ben-cousins1048 (accessed on 30 September 2021).

[94] Bundy 1990:6.

[95] Bundy 1990:6.

As a result of their exclusion, the black majority were forced into large expanses of desolate land set aside for black occupation – "the reserves."[96] In South Africa, reserved land accounted for barely 7% of the country's habitable land.[97] Those that "remained" because they had nowhere else to go, enslaved themselves as labour tenants on black farms that had been converted to white farms. I stop to ponder whether this has changed.

The Act made it illegal for white landowners to enter into sharecropping arrangements with Black farmers, Black farmers were left with no livelihood.[98] The reserves represented the congregation of those who both had land rights to lose and lost them through state (not private) action. It also represented those who lost land rights as a result of private actions and those who had no prior land rights to lose and could not acquire such rights. For my purposes, the reserves also represented a metaphoric contemptuous holding of alienated black interest in not only the physical territory, but also in participatory space: the space within which to participate in and make/influence decisions on the regulation of property, and through property, one's own economic and social existence.

The Natives Land Act was furthered by the Development Trust and Land Act,[99] paving the way for the formation of the South African Development Trust (the Trust). The principal purpose of the Trust through the Act was to regulate the holding and transfer of more land to Black people through leases or government sanction.[100] The Trust bought and owned the land. For the often-abused sake of promoting public welfare or acting in the public interest to achieve the goals of the Act, sec. 13 of the Act

[96] Bundy 1990:6.
[97] Bundy 1990:6. See also Rugege 2004:283-321 puts this at 8%.
[98] Davenport 1985:61; Davenport 1987:388-400 notes that the Land Act had a crippling effect on black agriculture. This form of contract was an agreement between a white landowner and farm employees wherein farm workers were allowed access to use a section of the farmer's property for their own produce in exchange for specific hours of labour. The Black Service Contract Act 24 of 1932 would later alter this. Under this Act, a Black person could stay on someone else's land as long as he or she supplied labour in exchange. During the tenure, the Black occupier was allowed to remain on the land, erect and/or build structures, grow, and tend to crop. At the termination of such tenure, the occupant was required to remove all erected structures and tend to crop that had already been sown, until they reached maturity, and then reap and evacuate the land at the conclusion of the tenancy.
[99] Act 18 of 1936. Although section 51 of the Act, as it was gazetted, specifies that the Act should be known as the Native Trust and Land Act, it later came to be known as the Development Trust and Land Act.
[100] Development Trust and Land Act 18 of 1936.

empowered the trustees of the Trust to expropriate land owned by natives outside of a designated region for reasons of public health or for any other cause.[101]

The Trust also decided the nature of access and the rights that could be exercised on that land.[102] Much more, it has been contended that the establishment of the Trust was to develop the "material, moral, and social well-being of 'natives' living on Trust land."[103] However, the Trust was not in fact a noble endeavour. It arose from a growing security concern over the gathering of a threateningly big number of Black people as labour tenants on white farms.[104] Over time, the Trust was also given the right to acquire more land for native settlement. The quantity of land that could be bought rose to about 13% of the total national acreage.[105]

Outside of the proposed exemptions, any black person who occupied land in contravention of these regulations would face not only eviction but also prosecution.[106] An unlawful occupier's eviction was initiated by a written notice requesting that they show reason why they should not be evicted.[107] Upon failure to adduce "reason", the native commissioner issued a warrant authorizing the police to evict the unlawful inhabitants using any means necessary, including force.[108] The evicted were resettled on land designated for black occupation.[109]

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[101] Natives Trust and Land Act 18 of 1936*: s*ec. 13(4).

[102] Haythorn & Hutchison 2014:195: "Vested in the Trust was land reserved for the occupation of natives and land within the scheduled native areas as identified in the Natives Land Act. Sec. 6(1) of the Natives Trust and Land Act." See Van der Walt 1991 for a discussion of the scope and content of the Land Acts.

[103] Sec. 4(1) of the Natives Trust and Land Act. Sec. 9(1) of the Natives Trust and Land Act. The Trust's regulatory reach was broad enough to include unilateral withdrawal or change of the aforesaid rights to occupy.

[104] Haythorn & Hutchison 2014:195.

[105] See Fourie 2000. See also Robinson 1997:475- "The act established 'reserves' for Black people and enlarged the Natives Land Act's 8% reservation to 13%, restricting 80 percent of the population to this territory. The Trust's authority to acquire land was further restricted to land within scheduled native areas or reserved regions." Sec. 10(2) of the Natives Trust and Land Act. Natives were entitled in terms of subsec. 11(1) and 18(2) of the Act to purchase, lease or otherwise acquire land in scheduled areas. See Van der Merwe 1989a:663-679. Chapter 4 of the Act regulated the tenure of Black people who resided on land other than the 'reserved' land. In summary, these provisions limited such occupation to instances where, the Black man, was according to sec. 26; (a) the registered owner of that land; (b) a servant of the owner of that land; (c) a registered labour tenant; (d) a registered squatter; or (e) otherwise exempted from the prohibitions contained in chapter 4 of the Act.

[106] Natives Trust and Land Act*: s*ec. 26(4).

[107] Natives Trust and Land Act*: s*ec. 37(5).

[108] Natives Trust and Land Act*: s*ec. 37(1)-(4).

[109] Natives Trust and Land Act*: s*ec. 38.

The further promulgation of the Native Administration Act,[110] which provided administrative authority to remove Africans from white-zoned property and relocate them, exacerbated the exclusion of those who had rights to lose and the disqualification of people who desired to (re)acquire rights to land. The resultant overcrowding on "reserved" land combined with unfavourable working conditions on white farms created an atmosphere that fostered extensive migration to cities.[111] This added a new dynamic in the evolution of urban land tenure. It is not my contention that the developments in urban land tenure did not follow or come before developments in rural land tenure. The point I make is, to use an English cliché, to consider urban land tenure constraints as independent from those in rural land tenure is to not see the wood for the trees. The following historical account and analysis should be viewed and read in conjunction with the one given above. I now proceed to deal with developments specific to pre-constitutional urban land tenure.

2.2.3 Urban land tenure

Acts governing urban land tenure, similar to those discussed in the previous section were intended to restrict and marginalize Black people's rights to land in a mutually reinforcing way.[112]

The Black (Urban Areas) Act,[113] for instance, was enacted to ensure that the occupation of land would be strictly controlled and that the settlement patterns of black people would take place on terms that served white interests.[114] To this end, an urban local authority could, "define, set aside, and lay out land for the occupation, residence, and other reasonable requirements of black people."[115] It could also "define, set aside, and lay out any portion of a location or any other land within its jurisdiction where black people could lease a lot of land for the erection of houses and huts for their own

[110] Act 38 of 1937.
[111] O'Regan 1989:364; Claassens 1990:30-43.
[112] See Madlalate 2019:195-217.
[113] Act 21 of 1923.
[114] Davenport 1969:95. Known as the Stallard principle; "The native should only be allowed to enter the urban areas, which are essentially the white mans' creation, when he is willing to enter and to minister to the needs of the white and should depart therefrom when he ceases to so minister."
[115] Sec. 1(2) read with sec. 2(1) and 3(1) of Black (Urban Areas) Act. For full discussion see Muller 2014.

occupation", with the approval of the Minister of Native Affairs.[116] Anyone who was a party to an agreement that intended to bypass sec. 4(1) would be charged with a crime.[117] All black persons employed by an urban local government were also barred from residing in any place other than in locations, native villages, or native hostels.[118] The Black (Urban Areas) Act was augmented by the Slums Act,[119] which prohibited Africans from obtaining land in metropolitan areas.

Over time, for practical reasons, the Native (Urban Areas) Consolidation Act,[120] further established four distinct classes of black urban dwellers, each of which were to be granted the permission to be in the city provided that the nature of their work demanded it.[121] After a period of rapid urbanisation, the government began to impose severe influx control measures to keep black people out of "white spaces" and confined to the outskirt.[122] The presence of black people in these places was always seen as temporary and contingent on employment.

Notwithstanding, Black people progressively began to inhabit vacant land and buildings closer to their workplaces. To prevent and control illegal squatting on public and private property, Parliament approved the Prevention of Illegal Squatting Act (hereafter PISA).[123] This Act made it unlawful to remain on land belonging to another without a justifiable reason.[124]

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[116] Black (Urban Areas) Act: sec. 1(1)(a)- (b). Only Black people were permitted to "engage into any agreement or transaction for the purchase" of a right to, interest in, or servitude over land in a particular location or native villages. For full discussion, see Muller 2014.

[117] Black (Urban Areas) Act: sec. 4(2).

[118] Black (Urban Areas) Act: sec. 5(1) read with subsec. (2) in respect of the groups of Black people exempted from this provision. See also Black (Urban Areas) Act: sec. 6(1) read with subsec (2) - The Governor-General could increase this area to a maximum of five miles in terms of s 6(2) of the Act.

[119] Act of 1934.

[120] Act 25 of 1945.

[121] Hall 2010:75.

[122] Schoombee & Davis 1986:208-219.

[123] Long title of Prevention of Illegal Squatting Act 52 of 1951.

[124] Prevention of Illegal Squatting Act 52 of 1951: sec. 1, read with sec. 2 and 3 regularising the demolition of any structures or buildings established on the land without the owner's or legitimate occupier's authorization. See also Muller 2014:367- relying on the National Party Election Manifesto (1948) to argue that the Act was also a further catalyst to ascertain white enclaves in order to fulfil the National Party's vow to "take robust and effective efforts to safeguard the safety of... property and the calm lifestyles" of white people.

PISA was accompanied by many other discriminatory laws aimed at repressing the free movement and (re)settlement of black people in urban areas.[125] The most noteworthy of these was the Group Areas Act.[126] Augmenting the Black (Urban Areas) Act,[127] the Group Areas Act partitioned and made it illegal for people of other races to use, occupy, and or possess land in areas set aside for the white race.[128] In contrast to the congested and overgrazed land set aside for Africans, land set aside for white occupancy was primed for development.[129] The Act was centred on a separate residential development agenda: the belief that non-whites could not live in the same areas as whites.[130]

As I mention earlier in the chapter, the displacement of the communal system of land ownership by an individual system of ownership set the foundation for the evolution of targeted legislative schemes of separate development based on exclusion and othering. This foundation, I contend, still serves as the organising principle for land holding, and its impact on the continuance of "othering" must be considered, particularly on the approach to the interests of those without rights to land in eviction cases. Notably, the emphasis is on exclusion, on who to exclude and when to exclude, rather than on who to include and when to include in the property system.[131]

The classification and distinction between not just "white" and "bantu", but also "bantu" and "coloured" groupings, putting the majority grouping of non-whites with minor to no

[125] Muller 2014:367. For the time being, I will turn away from discussing PISA. The following section 2.5.5 is dedicated to this piece of legislation.

[126] The Group Areas Act 41 of 1950 was amended by the Group Areas Act 36 of 1966. The relevant sections of both Acts, the Group Areas Act of 1950 and the Black (Urban Areas) Act of 1923 were copied verbatim in the Black (Urban Areas) Consolidation Act 25 of 1945 and in the proclamation of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters Proc. R1036 in GG Extraordinary 2096 of 14 June 1968 which reiterated the policy that the presence of black people in urban areas was of a temporary nature. The differences between the earlier Act and the latter are too narrow, at least for my purposes of highlighting the background of dispossession and the exclusion of Black interests in the participatory space of property relations. For example, sec. 13 of the Act of 1966 prohibits the acquisition of immovable property in a controlled area, while sec. 20 placed restrictions on the occupation of land in a controlled area. These sections reflect secs. 4 and 5 of the Group Areas Act of 1950.

[127] Black (Urban Areas) Act.

[128] Schoombee 1985:77 argues that group-area legislation formed the cornerstone not only of racial segregation but also of the all-encompassing government policy of separate development.

[129] See Schoombee 1985:77-79. See also Rugege 2004:285. The Act accordingly prohibited persons from other race groups from using, occupying, or acquiring ownership of land in areas designated for a particular group. Black designated areas were excluded from the ambit of the Group Areas Act. In 'black residential areas' it was a free for all.

[130] Van der Walt 1990:1-46.

[131] See Van der Walt 2001.

rights against each other so as not to be further marginalised, demonstrates the consolidation of this notion of "othering" inherent in the organising principle of land holding and the legislation discussed thus far.

Additionally, while the laws discussed up to this point may have made exceptions for Black persons to reside in non-reserve areas, these clauses should be viewed not only as a convenient means of assisting those who legally owned property in preferential areas but also for the consolidation of "othering". Using the Group Areas Act, as an example: it was not illegal for a person to occupy land or premises if that person was a bona fide state servant or employee; or was a bona fide visitor for a total of not more than ninety days in any calendar year of any person lawfully residing on the land or premises; or was a bona fide scholar attending a state-controlled or aided school.[132]

Those to whom the exception applied were made to feel more part of the othering system than those that the exception did not apply to. In the end, othering occurred at the level of and among the othered in a systematic fashion. The sensitivity to the need for and against change, in my opinion, of agents acting in the field of property rights all have this limitation to varying degrees.

The controversial Group Areas Act, dubbed the "heart of apartheid", resulted in the direct displacement of an estimated three to seven million people between 1960 and 1983.[133] Based on the level of control exercised over usage, occupation, and ownership, Muller believes that if these displacing legal regimes were depicted as points on a continuum, the "reserves" as envisioned in the earlier section would be on the left and the "group areas" on the right.[134] Moving from left to right on the continuum indicated a repressive ascent in the type and/or extent of control.[135] When investigating a suspected offence under the Group Areas Act, the Police had broad

[132] Group Areas Act 36 1966: sec. 17(2). In my view, this created the framework for future co-opting, which can be reflected in the foreword given in *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA)*; Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the Applicant unknown and who are unlawfully occupy remainder Erf 149, Philippi, Cape Town and Others* 2018 2 SA 228 (WCC) reflecting a view of inclusion as including but a few who later form the bulwark against the concerns of the majority of the excluded whom are from the previously marginalised subgroup. This sees people who had been discriminated against striving to keep the market value of property rather than grabbing the opportunity to define the system.

[133] Rugege 2004:285 estimates 7,5 million; Platzky & Walker 1985 quotes the Department of Land Affairs White Paper 1997 which puts the figure at 3,5 million.

[134] Muller 2013:367.

[135] Muller 2013:367.

powers, including sec. 43(1)(a), which allowed them to enter any property without a warrant and conduct any examination they deem necessary.[136]

A rise in economic growth, combined with a move away from capital to labour intensive businesses, increased demand for skilled and unskilled labour resulted in an inflow of Black people into white cities and suburbs in search of livelihood.[137] The Black (Urban Areas) Consolidation Act became increasingly obsolete as a result of the influx. This necessitated the drafting of the Black Communities Development Act.[138] The Act declared, "to provide for the purposeful establishment of Black communities outside of protected zones."[139] A certificate verifying the registration, the right to occupy the leased site, and the proof that certain rights had accrued would be given to the owner of this restricted right.[140] The Conversion of Certain Rights into Leasehold or Ownership Act,[141] which outlined the conversion of certain occupation rights into leasehold or ownership, came next.[142] A wave of laws aimed at repealing apartheid land law ensued.[143]

What matters for my objectives is to highlight the complexities concerning people who would finally be granted urban land rights in comparison to the preponderance of Black people who would be systematically excluded from these early efforts. The people forcefully evicted from rural/urban land, as well as those who were not forcibly evicted but had not acquired and hence had no rural/urban land rights to forfeit, and yet found

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136 Act 36 of 1966.

137 Terreblanche 2002:329-332.

138 See sec. 16 of the Black Communities Development Act 4 of 1984. See Kingwill *et al*. 2017.

139 Black Communities Development Act 4 of 1984: sec. 52(1)(a) & sec. 52(4)(a) and (b) for example, allowed the board, the local authority, or the township developer to grant a competent person a leasehold for a period of ninety-nine years on particular conditions and with payment or collateral.

140 See Muller 2013. Sec. 53(5) of the Black Communities Development Act 4 of 1984 afforded the holder of the leasehold the right to (a) erect and improve buildings or to alter and demolish buildings or structures; (b) occupy the buildings or structures and the site; (c) encumber the leasehold; and (d) dispose of the leasehold to another competent person.

141 Act 81 of 1988. See Muller 2013.

142 Sec. 1 of the Black Communities Development Act 4 of 1984.

143 The Abolition of Racially Based Land Measures Act 108 of 1991 - According to the Act's long title, "it was passed to repeal or amend certain laws to eliminate certain restrictions on the acquisition and use of land rights based on race or membership in a specific population group; to provide for the rationalisation or phasing out of certain racially based institutions; and to repeal the majority of discriminatory land laws." The Natives Land Act and related statutes were repealed by sec. 1. The Natives Trust and Land Act was repealed by sec. 11. Sec. 12 of the Act made provision for the phase-out of the South African Development Trust which controlled the majority of "native" land, allow for the land to be transferred from the Trust to the State.

themselves on land on account of work-related exceptions, stand to be considered.[144] While the majority fell outside of this ambit, particularly those who had not acquired and hence had no urban land rights to lose, this majority would later be excluded from tenure reform schemes such as restitution in the constitutional era.[145] The argument here is that in part due to the past's complexities the majority of people continue to access land in an informal manner.[146] This has kept them on the periphery of not only financial power and property ownership but also on the margins of the human condition in terms of the habitability of the spaces they occupy.[147]

This element is captured in one of the earliest constitutional housing rights cases decided in the Constitutional era, and I can do no better than quote, *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*,[148]

> "With the lifting of the racial restrictions as to where people could live and work, many of the unemployed in the former homelands migrated to the cities. They went in search of work, taking their families with them. The shortage of accommodation in the urban areas forced them to live in shack towns or squatter camps on open land. Their plight should be recognised, should be treated with awareness, and understanding. Humane action is needed, not a sledgehammer."

[144] See Murray & O'Regan 1990:137-161; Van der Merwe 1989b:353-369 In overview, rural land tenure provisions hampered black farmers' and non-farmers livelihood strategies by depriving them of their land and restricting their freedom of movement by allowing them to occupy land only lawfully in certain restricted areas while ensuring that these restricted areas would not meet their needs and force them into labour tenants in white farms and cities.

[145] For a full discussion on land reform with emphasis on restitution see Walker 2008.

[146] Refer to section 1.3.2.1 above.

[147] *See* Hornby *et al.* 2017. Approximately 60% of South Africans occupied land or homes in 2011 without their rights being recorded in official systems such as the Deeds Registry.17 million people living in communal areas, 2 million on commercial farms, 3.3 million in squatter camps, and 1.9 million in backyard shacks, 5 million in RDP houses without title deeds, and 1.5 million in RDP houses with inaccurate title deeds. Their claims to property cannot meet the stringent requirements of the cadastre and remain 'off-register'. See Napier 2011 and Dawson & McLaren "Monitoring the right of access to adequate housing in South Africa", https://spii.org.za/monitoring-the-right-of-access-to-adequate-housing-in-south-africa/ (accessed 11 August 2022):33. Data from Statistics South Africa (StatsSA)'s General Household Survey indicate that 79.3% of households in South Africa live in formal dwellings, while 13.9% of households live in informal dwellings and 5.9% of households live in traditional dwellings approximately 1 in 7 households in South Africa lived in informal dwellings (this figure is higher in metropolitan areas, where 1 in every 5 households lived in an informal dwelling). Moreover, the Housing Development Agency (HDA) has noted that these figures are likely to under-represent the real growth in informal settlements. See also Department of Human Settlements 2009:16 for character definition on the 'informal' and 'illegality' of tenure.

[148] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE): para 20.

2.2.4 The Prevention of Illegal Squatting Act

In this section I do not solely seek to situate PISA within the historical legislative framework. That is done in the previous section. In light of the assertion that the problem of insecure land tenure is in part a result of unreflective and open-textured legislation, PISA is explored here as a prelude to the comparative analysis alongside its successor PIE. In particular, those clauses and revisions pertaining to this thesis's focus: the continued stay of persons, who do not have any rights to land, on land belonging to someone else.

To recap, PISA emerged as a result of the government's frequently failed attempts to regulate the influx of black people seeking labour in cities from 1951 to 1988.[149] PISA evolved through amendments, filling in inefficiencies that developed as a result of ever-changing realities that tended to undermine the main exclusionary purpose of separate development.[150] The outlawing of illegal squatting saw measures aimed at not only physically removing those without any rights to land but also measures aimed at discouraging the organisation of outlawed interests.[151] To this end, PISA was put into place and evolved in order to vindicate the authority to remove,[152] demolish,[153] and sanction relocation.[154]

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[149] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE): para 20. The time period 1951-1988 reflects the time period in which the statute was first promulgated and last revised.

[150] For example, sec. 6F of the Prevention of Illegal Squatting Act was enacted to address the gap left by the repeal of the provisions in Chapter 4 of the Development Trust and Land Act by the Abolition of Influx Control Act 68 of 1986. Local governments could expel Black individuals from farms outside their jurisdiction under Section 6F if they had authorization to stay but were not directly employed by the owner or lawful occupant. See Lewis 1989 who saw the expansion of the Prevention of Illegal Squatting Act's scope to encompass rural areas outside the jurisdiction of local governments as an "essential innovation" in the entrenchment of homelessness.

[151] Prevention of Illegal Squatting Act: sec 3; sec. 4; sec 5 read with sec. 8.

[152] See sec. 1(1)(a) of the Prevention of Illegal Squatting Act made it illegal for anybody to access or remain on land without the authorization of the owner or legitimate occupier, regardless of whether the land was secured or not. See also sec. 6F of the Prevention of Illegal Squatting Act.

[153] See sec. 3B of the Prevention of Illegal Squatting Act gave landowners, municipal governments, and provincial officials the authority to demolish any building or structure established on a piece of property without the approval of the owner or authorised occupier after a seven-day notice period. This amendment also contained an ouster clause, sec. 3B(4)(a) which prevented squatters from approaching the court for an order halting their eviction unless they could establish title or a right to the land. See also Schoombee & Davis 1986:208-219. See *S v Peters* 1976 2 SA 513 (C).

[154] The Abolition of Influx Control Act necessitated the sec. 6A amendment of the Prevention of Illegal Squatting Act, introducing a new type of informal settlement called 'designated areas.' If residents could not find alternative places to dwell, the Minister of Constitutional Development and Planning might designate a section of property owned by the local government or that could be expropriated as a site

For my purposes, I highlight the development that emerged from a disconnect between the judicial power to order demolition and immediate evacuation, on the one hand and the cyclical revelation that, with nowhere else to go, the evictees simply migrated to a nearby plot of land and waited for the process to repeat itself.[155] This is crucial considering the potential problems that the continued presence of an unauthorised occupier on another person's property could cause.

Despite these changes, PISA was unable to keep up with the ever-changing dynamics of labour and land occupation.[156] The 1980 revision to PISA,[157] augmented the local authorities' summary demolition powers.[158] It became clear that a new urbanisation control plan was needed: one that took into account the inevitable urbanisation and overcrowding as well as the fact that most black people could not afford formal tenure.[159] The Abolition of Influx Control Act,[160] was passed resulting in the creation of “orderly urbanisation”, which would focus on urban development and planning.[161] PISA was updated in 1988 to incorporate the aforementioned criteria, increasing its scope to include rural areas and establishing comprehensive measures for dealing with rural squatting.[162] It strengthened local governments' ability to remove squatters and demolish their homes without due process. It did so while weakening court’s discretionary powers and common-law principles that sought to protect the minimal rights of unlawful persons' on land belonging to another.[163] The owner, rightful occupier, administrator, or local government would just need to show that squatters entered the property without authorization, gathered there, and refused to leave.[164]

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where they could settle and reside. Contrary to transit zones, these ‘designated regions’ would offer permanent accommodation to those who would otherwise be homeless. See Van der Walt 2005:413.

155 Fagan 1948:25; Fagan et al. 1948.

156 The Riekert Commission of Inquiry into Manpower Utilization 1977 was constituted to investigate and report on Black people's participation in the metropolitan labour market. The Commission suggested that Black urban laborers be allowed to relocate and work in any City, as long as sufficient housing land was available.

157 Prevention of Illegal Squatting Amendment Act 33 of 1980.

158 O’Regan 1989:361-394

159 Ibid.

160 Act 68 of 1986.

161 Ibid.

162 Ibid.

163 Ibid.

164 Sec. 3(1) of the Prevention of Illegal Squatting Act was amended so that a magistrate's discretion to issue an eviction order was replaced with a directive to order eviction upon conviction in terms of section 1 of the Act. Even if an appeal had been filed, eviction was permitted under sec. 11B. This was done to get around the government's inability to prove the elements of the crime because it had no way of

The Abolition of Influx Control Act necessitated the amendment to PISA in 1988 to create “designated zones”, which were informal settlements where people who would otherwise be landless could be “permanently” resettled.[165] Notably, exclusionary requirements of the existing Group Areas Act and the Slums Act, as well as traditional town planning fines, remained applicable in these designated areas. In these designated areas, Black people did not have formal rights.[166]

I highlight the above development to ponder the following: whether the current State mandated relocation of unlawful occupiers to alternative land reflects a positive shift in the security of tenure in these State provided alternative locations when juxtaposed to the security of tenure in “designated areas” under PISA.

Notwithstanding, almost three decades into the democratic dispensation, it remains an accurate account to state that the landless class that was established as a result of the aforementioned legal machinery that denied Black people their claim to title, continues to be without land.[167] More notably, although there is now anti-discrimination clauses attached, the laws that determine who can be present, when, and under what circumstances, as reflected by the legal conceptions of ownership, nuisance, trespass, and eviction, are still to address tenure insecurity adequately.[168]

Of those legislative mechanisms, the Extension of Security of Tenure Act (hereafter ESTA),[169] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (hereafter PIE),[170] regulate and provide an avenue for the restoration of rights

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demonstrating first, that the land in question was covered by the Prevention of Illegal Squatting Act; second, that the entry onto the land was illegal; and third, who the land's owner was, negating any attempt to prove that the occupation was done without the consent of the landowner and still persuade the magistrate to exercise his discretion to order the removal of the occupants in terms of sec. 3.

165 Sec. 6(2) read with sec. 6(4) of the Prevention of Illegal Squatting Act provided that, Unless the owner or legitimate occupier could demonstrate that the homeless people's occupation was against their will, a local authority could expropriate land when it was occupied by homeless persons without having to pay compensation. Without a doubt, the goal of this clause was to make landowners less likely to permit squatters to occupy their property.

166 Muller 2013:368.

167 Justice Dikgang Moseneke’s contributions to the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change: Report of Working group 2 on Land Reform, Redistribution, Restitution and Security of Tenure, September 2016 in Parliament of South Africa Report of the High-Level Panel on the Assessment of Key Legislation, and the Acceleration of Fundamental Change (November 2017).

168 See Klare 1998:150; Albertyn & Goldblatt 1998:248.

169 Act 62 of 1997.

170 Act 19 of 1998.

negated by arbitrary evictions. I now proceed to look at these legislative mechanisms. It is through their explicit contemplation of "justice and equity" that an eviction order can be denied, leaving a situation where an unlawful occupier remains on land that belongs to someone else without a formal right to do so. In the sections and chapters that follow, I also adopt a broader perspective on these legislative mechanisms, reflecting on Madlalatse's summary of the multi-level exclusionary characteristic of the old legislative scheme:

> "The policing and manipulation of space in line with the state's policy occurred on at least three mutually reinforcing scales. First, at the nano-level as was evident in restrictions on interpersonal relations. Secondly, at the micro-level, as was evident in the implementation of urban group areas and household segregation. Thirdly, at the macro-level, as was evident in the interdependent yet unequal relationship between the Bantustans, the reserves and white South Africans. They would eventually be denied political membership and citizenship from these spaces through the Bantu Homelands Citizenship Act of 1970. The operation of these laws meant that Black people entered South Africa from the Bantustans as temporary sojourners whose notional political citizenship lay in the 'independent' Bantustans."[171]

For my purposes, I consider the possible policing and manipulation of the participatory space that the current property rights discourse (jurisprudence) through the current legislative structure deals those without land.

2.3 Evictions from land post-1994

In the last section, I discuss the multi-dimensional loss and exclusion from the acquisition space of rights to land. To recap, the above account tells the story of those who both had land rights to lose and lost them due to state and private action, as well as those who had no land rights to lose by 1913 or had been forced to leave land on which they lived in search of other means of survival.[172] The character of the claimant suggested by the circumstance under investigation in this thesis necessitates

[171] Dugard 1980:11; Unterhalter 1987:19-32.
[172] See Walker 2008:11-27.

an emphasis on persons who had no land rights to lose and were disabled from acquiring land rights. This is the category characterized by unlawful occupants who remain on another's property after a court has determined that eviction would be unjust and inequitable. This is not to say that the unlawful occupiers who remain on another's land as posited in this thesis have no rights to land solely because of or since apartheid. Rather, the focus here is on comparing the systemic exclusionary approach to those who had no rights to lose during apartheid and to those who have no rights to land today.

In the post-apartheid era, those without land rights are governed by a different legal framework than they were under apartheid. Observations suggest that apartheid was abolished due to a combination of causes.[173] At the very least, the research in the previous section points to a legislative framework and a separate development goal that became progressively out of step with the country's economic growth and demands.[174] The resultant negotiated settlement that ushered in the 1996 Constitution, introduced a major innovation in eviction law. This innovation introduced a rights-based strategy, shifting the regulation of tenure reform away from a permit-based approach and toward a system of legally enforceable land rights envisaged through the interplay of sec. 25 and 26 of the Constitution.[175]

An endeavour to reconcile competing constitutional rights is at the heart of this evolution in private eviction proceedings. On the one hand, private property owners must be protected from arbitrary property taking by the government or any other person.[176] The Constitution, on the other hand, guarantees unlawful occupants access to property and adequate housing.[177] This is not to be oblivious to the nature and substance of issues raised in eviction cases which intersect with, and often call into

[173] Lipton 1985.
[174] Lipton 1985:227-236. See also Price 1991.
[175] Claassens 2000:129-142.
[176] Sec. 25 of the Constitution.
[177] Van der Walt 2011:12-16. Existing property rights are protected against unconstitutional interference under sec. 25(1)-(3) of the Constitution, while state action to promote land and other relevant reforms is guaranteed under sec. 25(5)-(9). The property clause has an inherent contradiction between safeguarding existing rights and reforming property interests. The purposive interpretation of these contradictory provisions ensures that both the protective and reformative aims of sec. 25 are honoured, protected, and advanced. Sec. 25(4) is an interpretive clause that covers both sec. 25(1)-(3) and 25(5)-(6). Sec. 26 of the Constitution.

question, other constitutional rights. The right of access to courts,[178] children's rights,[179] the right to education,[180] and the right to equality and human dignity,[181] are all constitutional rights that have come up in eviction disputes.[182]

In this section, I lay out the legal and regulatory structure that governs eviction in the constitutional era. Furthermore, in this section, I highlight the substantive differences in approach between the pre-constitutional legal and regulatory structure towards the structural handling of (exclusion or inclusion) of persons without land rights. This is in step with the work done to compare and contrast the different approaches to the disparities in security of tenure outcomes, if any exist, which I contend they do not. In what follows, I first provide a broad overview of eviction legislation before I turn to discussing and analysing the legislation on the basis set out above.

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[178] Sec. 34 of the Constitution. See *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC): para 40. The Constitutional Court interpreted the right of access to courts espoused in section 34 of the Constitution as encompassing, the duty of the state to provide 'necessary mechanisms' for both the unlawful occupier and the landowner to resolve disputes that arise between them. More so, the right envisages the establishment of the legislative framework, as well as mechanisms and institutions such as the courts to facilitate the execution of court orders.

[179] An unprocedural eviction is likely to infringe the dignity of not only an unlawful occupier but also people who live in the property through such an occupier, such as children. Thus, whenever a child is dependent upon the person liable for eviction and/or lives with the unlawful occupier, the 'child's best interests' must be advanced. Sec. 28(1)(b) is consistent with this "child-centred perspective". Sec. 28(1)(b) can therefore be envisaged to obligate the state to create the necessary environment for parents to provide proper parental care. The 'best interests' criterion also arises when a court determines the ambit of another right in the Bill of Rights or when assessing whether the limitation of another right is justified. See *Government of South Africa & Others vs. Grootboom & Others* 2001 1 SA 46.

[180] Sec 29 of the Constitution. See *Juma Masjid* case discussion in Chapter 3.

[181] Sec 9 and Sec. 10 of the Constitution. *See ABSA Bank v Murray* (8946/02) [2003] ZAWCHC 48 (18 September 2003): para 28- the court stated that the rights that would be relevant when dealing with evictions would include the right to human dignity, and
protection against being treated in a cruel, inhumane, or degrading manner. See also *S v Makwanyane and Another* 1995 6 BCLR 665: paras 44, 144 and 328-329 - The right to human dignity underlies the protection of all other rights, such that, one can only be said to have infringed the right to human dignity in relation to the way the infringement of another right has occurred.

[182] See UN Committee on Economic, Social and Cultural Rights (CESCR) "*General Comment No. 4: Right to Adequate Housing*" Article 11(1) of the International Covenant on Economic, Social and Cultural Rights 1991/12/13 (1991) 7-8 – the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. It should be seen as the right to live somewhere in security, peace, and dignity.

2.3.1 General overview of eviction legislation

Given prior legislative injustices against the Black majority, legislation to initiate land reform was adopted at the commencement of the new constitutional era. Land reform components were classified and statutorily protected in different ways.[183] The discussion that follows focuses on tenure reform legislation, specifically legislation that leads to situation of persons remaining on someone else's land without a right to do so. ESTA represents an attempt to redress a socioeconomic imbalance produced by pre-Constitution legislation as discussed above in the context of rural land tenure. The Act is noteworthy in that it is designed to address short-term security of tenure or securing the occupation rights of persons who are living on someone else's farmland but whose tenure would otherwise be at risk under common law.[184] In addition to the aforementioned, ESTA regulates the termination of occupancy which is the basis for the right and legality of remaining. [185] Simply put, ESTA is concerned with persons who have rights to land (occupation rights) and those who lose such rights and become unlawful occupiers of someone else's rural land without a countervailing right to continue occupation (without the occupation right).[186]

PIE, on the other hand, was enacted with the avowed objective of redressing injustices associated with a legislative past that had blatantly overlooked the interests of people who did not have rights to land.[187] The first major distinction is that PIE differs from

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[183] See UN Committee on Economic, Social and Cultural Rights (CESCR) "*General Comment No. 4: Right to Adequate Housing*" above.

[184] See sec. 1 of ESTA – The definition of "occupier" in ESTA includes features which characterize a lease agreement, namely "consent" and a "right in law" to reside "on land which belongs to another person." Sec. 8(2) refers specifically to "[t]he right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement . . . and section 10(1)(d)(i) uses similar terminology. See also See Roux 1998:7A-17. The Act infringes on a landowner's common law right to vindicate his or her immovable property through ejectment by contemplating and regulating rural evictions.

[185] See *Van Zyl NO v Maarman* 2000 1 SA 957 (LCC): para 16 - the fact that ESTA clearly contemplates cases where occupation was previously authorized through agreement does not preclude an owner from bringing an application seeking the eviction of any occupier.

[186] *Van Zyl NO v Maarman* 2000 1 SA 957 (LCC).

[187] The preamble to PIE read with sec. 4 of PIE - These goals are expressed in the preamble, which mirrors the provisions of Sections 25(1) and 26(3) of the Constitution. The preamble to PIE states that it is "desirable that the law regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances, with special consideration for the rights of the elderly, children, disabled persons, and particularly households headed by women, and that it should be recognised that the right of landowners to apply to a court for an eviction order. See also sec. 26(3) of the Constitution - expressly gives effect to this meaning of 'protect': 'No law may permit arbitrary evictions.' A law is 'arbitrary' when it does not provide sufficient reason for the eviction or is procedurally unfair. Sec. 25(1) of the Constitution reads: "no one

ESTA in that it applies to “all land” rather than just rural land.[188] PIE establishes processes for evicting people who have no countervailing rights to occupy someone else's land. More significantly, it reflects situations in which a landowner's right to possession may be limited for historically grounded socioeconomic reasons.[189]

The goal of this overview is to set the stage for the discussion of how ESTA and PIE might lead to a situation in which a court denies an eviction application for just and equitable reasons, allowing an unlawful occupant to remain on someone else's land. It is also to consider whether it is any different from the pre-constitutional legislation in the security of tenure outcome it produces. The latter is a point left to later chapters.

2.3.1.1 The Extension of Security of Tenure Act

ESTA finds relevance with the situation posed by continued unlawful occupation of another's land in a two-step entry point. The first step sees persons with occupation rights losing those rights upon termination of the agreement upon which such rights are based. Once the right of occupation is terminated, the occupiers are on someone else's rural land without a countervailing right. The termination of the right to occupy does not, however, automatically mean that the owner is permitted to evict such an occupier.[190] The right of residence of an occupier can, subject to certain exceptions that are not relevant in this case, only be terminated if it is just and equitable to do so, having regard specifically to five factors set out in sec. 8(1) of ESTA.[191] The owner

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may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”

[188] Sec. 2 of PIE.

[189] Pienaar 1999:12-15 - It is important to reiterate that PIE does not place a prohibition on evictions, but places sole emphasis on the prevention of unlawful eviction. i.e., evictions that do not comply with the Act.

[190] See *Aquarius Platinum (SA)(Pty) Ltd v Bonene and Others* [2020] ZASCA 7; 2020 (5) SA 28 (SCA); *Sterklewies (Pty) Ltd t/a Harrismith Feedlot v Msimanga and Others* [2012] ZASCA 77; *Maluleke NO v Sibanyoni and Other* [2022] ZASCA 40**.** ESTA envisages a two–stage eviction procedure. The first is a notice terminating the occupier’s right to reside, thereafter a second notice of eviction in terms of s 9(2)(d) should be given to the occupier.

[191] Sec. 8 of ESTA provides that the termination must be on any lawful ground. The section further makes a proviso that the termination of the right of residence must be just and equitable, having regard to all relevant factors. These factors, set out in sec. 8(1), make it clear that fairness plays a significant role. They are; “(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies; (b) the conduct of the parties giving rise to the termination; (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated; (d) the

must instead acquire a court order prior to conducting an eviction. I will now explore this process as it operates in ESTA.

ESTA provides for the eviction of occupiers in its sec. 9(2). The process envisaged therein has two entry points relevant to the thesis. The first is through sec. 10, which regulates an order for the eviction of a person who was already an occupier when the Act came into effect.[192] This regulation is subject to a voluntary resignation or fundamental breach of agreements and or dereliction of duty on the part of the occupier.[193] If the foregoing requirements are met, the court may grant an eviction if it is convinced that the occupier has adequate alternative accommodation.[194] When adequate alternative accommodation is not available, the occupier is afforded a nine-month grace period from the date of termination of his or her right of residence under sec. 8.[195] Only after this, an owner who is prejudiced by the ongoing occupation may proceed with the eviction application.[196]

The second is through sec. 11, which regulates the eviction of a person who becomes an occupier after the commencement of the Act.[197] The court shall consider the

existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence." See *Snyders and Others v De Jager* [2016] ZACC 55; 2017 (3) SA 545 (CC): para 56.

[192] Sec 9(2)(c) of ESTA

[193] Sec. 10 of ESTA read with sec. 6(3) of ESTA – "An occupier may not— (a) intentionally and unlawfully harm any other person occupying the land; (b) intentionally and unlawfully cause material damage to the property of the owner or person in charge; (c,) engage in conduct which threatens or intimidates others who lawfully occupy the land or other land in the vicinity; or- (d) enable or assist unauthorized persons to establish new dwellings on the land in question."

[194] Sec. 10 (1)-(3) of ESTA. Sec. 10(3) of ESTA provides: "If (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8; (b) the owner or person in charge provided the dwelling occupied by the occupier; and (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to — (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and (ii) The interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

[195] Sec. 10(3) of ESTA

[196] Sec. 10(3) of ESTA.

[197] Sec. 11 of *ESTA* provides that; "(1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just

following factors in determining whether it is just and equitable to grant an order for eviction (or decline to grant the eviction order) under this section: the length of time the occupier has lived on the land in question; the fairness of the terms of any agreement between the parties; whether suitable alternative accommodation is available to the occupier; the reason for the proposed eviction; and the balance of the interests of the owner and the occupier on the land.[198]

In sum, "just and equitable" comes into play in three places in ESTA. First, the termination of right of residence must be just and equitable before a court will consider granting and eviction order. Second, the court will only order an eviction if it will be just and equitable to do so. Third, if an order of eviction is granted, its terms too must also be just and equitable. This multi-layered assessment does not envisage an exhaustive list of factors to consider. The objective is to evaluate the concepts of justice and equity and determine if the standard has been satisfied based on the facts of the case. To achieve a fair and orderly eviction, different facts in different cases necessitate different arrangements.[199] This opens the decision making to personal and institutional subjectiveness outlined in the theoretical approach.

ESTA was enacted in juxtaposition to the pre-constitutional legislative structure governing rural/farmland tenure. It was enacted, among other things, to ameliorate the uncertainty and sub-human tenure conditions of persons occupying property on another's rural farmland and to provide substantive protection that common law remedies could not provide.[200] Where possible, occupants, farm owners, and government agencies work together to establish the conditions under which an occupant may be evicted in order to safeguard occupiers against unfair or arbitrary

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and equitable to do so. (2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997, provided that it is just and equitable to do so."

198 Sec. 11 (3) of ESTA. For a full appraisal of the just and equitable requirement on ESTA, see also sec.12 of ESTA - demands that in the event that the court sees it just and equitable to grant the eviction order, the court must ensure that the eviction is done in a just and equitable manner. That is, in determining a just and equitable date the court shall have regard to all relevant factors. These factors include; "(a) the fairness of the terms of any agreement between the parties; (b) the balance of the interests of the owner or person in charge, the occupier, and the remaining occupiers, on the land; (c) the period that the occupier has resided on the land in question; and (4) the combined household income of the occupiers."

199 *PE Municipality*: para 33.

200 Roux 1998:7A-17.

eviction.[201] It also includes safeguards for farm residents' and owners' rights and obligations.[202] By identifying the circumstances under which an occupant may be evicted, the measure seeks to protect occupiers against unfair or arbitrary eviction.[203] The relevance of ESTA in the context of its approach to persons without any rights to land is not that it eliminates the landowner's right to obtain eviction of an occupier. Rather, it circumscribes it by requiring that the right be vindicated only in particular circumstances and following specific processes.[204]

2.3.1.2 Evictions under the PIE Act

To distinguish PIE from ESTA and avoid the seemingly fruitless task of dealing with two identical pieces of legislation, PIE protects unlawful occupants who have settled on public or private urban or rural land without the authorization of the owner.[205] ESTA, on the other hand, is concerned with the termination and eviction of occupiers who once had a right to occupy space on rural land at some point but no longer do so.[206] This has two implications. The wording "a person who occupies land without... consent, or without any other legal right to occupy" could be taken broadly to mean "a

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[201] Badenhorst *et al*. 2006:610. Sec. 4 of the ESTA- The relevant provision of the Act states that, "...the Minister may grant subsidies to facilitate the planning and implementation of on-site and offsite developments; enable occupiers, former occupiers and other people who need long-term security of tenure to acquire land or rights to land; and for the development of land occupied or to be occupied in terms of on-site or off-site developments."

[202] Sec. 6(1)-(3) and (4) of the ESTA.

[203] Sec. 9-12 of the ESTA. Sec. 9 of ESTA provides that "notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act."

[204] Sec. 9(1) of the ESTA.

[205] Sec. 1 of PIE states that "In this Act, unless the context indicates otherwise—(i) ''building or structure'' includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter; (iv) ''evict'' means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and ''eviction'' has a corresponding meaning." See also sec. 2 of PIE - applies to all land rather than just rural land.

[206] See *Van Zyl NO v Maarman* 2000 1 SA 957 (LCC): para 11-12. See also *Sentrale Karoo Distrikraad v Roman* JOL 6112 (LCC). See sec. 1 of PIE- An "unlawful occupier" is defined in *PIE* as meaning - "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is a occupier in terms of the *Extension of Security of Tenure Act*, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996." See *Ndlovu v Ngcobo* 2002 4 All SA 384 (SCA) - equally so, someone who took occupation without the necessary consent but afterwards obtained consent could not be an unlawful occupier for the purposes of eviction. In contrast to ESTA, once unlawfully evicted, there are no safeguards in place to return the evictee to the land through PIE. Ordinary appeal and review proceedings and remedies outside of legislation, such as mandament van spoile, would be available to an eviction order obtained by a magistrate's court or conducted without a court order, contrary to the Act, but no automatic review system exists as with the ESTA.

person who occupies land without consent, or without any other legal right to occupy" at the moment proceedings are started.[207] This would cover circumstances where an occupant has never had consent or other right to occupy, as well as those where the occupant had consent or a right to occupy before. As a result, failure to prove a qualifying reason under ESTA or any other statute will bring one under the jurisdiction of PIE.[208]

When a court receives an eviction application for an unlawful occupier, PIE says that the applicant must provide the unlawful occupier with written and effective notice of the proceedings at least 14 days prior to the hearing.[209] Sec. 4(5) of PIE lays out the requirements for serving a notice of proceedings, including what the applicant must do for the notice to be delivered to the respondent.[210]

Further to that, if an unlawful occupier has been on the property for less than six months at the time the proceedings are started, a court may grant an eviction order if it believes it is just and equitable, taking into account all relevant circumstances, including the rights and needs of the elderly, children, disabled people, and women-headed households.[211] If an unlawful occupier has been on the property for more than six months, the Act states that a court must assess whether land is available to which they can be relocated, or whether the owner or the local government can reasonably make land accessible. Those who have spent less than six months have less rights in

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[207] *Ndlovu v Ngcobo* 2002 4 All SA 384 (SCA).

[208] See also *Machele v Mailula* 2010 2 SA 257 (CC): para 26. The Court in *Machele* held that the application of PIE is not discretionary. This assures that an eviction proceeding always has a legislative base, eliminating the option of using the common-law right to evict. In circumstances where other statutes dealing with eviction, such as the *Land Reform (Labour Tenants) Act* or the *ESTA*, do not apply, the PIE Act will apply.

[209] Sec. 4(2) of PIE.

[210] Sec. 4(5) of PIE. The notice must state that proceedings are being initiated in accordance with the Act's provisions, indicate the date and time of the proceedings, specify the grounds for the proposed eviction, and state that the unlawful occupier has the right to appear in court and may apply for legal aid if they are eligible.

[211] Sec. 4(6) of PIE "If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women. (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 land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

terms of what the property owner or city or state must do in terms of providing an alternative.[212] The wording of these clauses seems to imply that courts do not have to take the availability of alternative housing or land into account when deciding cases where occupiers of a property had occupied it for less than six months.

In *Occupiers, Shulana Court v Steele (Shulana Court)*,[213] however, the SCA observed the variances in terminology between secs. 4(6) and 4(7) of the PIE and determined that nothing in sec. 4(6) meant that a court would be limited to only considering the conditions specifically listed in the subsection.[214] A court may demand further information in order to make sure it is adequately informed. In fact, if key concerns are not addressed in the evidence before a court, the court may need to "go beyond the evidence and produce creative ways to gather the data required "to enable it to the give consideration to important circumstances."[215]

Evictions in the case of a state organ are covered by sec. 6 of the PIE.[216] The consensus appears to be that if a court considers that homelessness will result and

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[212] See *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* (245/08) 2010 4 BCLR 354 (SCA). See also *PE Municipality* at para 45. Sec. 4(7) of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable.

[213] *Occupiers, Shulana Court v Steele (Shulana Court)* 2010 4 All SA 54 (SCA): para 13.

[214] See also *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Threat Ltd* 2012 2 SA 337 (CC): para 16 reads: "While this distinction [regarding the reference to less than six months' occupation or more than six months' occupation in ss 4(6) and 4(7) of PIE, respectively is important, I do not think it is decisive to the justice and equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all relevant circumstances. In an enquiry of this kind, a court should determine what the relevant circumstances are."

[215] *PE Municipality:* para 32; See also *Shulana Court v Steele 2010 4 All SA 54 (SCA):* para 12; *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others (245/08) 2010 4 BCLR 354 (SCA):* para 11-14.

[216] See sec. 6(1) of PIE; "An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if— (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or (b) it is in the public interest to grant such an order. (2) For the purposes of this section, ''public interest'' includes the interest of the health and safety of those occupying the land and the public in general. (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to— (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land."

that no alternative accommodation is available, it will be hesitant to give an eviction order, more so, in state instigated evictions.[217]

In order to obtain specific information on alternative accommodations and their capacity to give them to occupiers in need, municipalities may be required to join the eviction application by a court.[218] This is because municipalities have a direct, significant, and tangible interest in these issues since they have a constitutional duty to offer alternative accommodation to individuals who are unable to do so on their own and because they assume a key engagement or mediation role between the interest involved.[219]

The higher threshold tilted towards the State, I hold, further entrenches the notion that the horizontal application of rights to secure persons without rights to land is simply a matter of last resort and not a matter of best resort, irrespective of the State's capacity.[220]

Sec. 5(1) of PIE authorizes a private landowner or person in charge of land, notwithstanding the provisions of sec. 4 of PIE, to commence urgent eviction procedures until the conclusion of proceedings for a final eviction order.[221] In sum,

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[217] See sec. 7(2) of the Constitution; Viljoen 2015:44-46; Mhlanga 2018. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 9 BCLR 847 (CC); *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* 2009 3 SA 245 (D).

[218] *Sailing Queen Investments v Occupants La Colleen Court* 2008 6 BCLR 666*:* para 14; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 6 SA 294 (SCA):* para 38. See Muller & Liebenberg 2013.

[219] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 6 SA 294 (SCA): para 38; *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others (245/08)* 2010 4 BCLR 354 (SCA): para 11.

[220] See Mhlanga 2018. One of the flaws made against this argument in the evaluation of the aforementioned work was the lack of a foregrounding and better theoretical explanation for why private actors - who pay taxes – should carry positive obligations. In this regard see Liebenberg 2010:193-197 – presents a counter argument that the transformative potential of socio-economic rights would be severely diluted if the courts adopt the view that the availability of resources for their realisation can only be assessed within the parameters of existing budgetary allocations to the relevant departments or spheres of government. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 6 SA 294 (SCA): para 38; *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* (245/08) 2010 4 BCLR 354 (SCA) where the State's capacity issues are laid bare.

[221] Sec. 5(1) of PIE - This is subject to the court appraising itself of the presence of; "(a) a real and imminent danger of substantial injury or damage to any person or property should the unlawful occupier not be immediately evicted from the land; (b) the extent of hardship to the owner or any other affected person, if an order for eviction is not granted, exceeding the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and (c) no other effective remedy available.

"just and equitable" comes into play in two areas in PIE - first, the court will only order an eviction if it will be just and equitable to do so; and second, if an order of eviction is granted, its terms must likewise be just and equitable. A "just and equitable" eviction order requires careful consideration of all relevant circumstances.[222]

The impression is given that the more relevant circumstances considered, the broader the approach will be. The more comprehensive the approach, the better the chances of achieving a just and equitable result.[223] A just and equitable outcome being one that can be seen to both promote the security of tenure of occupiers and protect landownership rights. This should be a contextual approach, in which competing rights are placed on an equal footing and relevant interests and specific factors are assessed to determine the specific obligations that must be attached to eviction orders.[224] For example, anyone can be considered an unlawful occupant by virtue of being on any land without requisite authorization and thus be vulnerable to landlessness. However, the context in which their vulnerability arises may differ from that of those who have been allowed to remain on another's land despite their unlawfulness, as precedent suggests.[225]

It is apt to return to Rich at this point to reiterate the focus of this chapter. In this chapter I give context: historical and current context of the legislation governing evictions in South Africa. I do so to enable the assessment of the impact that the historical developments have had on the current legal framework and to better place the

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This becomes relevant in the instance where an argument that may be advanced that the landowner is without remedy once the court has denied to evict in a prior application."

[222] See Van der Walt 2011:525. The cross-applicability of factors to be considered is articulated in *PE Municipality*: para 30-32. Also see *Vorster v Van Niekerk & Others* [2009] ZAFSHC 9 (*Vorster*); *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments & Others* 2009 4 All SA 410 (SCA); *Arendse v Arendse* 2013 3 SA 347 (C): para 33; *Thutha v Thutha & Another* [2010] ZAECMHC 2: para 8; *Occupiers of Erven 87 & Berea v De Wet NO & Another* 2017 5 SA 346 (CC) - cases in which the courts overturned earlier decisions for the failure to have regard to all relevant circumstances not just those pleaded or listed in the statutory provisions.

[223] *Occupiers of Erven 87 & Berea v De Wet NO & Another* 2017 5 SA 346 (CC). See also *PE Municipality*. The investigation into all relevant circumstances is not limited to the factors listed. In other words, in addition to the precise elements listed in PIE, judges must consider facts relevant to the specific case at hand.

[224] *PE Municipality.* See also *Pienaar & Muller* 1999:380.

[225] See *Absa Bank Ltd v Amod* 1999 2 All SA 423 (W), *Bekker v Jika* 2001 4 All SA 563 (LCC), *Ndlovu v Ngcobo* 2002 4 All SA 384 (SCA) – "It is not inconceivable that when setting out a minimum threshold to which to regulate eviction processes to better protect and promote the welfare of the overlooked, poor majority, that such advantage may accrue to those who may not be the primary targets for such a benefit." See also National Department of Housing 2006 - withdrawn attempts made to disqualify parties holding-over from the protection ambit of the Act.

consideration of the internal and external factors that enclave the "just and equitable" requirement. I also give context because I am writing this in a time when anything we write can be used against those we love.[226]

I proceed below with an analysis of the just and equitable requirement described above. This analysis is focused on the concept's open-endedness and susceptibility to subjectivities that may work to constrain tenure reform. This analysis discusses how the open-endedness of the concepts may influence the application thereof. This is not so much to the extent that it would constrain the determination of whether one remains or not, which I do not argue it does. It has much to do with how the courts may be limited in comprehending that the application thereof has thus far not gone far enough as it does not define the conditions of such remaining. Such that the prevailing arrangement continues to be unjust and inequitable.

This following discussion is thus preparatory. It leads to a more in-depth consideration of whether such influence has occurred and can be traced in cases that present the posited situation of remaining. The latter is the subject of discussion in a later chapter.[227]

2.3.3 The concept of "just and equitable"

To recap, following the determination of an unlawful occupancy, courts are required to issue eviction orders only when they are satisfied that doing so is just and equitable in the circumstances.[228] Furthermore, the courts are enjoined to ensure that the execution of an eviction order is just and equitable.[229] As a result, the requirement of "just and equitable" is raised twice during the eviction process. The first time occurs

[226] See Rich, A 1983.
[227] See Chapter 3.
[228] See *Ndlovu v Ngcobo* 2002 4 All SA 384 (SCA)*; Bekker and Another v Jika* 2003 1 SA 113 (SCA): para 131 G – 132 A. The learned Judge of Appeal stated the following- "The important impact of PIE, however, is to be found in the substantive provisions of sec. 4 (6), (7) and (8). No longer does the owner have an absolute right to evict the unwanted and unlawful occupier. The court is now given a discretion to evict or to allow the occupier to remain in possession." See also *Pitje v Shibambo* 2016 JDR 0326 (CC): para 19. The Court in that instance held that courts are not allowed to passively apply PIE and must "probe and investigate the surrounding circumstances. See also *Pieterse v Venter and Another* (A5016/2011) (10 February 2012) in claiming that he or she is an occupier as defined in ESTA, a party is under a duty to present evidence that falls peculiarly within his or her knowledge.
[229] See *PE Municipality.*

when an application for the eviction of an unlawful occupier is considered by the court, and the second time occurs when the application is granted and the conditions for the eviction's execution are being set. A negative finding in the first leg eliminates the need to move forward to the second leg. There is no need to set conditions to the eviction if the eviction application is denied.[230] If anything, the basis for this thesis is that there is a duty to establish that the conditions of remaining are just and equitable when the eviction is denied, just as there is a duty to establish that the conditions of evictions are just and equitable when it is granted. When eviction is denied, the practicalities of the continued stay of an unlawful occupier on land belonging to another must be just and equitable.

Following the detailing on how the concept of just and equitable emerges from legislative procedure. In this section, I explore what the concept of just and equitable theoretically encompasses in the context of the eviction legislation discussed above. As a result, I explore the concept's sensitivity to constraining influences, to the point set out in the hypothesis.[231]

2.3.3.1 What is "Just and Equitable"

What is the just and equitable requirement, and what does it imply for those who must oversee that it is followed? The consensus appears to be that in order to ensure that all parties' interests and relevant factors are considered, the criterion demands a broad discretion in granting or dismissing an eviction petition.[232]

The biggest takeaway is that the criterion is a revolt against the pre-constitutional way of doing things. In the pre-constitutional era, actions for evictions were relatively uncomplicated due to the straightforward requirements of these causes of action,[233] and the landowners' relatively strong rights vis-à-vis the weak position of unlawful

[230] In the rest of this section, the term "just and equitable" will now only be used in this context to refer to the proposition as outlined in the first leg. Later, I differentiate between cases where unlawful occupiers remain on another's land as a by-product of an application of the just and equitable standard and cases where a court dismisses an eviction request because eviction would be unjust and inequitable in the circumstances.
[231] Refer to section 1.2 above.
[232] Pienaar 2014:761.
[233] See the discussion on the Prevention of Illegal Squatting Act 52 of 1956 (PISA) in sec. 2.

occupiers.[234] The new rights paradigm suggests the non-supremacy of the ownership right.[235] Cloete cites the just and equitable legislative measure's impact on the shift from a private-law rights-based approach to eviction disputes, where ownership was central, to an approach where interests other than ownership are considered before an eviction order can be issued.[236] Cloete also cites the impact on the adversarial system of civil procedure and the conservative legal approach it breeds:[237] an impact necessitating a break away from the narrow and purely legalistic approach that was followed under the apartheid regime.[238]

The issue for my purposes, however, is not to determine whether the legislation requires, or has been altered to ensure that all interests, not just the ownership right, are considered.[239] The point I make follows but upon this. My point is that the law, notwithstanding, leaves it to those who wield it to decide the extent to which the shift is envisaged. To the extent that those who wield the law are affected by the underlying power dynamics as outlined in the theoretical approach to this thesis, open-ended metrics like the just and equitable measure are intrinsically inclined towards the status quo. The status quo in this instance is not necessarily the non-extension of property

[234] See Van der Walt 2009:53; Van der Merwe 1989:350 - a rights paradigm where ownership was accepted as the strongest right in the hierarchy of rights.

[235] Van der Merwe 1989:350.

[236] See Cloete & Temmers Boggenpoel 2018:432.

[237] See Cloete & Temmers Boggenpoel 2018:432 – the new rights paradigm being an affront against the adversarial tendency to view disputes between parties as private matters where court intervention is not required. Also see *Khuzwayo v Dludla* 2001 1 SA 714 (LCC); *Skhosana & others v Roos t/a Roos SE Oord & others* 2000 4 SA 561 (LCC); *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 4 SA 468 (W). Cloete & Temmers Boggenpoel refer to eviction cases which were decided in the constitutional era but before the promulgation of ESTA/PIE to highlight the impact of the legislation when compared to the cases that followed after the promulgation chief amongst them *PE Municipality*.

[238] See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 2 SA 1074 (SE):*1081E; *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 3 SA 23 (SCA).

[239] See Van der Walt 2005:412. Van der Walt posits the normality assumption, which states that a landowner is entitled to exclusive ownership of his or her property — this being the normal condition of affairs, which will be upheld without compelling evidence to the contrary. The normality assumption underpins western liberal notions of what property relations are and should be. How does this fit into the broader problem identified above? The new normality in South African property relations has also brought about substantial changes to the position of private landowners. Non-rights have the potential to limit the right to property. See also Wilson 2009. See also Van der Walt 2014:45, 62; Currie & De Waal 2013:250-253, 258-259. See *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C).

rights to those without, but rather maintaining this as the concern of the State rather than both the State and private parties.

The just and equitable requirement, according to Horn AJ, provides a guideline that demands courts to make a "value judgement based on morality, fairness, society values and implications, and any other factors that would need bringing out an equitably principled conclusion."[240] Aside from the lawfulness of occupation and the interests and conditions of both the landowner and the occupier, the requirement demands that the court consider the subjective-objective abstract value of fairness and other constitutionally aligned values.[241] This is in order to make a value judgement that avoids viewing the legal scheme as requiring an either/or but an interactive and mutually reinforcing approach.[242] Courts are implored through this criterion to go beyond their regular tasks and engage in active judicial management based on equitable principles of a continuous, "stressful and law-governed social process."[243]

What relevance does this context have to this thesis? The fundamental issue is that courts continuously fail to give insecure tenants, such as those who find themselves on someone else's land despite having no legal right to be there, sufficient recognition that enhances their security of tenure. This is true even though the law is amenable to embracing non-right interests to land.[244] Van der Walt makes this point. He notes that in the past, our courts have resisted expanding the scope of our eviction statutes out of concern that doing so would weaken the institution of ownership and cause an economic downturn by jeopardising the certainty of the property market.[245] I do not take the argument to that level at this point. Rather, for my purposes in this section, I highlight that legal actors in the pre-constitutional era developed an agenda-serving idea of ownership, related to eviction remedies, and adjudication processes

[240] See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 2 SA 1074 (SE):* 1081E; *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 3 SA 23 (SCA): para 18.

[241] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE): para 35.

[242] *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA): para 19; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE): para 35.

[243] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2000 2 SA 1074 (SE):* para 36.

[244] Cloete 2016; See *Ellis v Viljoen* 2001 4 SA 795 (C); *Pieterse v Venter* 2012 JDR 0184 (GSJ).

[245] Van der Walt 2002a.

entrenching them in standards of interpretation and procedural rules.[246] To further reform, it would seem that those working within the “just and equitable” paradigm of eviction law must actively confront these engrained habits.[247] Unchallenged, these standards stand to strengthen and preserve the privilege and authority of those who already have access to land and land rights.[248]

2.4 Conclusion

In this chapter, I describe and depict the development of eviction law in South Africa. The purpose of this exercise was to give both historical and current legislative context to evictions from land. As envisaged above, the context depicts a history of land dispossessive racial legislation and a current legislative framework that seeks to in part undo that racially dispossessive history. In its attempt to undo the history of wanton dispossession and evictions from land, the current legislative framework sets out court ordered processes before an eviction can be lawfully granted. The stated eviction legislation necessitates a step-by-step procedure over and above ascertaining the unlawful nature of the occupation.

In the context of the just and equitable development in eviction law, the scenario in which unlawful occupiers remain on land belonging to another arises. This may arise in three ways. The first is where an application for eviction has been granted, but the private landowner is ordered to allow unlawful occupiers to remain on the land/property while alternative accommodation is being sought by the state. The second is an order where the application for eviction has been granted, but the execution of the order becomes impossible for one reason or the other. The third is where an application for an order for eviction is denied because eviction would not be just and equitable and the unlawful occupier remains on private land indefinitely. I am interested in the last

[246] See Underkuffler 2003:64-71-The idea that individual rights are dominant and normatively more compelling than competing non-right interests and must prevail if individual rights are to be taken seriously is supported by the presumptive value of property rights in terms of how people generally view property. See Dhliwayo 2015:96-112 - it is the enduring deep-level pre-constitutional presumptions about the strength of the landowner's power to evict, along with procedural customs ingrained in their pre-constitutional legal culture.

[247] See Muller 2013:367-392.

[248] Liebenberg 2008:464.

type of court order arising from the application of the just and equitable standard. This type of order is that which sees an unlawful occupier remaining on land belonging to another despite having no formal countervailing right to do so, indefinitely. In the next chapter, I describe the three kinds of cases in which a situation of remaining may arise, against the backdrop of the description of the law given in this chapter.

Chapter 3
ORDERS TO REMAIN

3.1 Introduction

In the previous chapter, the difference between the old and the new legislative approach to evictions is set out. The “new” approach differs from the “old” approach by imposing a judicial fiat. That is, it allows for evictions to take place only on the basis of a court order, and only to the extent that a court has exercised a “just and equitable” discretion. While the requirement that evictions should be approved by the courts is not a new phenomenon or foreign to the old approach.[249] The addition of the just and equitable requirement is new. The addition of the just and equitable requirement begets a value proposition that brings in legal and extra-legal considerations.[250] The interpretation and application of these value laden considerations on different sets of facts necessitate different outcomes.

This chapter is not intended to provide primary research for assessing how the courts in every eviction case involving unlawful occupiers on private land have applied the just and equitable discretion. Instead, a trend with regard to the way in which courts applied the just and equitable discretion in specific cases is identified. This trend is then related to the described constraints in terms of the scope of change that discretion may allow with the intention of bringing the claim to remain within the purview of the discretion.

In this chapter, I distinguish between those instances in which the court-supervised process identified in Chapter 2, which an unlawful occupier is entitled to, leads to a situation of that unlawful occupier remaining on land belonging to a private landowner, notwithstanding the absence of a right to do so. In respect of this broad undertaking, the case law discussed in this chapter follows three main eviction orders.[251] These

[249] Refer to section 2.2 above.
[250] Van der Walt 2009:54.
[251] *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.

three main eviction orders have one main underlying character in that the net effect is of unlawful occupiers remaining on private property/land without a countervailing formal right to do so.

The first type of eviction orders that I will look into are orders where an application for eviction has been granted but with the proviso that the private property owner must allow unlawful occupiers to remain on the property while alternative accommodation is being sought. The second, entails orders where the application for eviction has been granted, with or without the above-mentioned proviso, but the execution of the order becomes impossible for one reason or the other. The third type of eviction orders are those where the application for eviction has been denied because it would not be just and equitable to grant it, with the result of positively obligating private property owners to allow unlawful occupiers to remain on private property indefinitely. The fact of remaining that triggers this thesis relates to the third type of order. Notwithstanding, a case-by-case description of all three types of orders identified above is undertaken to highlight and distinguish the context and considered circumstances that have seen the courts opt for the different orders.

More than that, the case description provides a platform to ascertain the hypothesised court's unwillingness to define the content of socio-economic rights.[252] The signature of this is the court's reluctance to pronounce on any issue that does not need to be decided for the purpose of deciding the case. A reluctance to play any wider or more conclusive role despite every indication that it is needed so as to promote secure tenure. This reluctance is linked to the discursive and non-discursive influences that constrain the approach to and the development of non-right interests to land.

To this end, in section 3.2, I describe the instances where the courts have ordered private landowners to allow unlawful occupants to remain on their land or property while the State makes the required preparations to find alternative land. In the same section, I also detail those cases in which the courts have granted the eviction application, but the execution of the order becomes impossible. I also consider the cases where the court denies the application to evict. In section 3.3, I make a

[252] The first and second type of orders are discussed in full so as to illuminate this point in addition to distinguishing the first and second from the third type of order.

distinction between the remaining that arises in each of these orders, identifying the particular sort to which the thesis's claim is related. Common reasons that might logically be assumed to have influenced the decision to give the order dismissing the eviction application on the grounds that it would not be just and equitable are identified and described in section 3.4. This is done in order to foreshadow the nature and potential normative content of the claim to remain, in this instance, as a remedy that aims to prevent a specific harm. I conclude this chapter in section 3.5 and introduce the next one, which is about the development of the claim to remain' normative content.

3.2 Orders to remain

3.2.1 First and second type of orders

In this section, I detail those cases in which the courts have enabled unlawful occupiers to remain on land belonging to someone else while the State makes the necessary arrangements to secure alternative land.[253] I also detail instances in which, after an application for an order of eviction is granted, with the execution of the order set for a determinable date in the future, execution becomes impossible for one reason or another on that date.[254] Although these are two distinct outcomes, they share a common onset and a comparable sequence of events. These instances may not relate directly to the thesis's topic. However, they are important to round out the discussion in this chapter for a variety of reasons.

The purpose of the following case discussion is firstly, to distinguish this instance of remaining from the instance of remaining under investigation in this thesis. Secondly, it is to highlight a reluctance to develop the content and meaning of rights related to

[253] For a full discussion on these types of cases see Clark & Wilson 2013; MacDonnell 2015; Mbazira 2008a; Mbazira 2008b. See for example *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) (*Modderklip*); *Occupiers of Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 208 (CC) (Olivia Road); *PE Municipality*; *Abahlali baseMjondolo Movement SA and Another v Premier of KwaZulu Natal and Others* 2010 2 BCLR 99 (CC) (*Abahlali*); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 SA 104 (CC) (Blue Moonlight); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries* 2012 4 BCLR 382 (CC) (*Skurweplaas*); and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 2 SA 337 (CC) (*Mooiplaats*).

[254] Ibid.

evictions by the courts.[255] In other words, the purpose of the following case discussion remains that of highlighting the primary and broader questions outlined in this thesis.[256] The purpose of discussing case law relating to these types of orders is not to cast doubt on the State's commitment to accommodate evicted occupiers from private land. The State's approach to implementing policy and other acceptable ways of providing alternate accommodations is not up for debate. The notion that the state must give at least basic housing to everyone, not only gradually and to the extent that its available resources allow, but to all and at all material times when the necessity arises, has a long history.[257] In light of the foregoing, I seek to illuminate the overall "conflict between the moral, political, and constitutional need to change and the cultural and methodological predisposition to reject, postpone, or minimise change", as Van der Walt puts it.[258]

Blue Moonlight

The *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* case,[259] (hereafter *Blue Moonlight*) is a flagship case in which the orders for alternative accommodation have found direct reference in the recent past.[260] The

[255] Dugard 2014:265-279.

[256] Refer to Chapter 1.

[257] See *Government of South Africa & Others vs. Grootboom & Others* 2001 1 SA 46 (CC) - Already, in *Grootboom*, the court held that sec 26(1) and (2) must be read together, and that the state's housing obligations must be judged against the reasonableness criteria set forth in sec 26(2). A reasonable facilitation of the housing right being one that caters for long, medium, and short-term demand. *PE Municipality*: para 28 - "courts should generally be reluctant… to grant an eviction order against relatively settled occupiers unless a reasonable alternative was available"; *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA)*; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC): para 1- 28; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC): para 30. concluded that the state prevented the landowner from conducting the eviction order by failing to provide alternative housing to the unlawful tenants. This is because the illegal occupants lacked alternative housing and would easily reoccupy the property once evicted, neutralising the eviction's effect.

[258] Van der Walt 2009.

[259] *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 2013; Tulk & Dewar 2011.

[260] 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*

case's significance pertains not only to the deliberations in the case, but also to the cases that arose from it.[261]

Blue Moonlight was about 86 impoverished people who were living in a building called "Saratoga Avenue" in Berea, City of Johannesburg, without permission.[262] The property in question was an old and dilapidated commercial premises with office space, a factory building, and garages.[263] At issue were the rights of the owner of the property (Blue Moonlight Properties), the rights of the occupiers, and the inescapable duty of the City of Johannesburg to provide suitable alternative accommodation for the occupiers in the event of an eviction.[264] The City stated that it was neither obligated nor able to provide accommodations in these circumstances.[265] The owner pursued its right to exclude, which would make it easier for it to develop the property to fulfil its interests.[266] The occupiers, for their part, did not want to end up on the street as homeless people.[267]

According to the High Court,[268] and the Supreme Court of Appeal (hereafter SCA),[269] *Blue Moonlight* had met the PIE criteria and was entitled to eviction, but such eviction could not take place until the City provided alternative accommodation.[270] On appeal,

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Centre, amici curiae) 2004 6 SA 40 (SCA); *Lingwood v The Unlawful Occupiers of R/E Erf 9 Highlands* 2008 3 BCLR 325 (W).

[261] See *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another 2014 6 SA 516 (GJ)* (Dladla 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 number: 2011/20127 (14 June 2012); *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 4 SA 212 (GSJ) (Hlophe)

[262] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another 2009 1 SA 470 (W):* para 1-15.

[263] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another 2009 1 SA 470 (W):* para 1-15.

[264] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another 2009 1 SA 470 (W):* para 1-15. See also *Sailing Queen Investments v Occupants La Colleen Court* 2008 6 BCLR 666 (W) on the need to always join the state in private eviction proceedings. See also Muller & Liebenberg 2013.

[265] Muller & Liebenberg 2013:554-570.

[266] Muller & Liebenberg 2013:554-570.

[267] Muller & Liebenberg 2013:554-570.

[268] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 1 SA 470 (W).

[269] *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA).

[270] *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA). Due to their housing policy being found unconstitutional in that it excluded any consideration of the status and alternatives of persons evicted from private land, the City was told to either provide temporary housing or pay each of the residents R850 per month towards the cost of finding their own housing.

the Constitutional Court (hereafter CC) was asked to consider whether evicting the occupiers was just and equitable in the circumstances. This included whether there was availability of other land, and, if so, when eviction would be just and equitable.[271]

In its judgment, the CC ruled that the City had an obligation arising from the State's responsibility to support the realisation of constitutional rights to land and housing, among other rights.[272] While the eviction was just and equitable, the CC concluded that evicting the occupiers immediately, would be unjust and inequitable. To that end, the eviction was granted, but the execution was deferred until the occupiers were provided with alternative housing by the State.[273]

However, adequate alternative accommodation was never found, at least not in the manner anticipated by the order.[274] What then ensued is captured in *City of Johannesburg v Changing Tides 74 (Pty) Ltd (Changing Tides)*;[275] *Mthimkulu and*

[271] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 1 SA 470 (W): para 37-102. As a result, the City agreed to the property owners' right to eviction. The City, on the other hand, argued that this right did not come with a commensurate obligation to provide housing to all those evicted by private landowners. Given the already insurmountable housing backlog, the City claimed that issue was exacerbated by the restricted resources available to fulfil emergency housing circumstances.

[272] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 1 SA 470 (W): para 76-95. It makes no difference to the occupiers whether the evictor is private owners or the State when a combination of children, elderly people, people with disabilities, or women-headed households are involved, for whom the need for housing is particularly great or for whom homelessness is the most detrimental. At para 40, the Court noted that private property owners do not have the same positive obligations to provide access to housing as the state, but that in situations where poor people have no alternative shelter and must wait for the state to provide one, owners may have to bear some inconvenience while the state arranges emergency shelter options. I regard this as an expression of conservatism and that the state and private owners through the gateway of sec. 8 of the Constitution, 1996 are liable to positive obligations in the same manner. See Mhlanga 2018.

[273] To be evicted by 15 April 2012.

[274] For a full discussion see Dugard 2014. The back-and-forth between the City, the occupiers, and the property owners as a result of the City's failure to comply with this and other temporary accommodation orders that had been piling up while parties awaited the outcome of Blue Moonlight as a precedent-setting case resulted in a challenge that proved too great for an unsupervised order. See *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 6 SA 516 (GJ). In April 2013, a case in the South Gauteng High Court was filed on behalf of 33 former residents of 7 Saratoga Avenue who were forced to relocate to Ekuthuleni, one of the two housing options available to Blue Moonlight residents, where their rights to dignity, privacy, association, and family life were violated. More importantly, the City had included a provision that allowed occupiers to be evicted without a court order.

[275] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 6 SA 294 (SCA)* 2012 6 SA 294 (SCA). The constitutionality of Ekuthuleni's housing limitations was contested in Dladla. Changing Tides insisted on evicting the occupiers on the agreed-upon eviction date, despite the City's hesitation over where to relocate them. Despite the difficulties, the Court directed the City to assist the occupiers in gaining access to the identified properties. Residents refused to leave Tikwelo House until the day of eviction, knowing they would be sent to the dangerous Ekuthuleni and Linatex shelters. They were evicted forcibly since the structure was being demolished and further admission was prohibited. As a

Another v Mahomed and Others (*Chung Hua Mansions*),[276] *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others (Hlophe)*;[277] a terrible reality in which the City sends occupiers from pillar to post with little relief or semblance of secure tenure.[278]

Nonetheless, the court in the subsequent cases emphasised the importance of establishing a link between the date of eviction and the date on which the municipality must avail alternative housing to ensure that vulnerable residents are not left homeless in the intervening period.[279] *Skurweplaas* and *Mooiplaats*, reaffirmed the view established in *Blue Moonlight* that owners may have to wait while their ownership rights are temporarily constrained until alternative accommodations can be found.[280]

While it has become clichéd to think of these cases as heralding a significant shift in property relations in which the right to temporary accommodation can sometimes undercut property owners' unrestricted rights of use, the current trend appears to be based on an administrative rather than a substantive approach to the rights at hand.

In her analysis of *Blue Moonlight* and the cases surrounding it, Dugard raises a justifiable anti-transformative concern signified by a failure to assess the adverse effects of the courts' attitude to poor individuals displaced from inner-city

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result of the chaos, many of the residents of Tikwelo House were forced to flee to neighbouring slum houses in the inner city (Chung Hua Mansions).

[276] 2011 (6) SA 147 (GSJ) (Full Bench Chung Hua Mansions); Unreported judgment of *Changing Tides 74 (Pty) Ltd. v The Unlawful Occupiers of Chung Hua Mansions*, South Gauteng High Court case number: 2011/20127 (14 June 2012).

[277] [2013] ZAGPJHC 98, *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 4 SA 212 (GSJ) (Hlophe); Unreported judgment of *Philani Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others*, South Gauteng High Court case no: 2012/48103 (consolidated with case no: 2011/20127 (*Chung Hua Mansions*) - Whether they were originally housed in MBV Building or were sent to Ekuthuleni, many former Blue Moonlight tenants (along with some residents from Tikwelo House) found themselves in Chung Hua Mansions by default. The City was ordered by the High Court to provide alternative housing to all residents of the Chung Hua Mansions as close to their current location as possible, where they could live secure against eviction, as well as a report outlining the nature and location of the temporary shelter to be provided. The City missed the deadline to provide shelter, necessitating additional lawsuit (Hlophe) to ensure compliance.

[278] See Kotze 2016:65:99; Fick 2017; Clark & Wilson 2013; Dugard 2014.

[279] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries* 2012 4 BCLR 382 (CC): para 13

[280] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries* 2012 4 BCLR 382 (CC): para 11; *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 2 SA 337 (CC)*:* para 17. See Fick 2017:48-90. Fick argues that because the buildings in *Blue Moonlight* and the cases arose because of Blue Moonlight posed a health and safety concern, the eviction could not be refused, as it had been in *PE Municipality*. However, *Skurweplaas* and *Mooiplaats* unlike the others discussed up to this point had not featured an eviction in reaction to the construction and occupation of non-permanent structures on vacant privately owned land.

Johannesburg.[281] According to Dugard, the CC's refusal to exercise control over Blue Moonlight and subsequent cases demonstrates the court's longstanding reluctance to maintain a supervisory role, despite a judgment dating back to the *Olivia* case indicating the benefits of doing so.[282] This point, I believe, is related to the notion in my thesis that the axis of legal agency has been plagued by a biased inertia towards the status quo.[283] This is envisioned in the ineffective day-to-day administration and implementation of standard procedure, which, in an unequal climate, inhibits real change.[284]

The rights and interests of the owners and the unlawful occupiers are jeopardised when non-effective remedies in eviction cases are standardized. In the absence of alternative accommodation offered by the State, the contradictory character of these two rights and interests may prevent them from being met concurrently.[285] In this circumstance, the landowner's principal incentive for seeking an eviction order will be to protect his or her private use and enjoyment of the property.[286] The occupier's key intent is to achieve the immediate realisation of his or her housing rights, as well as

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[281] Dugard 2014. It has been a long, hard, and expensive process to enforce *Blue Moonlight* and other lower court judgements. Due to the Court's unwillingness to give significant content to the right of access to sufficient housing, the City of Johannesburg has been able to tender inadequate housing that infringes on several rights.

[282] Dugard 2014. Litigants cannot rely on the Court to implement or vary its own orders due to the Court's failure to offer longer-term monitoring or structural interdictions. Instead, individuals must repeatedly appeal to lower courts and defend new appeals in order to have their rights upheld. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC).

[283] Indeed, bias is not inherently unjust; it only becomes problematic when such bias, in the overall scheme of things, perpetuates a lasting advantage against a specific subgroup rather than the tilting of scales towards overall balance. This notion, however, must be reconciled with the practicality that, in pursuit of overall balance, there will be a give and a take.

[284] See *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 4 SA 212 (GSJ). Following that, the court has issued orders requiring officials to make all reasonable attempts to provide shelter to the citizens. If the Mayor, City Manager, and Director of Housing fail to cooperate, they may be held in contempt and punished or imprisoned. Where this has been the case, I contend that the shift still reflects an unwillingness to see socioeconomic rights as demanding more than an administrative approach but more of content-building, which would eliminate the need to vindicate the order through another order. For cases that emerged after and around Blue Moonlight see *Odvest 182 Pty (Ltd) v Occupiers of Portion 26 and Others* (19695/2012) [2016] ZAWCHC 133 (14 October 2016) (hereafter *Odvest*); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries* 2012 4 BCLR 382 (CC). (Skurweplaas); and *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 2 SA 337 (CC) (Mooiplaats); *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC) (hereafter *Berman Brothers*).

[285] Sec. 25(1) and sec. 25(6), 26(1) and (3) of the Constitution. Strydom &Viljoen 2014:1207-1261; Swart 2005:217.

[286] See Van der Walt 2011:190-333.

secure and dignified tenure on land.[287] As part of the process of reconciling these two seemingly opposing objectives, the landowner's rights may be temporarily limited to allow the State to provide alternative housing.[288] This practice is not limited to housing rights.

Juma Musjid

In *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*,[289] (hereafter *Juma Masjid*) the facts describe a relation between the Trust and the State to establish and run a public school with an Islamic religious ethos on the Trust's property.[290] This was subject to the completion of a written agreement between themselves and the Member of the Executive Council (hereafter MEC) which never came to be. Despite this inaction, the school was run as a public school from the Trust's property at the Trust's expense.[291]

On two grounds, the Trustees filed an application against the SGB and the State respondents. The first was an application to assert the Trustees' right to vindicate its property under common law's *rei vindicatio* remedy.[292] Alternatively, the Trustees claimed that the MEC had breached her tenancy obligations.[293] The respondents, on the other hand, contended that the Trust performed a public function within the scope of administrative action as defined in the Promotion of Administrative Justice Act[294]

[287] Van der Walt 2011:190-333.
[288] See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA): para 30.
[289] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 1-12 - the facts came because of an application in which the Juma Musjid Trust (Trust), the owner of the private property, and the Member of the Executive Council for Education for KwaZulu-Natal (MEC), as well as the School Governing Body (SGB), were pitted against each other. The dispute arose as a result of the MEC's failure to enter into an agreement outlining the tenancy terms and conditions, as required by the South African Schools Act (Act).
[290] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 1-12.
[291] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 12-15.
[292] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 11-24.
[293] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 11-24.
[294] Act 3 of 2000.

(PAJA), and that the provisions of PIE should have guided the decision-making process.[295] In this regard, the High Court held,

> "The Trust owes no constitutional obligation to the first respondent or to the learners at the school. It has its own constitutional rights to property recognised in terms of section 25 of the Constitution. The obligation to provide compulsory education is an obligation of the Department of Education. The intervening respondents and their children may have relied on the existence of the school and have an expectation of education for their children. The Trust has the power and is at liberty to make its property available for that purpose, but it is not, on my reading of the Trust deed, obliged or compelled to do so. Making premises available for education is merely one of the objectives in a range of objectives of the Trust, which the Trustees may choose to give effect to from time to time."[296]

The High Court also ruled that considering PIE in this case would be misleading.[297]

The State and the SGB petitioned the CC to consider that, while performing a public function, the Trust as property owners were constrained by the requirements of fairness in terms of PAJA.[298] Alternatively, the common law ought to have been developed to balance a common law right that violates a fundamental right with mediation and only as a last resort eviction.[299]

The CC accepted certain findings of the High Court, and came to the following conclusions: (a) The Trustees and the State have a constitutional duty to respect the learners' right to a basic education in terms of sec. 29(1) of the Constitution;[300] (b) having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; however; (c) in considering the Trustees' application and in granting the order of eviction, the High Court did not

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[295] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 8 BCLR 761 (CC)*: para 16.
[296] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 8 BCLR 761 (CC)*: para 24.
[297] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 8 BCLR 761 (CC)*: para 23.
[298] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 8 BCLR 761 (CC)*: para 25.
[299] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 8 BCLR 761 (CC)*: para 25.
[300] Sec. 29(1) of the Constitution- Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

properly consider the best interests of the learners under sec. 28(2) and their right to a basic education under sec. 29(1) of the Constitution.[301]

On the best interests of the learners under sec. 28(2) and their right to a basic education under sec. 29(1) of the Constitution, the CC came to the view that the High Court's finding was erroneously founded on pre-constitutional common law principles of *rei vindicatio*.[302] To this end, the High Court had failed to give due regard to sec. 8(2) of the Constitution and the impact the eviction would have had on the learners' rights.[303] A proper consideration of sec. 8(2) of the Constitution would have brought about a realisation that the Trust does have a negative constitutional obligation not to impair the learners' right to a basic education.[304] In this instance, I pause to consider why the court never contemplated that the same section could draw the realisation that the Trust, albeit a private entity, could very well assume a positive obligation. More so because, unlike housing rights, sec. 29(1)(a) regulating the right to education envisages this right to be immediately realisable.[305] This sets the right to basic education apart from, firstly, the right to "further education" in sec. 29(1)(b) but also other socio-economic rights in the Constitution, which demand budgeted "progressive realisation."[306]

The CC applied the directive alluded to in *PE Municipality*, regarding our courts' new role when confronted with competing rights to rule that the High Court had failed to "balance out and reconcile the opposed claims in as just a manner as possible, considering all the interests involved and the specific factors relevant in each particular

[301] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 53. Sec. 28(2) – A child's best interests are of paramount importance in every matter concerning the child.
[302] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 54-60.
[303] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 54-60. Sec. 8 of the Constitution – (1) 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.
[304] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 60.
[305] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 37.
[306] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC).

case."[307] The CC overturned the High Court's eviction order in favour of a provisional order effectively giving the MEC another chance to reach an agreement with the Trust.[308] When that failed, the Trustees made another case for eviction, claiming that the MEC had made satisfactory arrangements to ensure that all students would be accommodated at other schools.[309] The granted an eviction order.[310]

My next aim is to draw attention to a trend of cases that are similar but not identical to those mentioned above. I distinguish cases where the State was forced to pay compensation for the unreasonable delay it took to remove occupiers from private property once the eviction was granted.[311] That is, where the property owners were simply required, albeit for an extended time in these cases, to bear the presence of the occupiers who were eventually removed. These types of cases do not differ from the types of cases covered thus far in this section as regards the basis for remaining.[312] The basis of remaining on land belonging to someone else, in this instance, is still to allow unlawful occupiers to remain on the property/land while the State makes the necessary arrangements for alternative housing. In this way, the following cases are examples of this to varying extents.

[307] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 70-80. In this case, the High Court failed to envisage this new obligation by prioritizing the rights of ownership over the rights of the learners and the best interests of the child.
[308] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC): para 70-80.
[309] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC).
[310] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 8 BCLR 761 (CC).
[311] See Boggenpoel 2017:91-178.
[312] See *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC); *Odvest 182 Pty (Ltd) v Occupiers of Portion 26 and Others* (19695/2012) [2016] ZAWCHC 133 (14 October 2016); *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA).

Modderklip

The *Modderklip* case,[313] is one such instance where the settlement had grown to 40,000 people by the time the eviction order became effective.[314] *Modderklip* filed what was a third application in the High Court, citing dereliction of duty, to compel the state to execute the eviction order.[315] As a result, the High Court imposed a structural interdict, asking the State to specify what steps it planned to take to carry out the eviction order.[316] The State, on the other hand, challenged the High Court's decision.[317] In the SCA, given the State's incapacity to execute,[318] Harms JA concluded, citing the *Grootboom* case,[319] it would not be just and equitable to enforce the eviction of the occupiers. Only by allowing the occupants to stay on the property until the State gave them other land could they obtain the right remedy.[320] The SCA went on to conclude that "the State was in breach of its obligations to the occupiers and this leads ineluctably to the conclusion that the State simultaneously breached its sec. 25(1) obligations towards Modderklip."[321] The SCA brought up the issue of expropriation in this context, observing that "the State may, presumably, expropriate

[313] *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)*; 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.

[314] Ibid.

[315] *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)– "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."

[316] *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).

[317] *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).

[318] *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) - the owner's property rights had been violated, as well as the State's obligations under Section 26(1) and (2).

[319] *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.

[320] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA): para 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."

[321] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA): para 28

the land in which case Modderklip will no longer incur any loss in the intervening period."[322]

Citing *Fose v Minister of Safety and Security*,[323] and *Minister of Health and Others v Treatment Action Campaign and Others (No 2),*[324] the SCA chose not to pursue expropriation further, instead ruling that the private owner was entitled to constitutional damages for as long as the occupants were on the property.[325] The opportunity to develop the jurisprudence in this respect was too easily foregone. This is not to suggest that the decision not to pursue expropriation was erroneous. In this light, I suggest that jurisprudence emerges when courts take it upon themselves to manage not just questions directly in issue but also questions that arise consequentially. The courts do not need to wait for the ideal case with the ideal set of facts.[326]

In the CC,[327] the Court upheld the SCA decision but replaced the basis for the infringement. The CC further opted to avoid the issue of whether sec. 25(1) has

[322] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA): para 43

[323] 1997 7 BCLR 851. In the South African context, the court at para 60 held that: "Notwithstanding these differences, it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed."

[324] 2002 5 SA 721 (CC): para 102.

[325] The SCA in *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) held that, "constitutional remedies will differ by circumstance. The only appropriate relief that, in the circumstances of the case, would appear to be justified is that of constitutional damages, i.e., damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees, or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost, and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay, and the immediate social problem is solved while the medium- and long-term problems can be solved as and when the state can afford it."

[326] Even in the perfect case, evidence shows that the courts still avoid developing the jurisprudence when obligatory property questions are raised.

[327] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC)- The State contended that Modderklip was not entitled to the remedy it requested because it failed to timely request an urgent eviction order in accordance with sec. 5 of the PIE. The CC determined that the SCA decision was correctly based on the understanding that the unlawful occupation that persisted even after an

horizontal application. - that is, whether the State violated the landowner's right in terms of sec. 25(1) or the unlawful occupiers' rights in terms of sec. 26 of the Constitution.[328] The CC founded its decision on the rule of law and sec. 34 of the Constitution, the right of access to courts.[329] The CC reasoned that the State's duty to provide citizens with the necessary channels for resolving inter-citizen conflicts had been weakened by the State's refusal to carry out the court-ordered eviction..[330]

Aside from the compensation award, the reason for remaining in the *Modderklip* case is the same as the reason for remaining in the *Blue Moonlight* case. The compensation in this instance was for the damage suffered in the undue delay to provide an alternative occasioned by the State. It is, however, distinct from the second type of basis identified in this thesis. The second type of basis covers instances in which the State acquired land from the landowner to place at the disposition of the occupants and the occupiers then presumably live there indefinitely.[331] This is not to say that the order for establishing the first type of basis comes before the order for establishing the second type of basis, which I now turn to discuss below.[332] As a result, the *Fischer v Unlawful Occupiers and Others,*[333] *(*hereafter *Fischer)* case stands out as a distinguishing example between the first and second type of basis for remaining.

eviction order had been issued was not the result of wilful disregard but rather was a result of the unlawful occupiers' lack of other options.

328 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC): para 26.

329 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC): para 48-68. At para 64 – the Court reasoned that it is not required to decide, in this case, whether or not a court can order the expropriation of property because the owner demonstrated a "willingness, even eagerness" to surrender the land to the State.

330 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). Because the Court lacked authority to mandate land expropriation, it was decided that awarding constitutional damages for the losses already incurred and those that would have to be endured until the State could find suitable alternatives was more appropriate in this case.

331 See section 3.3 for a discussion on distinguishing this type of order from the third order which is the focus of this thesis.

332 See Dugard 2018 - the evasive strategy used in earlier cases like Modderklip may be partially to blame for the two-stage eviction process, since Blue Moonlight, running into systemic problems, especially in the City of Johannesburg with the state regularly failing to uphold the orders to provide emergency shelter, leading to eviction orders constantly having to be varied (own emphasis).

333 *Fischer v Unlawful Occupiers and Others* 2018 2 SA 228 (WCC); *Fischer and Another v Ramahlele and Others 2014 4 SA 614 (SCA)*.

Fischer

In the *Fischer* case,[334] three distinct cases were merged in which various property owners sought relief from having to accommodate unlawful occupiers for an unreasonable period of time. For the purposes of highlighting a distinct basis for remaining, there is not much to mention about the events leading up to the eviction application, except that the State was made aware of the occupants' and property owners' situation prior to the application.[335]

The CC's finding in Modderklip, that the State was negligent in not making financial preparation for a foreseeable circumstance of which they were aware for a significant period, was held to match the State's callous conduct in this matter in the eviction motion.[336] Through its unreasonable conduct in this matter, the State was held to have breached its duty in terms of sec. 7(2), as well as secs. 25 and 26 of the Constitution.[337]

After much back and forth, the City conceded that they may never be able to accommodate the occupiers elsewhere. The High Court held that this put both the owners and the occupiers in an untenable position.[338] 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.[339] It was also to balance the applicants' sec. 25 counter-right by taking advantage of the alternative proposition of a willing seller.[340] On the expropriation hypothesis, the High Court cited the *Modderklip* case in holding that ordering the State to purchase specific land would be unjust.[341]

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[334] *Fischer v Unlawful Occupiers and Others* 2018 2 SA 228 (WCC); *Fischer and Another v Ramahlele and Others 2014 4 SA 614 (SCA)*.

[335] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA)- In the main application, the occupiers were a group of 37 homeless and poor people who came from rural Eastern Cape and moved to Cape Town in search of work. Following a series of actions to prevent the invasion of the property, Mrs. Fischer approached the court with the assistance of the City, seeking the eviction of what was then approximately 45 shacks. A *rule nisi* was issued and in response the occupiers filed a counterapplication against the City; See *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA) (Interdict application).

[336] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 190.

[337] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 190.

[338] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 160-218.

[339] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 160-218.

[340] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 160-218. The City to initiate the process provided for in terms of section 9(3) of the Housing Act, by entering good faith negotiations to purchase the Marikana land and to report back to the Court if purchase negotiations failed.

[341] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA): para 167. See Dugard 2018. See *Ekurhuleni Municipality v Dada* 2009 4 SA 463 (SCA) (hereafter *Ekurhuleni*)- In an attempt to strike a balance between separation of powers considerations on the one hand and the necessity for an

On this basis, Fortuin J agreed with the occupiers that the only fair remedy was for the City to "engage into good faith discussions with Mrs. Fischer and the other landowners in order to purchase her property."[342] Following the High Court's judgement in *Fischer*, the SCA order was issued by agreement between the parties, requiring the City of Cape Town to purchase the properties that were the subject of the High Court's ruling.[343]

This distinction creates a different legal basis for remaining on someone else's land than the one found in *Modderklip*, where the occupants were eventually compelled to vacate the land after spending a compensable unreasonable period on it.[344]

The ultimate point here is not to argue whether a court can order the expropriation of land occupied by unlawful occupiers in circumstances where the number of occupants is such that the State may never be able to accommodate them elsewhere. It would be remiss, however, not to critique the general lack of judicial effort to at least explore expropriation without depending on precedent that similarly did not deal with it adequately, if at all.[345] The courts' approach in this case, as in all other cases considered thus far, has been to avoid the plausibility of placing positive duties on private landowners, preserving conventional private law landlord rights by emphasizing the State's obligation to fulfil tenants' rights. It is evident that evictions from private land are considered by the courts above from a socioeconomic perspective as well as through the lens of the sec. 26 right, but not from a sec. 25 against sec. 26 standpoint. As a result, the coexistence of the landowners' property

effective remedy on the other, Fortuin, J pointed out three key differences between the Fischer and Ekurhuleni case. To begin with, Ekurhuleni involved "a relatively small number of individuals, "making the possibility of eviction and relocation "extremely serious," whereas Fischer had around 100,000 occupants. Second, 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." Third, 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.

[342] *Fischer and Another v Ramahlele and Others* 2014 4 SA 614 (SCA) – "…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.

[343] *City of Cape Town & Others v Fischer & Others* 2020 708/2018 (SCA).

[344] See section 3.3 for a full discussion.

[345] See Draga & Fick 2019; See Dugard 2014.

rights and occupiers' rights is devoid of normative content. In addition to the objective of distinguishing the two bases of remaining stated above from the third, the third type of order outlined next in this section picks up on the unwillingness to establish the normative content of the property right vis-à-vis the occupiers' right.

3.2.2 Third type of orders

Here, I look at instances where courts have denied eviction applications because to evict would not be just and equitable. In this instance private property owners are left to deal with the clear practical problem of unlawful occupants remaining in occupation of their property without a countervailing right to do so.

PE Municipality

In the *Port Elizabeth Municipality* case,[346] an application for the eviction of some 68 unlawful occupiers, including twenty-three children was brought to the High Court by the Port Elizabeth Municipality, on behalf of the private landowners.[347] The occupiers were in unlawful occupation of twenty-nine shacks erected on privately owned land within the Municipality.[348] The Municipality brought the application on behalf of the private landowners.

Despite this, the occupiers contended their willingness to leave the private property provided that suitable alternative land and security of continued occupation was guaranteed.[349] Addressing this contention, the Municipality submitted that, although it appreciated the obligation that faces it, availing suitable alternative land in this instance would have the negative effect of disrupting its existing programmes.[350] The private landowners on their part wanted to vindicate their property for future

[346] *PE Municipality.* For a full discussion of *Port Elizabeth Municipality* see Liebenberg 2010.
[347] *PE Municipality*: para 1-7.
[348] *PE Municipality* - At the commencement of the proceedings in the High Court, the occupiers had been in occupation of the private land in question for a period of two to eight years. Prior to this current occupation, the occupiers had been evicted from other land.
[349] *PE Municipality*.
[350] *PE Municipality* - This was more so because the occupiers *in casu* had not previously applied for assistance through the identified programme and self-help in the form of unlawfully occupying private land could not be seen to be profitable, through enabling queue jumping the waiting list, on the identified programme.

unspecified use.[351] In terms of sec. 6 of PIE, the High Court concluded that the occupiers were unlawfully occupying the property and that it was in the public interest that their unlawful occupation be terminated.[352] The occupiers took this matter on appeal to the SCA.[353]

The SCA held that the important consideration in the present case was the availability of suitable alternative land in lieu of the pertinent mischief of insecure tenure.[354] The SCA also considered the length of time that the occupiers had occupied the land, and, more importantly, because the eviction order was not sought by the owners of the property but by an organ of state on the owners' behalf.[355] The SCA accordingly upheld the appeal and set aside the eviction order.

A subsequent appeal was lodged in the CC against the decision of the SCA.[356] The substantive basis for this appeal entailed a prayer for an order reflecting the position that private persons seeking an eviction of unlawful occupiers are not constitutionally bound to provide alternative accommodation or land.[357]

The CC, in addition to the considerations mentioned in sec. 6 of the PIE, took into account other significant factors.[358] It started with the fact that the occupiers went onto the land with what they thought was the owner's permission and had been there for a long time.[359] This had seen eight children attending local schools in the area and a number of the adults working nearby.[360] Secondly, the CC took into account the disdainful attitude of the Municipality in securing a suitable alternative for the

[351] *PE Municipality*.
[352] *PE Municipality*. Sec. 6 of PIE.
[353] On the basis that, theirs was not a play at receiving preferential treatment but rather it was a desperate request aimed at securing alternative land where they could put up their shacks without fear of another eviction.
[354] The SCA also pronounced itself on the identified alternative from the Municipality, which was turned down by the occupiers, stating that, the High Court should not have granted the order sought without assurance that the occupiers would not be evicted once from said alternative.
[355] *PE Municipality*.
[356] Ibid.
[357] Ibid.
[358] Ibid: para 53-61.
[359] Ibid.
[360] Ibid.

occupiers.[361] Referencing *Grootboom,*[362] the CC held that Municipalities have a formal duty to see to it that the vulnerable that fall within their jurisdiction and face eviction, have a secure alternative.[363] In recognising that the traditional ownership rights of possession, use, and occupation are now balanced by a new and equally relevant right to not be arbitrarily evicted, the Constitution can be viewed to have significantly changed the law dealing to evictions.[364]

However, *PE Municipality* should not be taken as precedent for assuming that evictions will not occur if homelessness (landlessness) will arise. In fact, the court's decision in *PE Municipality* speaks to the fact that the Constitution does not intend for a judicial fiat to effect a transfer of ownership.[365] In this regard, the court stated that the Constitution's understanding of the relationship between land, hunger, homelessness, and respect for property rights did not intend for the rights of landless people to be readily enforced.[366] That is, residents of informal communities may be forced to leave, even if it means losing their homes.[367]

The court cannot be criticised for requesting for balanced, context-specific outcomes. In the same breath, the court in *PE Municipality* appears to be emphasizing what the relationship does not intend, without as much telling us what it does intend. I contend, the court evades the simple question whether it is acceptable to expect those who own property — voluntarily or involuntarily — to share it with those who do not, given the historically lopsided distribution. The obtaining mystification of what is essentially a chance to decidedly develop the content of the relationship between the ownership right and other rights, like that of housing, does not attempt to answer this question.[368]

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[361] Ibid: para 54. In its submission the Municipality stated that, "It is respectfully submitted on behalf of the Applicant that what the Respondents have sought to do is unilaterally occupy private land and then, when requested to vacate, the Respondents have alleged that they have nowhere else to go and the Applicant must solve their problem by providing alternative land."

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

[363] *PE Municipality*: para 56-61.

[364] Ibid: para 23. See also Liebenberg 2010:274.

[365] Ibid: para 20-22.

[366] *PE Municipality*.

[367] *PE Municipality*.

[368] *PE Municipality*: para 23 - "The role of the judiciary in respect of eviction matters was aptly described as follows: The judicial function in these circumstances is not to establish a hierarchical arrangement between different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking into account all the interests

Instead, we see a strategy that, whether inadvertently or by design, attempts to restrict and sustain both positions, even if there are compelling justifications for the ownership right to entirely submit to a non-ownership right.[369] Due to the influential role *PE Municipality* has played in these types of cases and its status as a guiding precedent, I argue that this tendency is typical in the cases that follow in this discussion.

Returning to the CC, it was held that Municipalities ought to take extra care so as to ensure that where eviction arises, humanity and dignity also ensue.[370] In *casu*, the Municipality was held to have acted contra to this approach by failing to, at the very least, ascertain the circumstances surrounding the occupiers with the view to taking reasonable steps at finding a solution before resorting to eviction.[371] This was further exacerbated by the absence of evidence to advance the position that the landowners were in immediate need of the occupied property.[372] Citing the above, the CC found that the eviction could not go ahead and the appeal was dismissed.[373] The occupiers remained on land belonging to the private owners (not the Municipality).

Molusi

In *Molusi and Others v Voges N.O. and Others*,[374] (hereafter *Molusi*) private landowners brought an action against occupants who were accused of breaching a material term of the lease by failing or refusing to pay rentals.[375] The eviction application was granted despite the fact that the occupiers were at risk of being homeless. The LCC concluded that sec. 9(2) read with sec. 8 of the ESTA had been

involved and the specific factors relevant in each particular case." See reasoning in Botha 2003:34. See also Botha 2002, Botha 2004 and Botha 2000.

[369] See reasoning in Botha 2003:34. See also Botha 2002:612; Botha 2004 and Botha 2000.

[370] *PE Municipality*: para 56-61.

[371] Ibid.

[372] *PE Municipality*.

[373] *PE Municipality* - In closing, the CC directed that, based on this judgment a court involved in future litigation would have to insist on an appraisal on the reasonable steps taken to get an agreed, mediated solution.

[374] *Molusi and Others v Voges N.O. and Others* 2016 3 SA 370 (CC).

[375] *Molusi and Others v Voges N.O. and Others* 2016 3 SA 370 (CC): para 1-15. The private landowners later contended that the reason for the cancellation was that they needed to develop the property. The LCC accepted this on the basis that a periodic lease may be terminated on reasonable notice by either the lessor or the lessee.

met by giving the respondents' right to exclude more weight than the occupiers' rights.[376]

The SCA determined on appeal that the common law ground of termination on reasonable notice ground was a lawful ground for the termination of a right of residence, rendering sec. 8(1)(d) irrelevant to the facts.[377] On appeal in the CC, it was decided that the prerequisite of terminating the right of residence on a "lawful ground" is merely a fraction of the requirement of sec. 8(1) and does not necessarily imply the investigation is over.[378] To that end, the CC determined that the SCA had not conducted a complete investigation required to establish, chief among other things, a balance between the interests of the landowner and occupiers.[379] The SCA had not considered whether revoking the applicants' residency rights was reasonable. More importantly, the SCA therefore did not get to and thus did not assign enough weight to the hardship that would arise from the eviction and termination of the occupiers' rights of residence.[380] The CC overturned the SCA's eviction order. This meant that the occupiers remained on the applicants' land without a countervailing right to do so.

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[376] Sec. 8(1) of the ESTA lists the factors a court must take into account before granting an eviction as "(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies; (b) the conduct of the parties giving rise to the termination; (c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated; (d) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and (e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence." Sec. 9 is titled Limitation on eviction; "(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act. (2) A court may make an order for the eviction of an occupier if — (a) the occupier's right of residence has been terminated in terms of sec. 8; (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge; (c) the conditions for an order for eviction in terms of secs. 10 or 11 have been complied with."

[377] ESTA. The relevant subsection relates to the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time. The occupiers presented an argument partly on this basis.

[378] *Molusi and Others v Voges N.O. and Others* 2016 3 SA 370 (CC): para 24- 47. The Court shares these sentiments by stating that, the pith of the phrase "just and equitable" in secs. 8 and 11 of ESTA invokes the constitutional values of human dignity, equality and freedom as informed by a quest for social justice that is cognizant of the past injustice.

[379] *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."

[380] Ibid.

All Builders

In *All Building and Cleaning Services CC v Matlaila and Others*,[381] (hereafter *All Builders*) an eviction application was filed to evict a 71-year-old widower who had resided on the property for more than 40 years, alongside two other occupants, one of whom was the widower's daughter who had lived there her entire life.[382] The landowners filed the application in the High Court based on their common law right to exclusive possession of the property in the face of the unlawful occupation.[383] The landowners contended that, contrary to the occupiers' claims, an eviction order would not result in homelessness in this case.[384]

Referencing *City of Johannesburg v Changing Tides Properties*,[385] the High Court held that the onus to prove and or disapprove the availability of alternative accommodation was on the private landowner seeking to evict occupiers from its land and to show that the occupiers' eviction would be just and equitable.[386] 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.[387]

As a result, the High Court considered the circumstances and factors set out in sec. 4(7) of the PIE Act, 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 goal

[381] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.
[382] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13. The background in this case followed the first respondent (widower) whose initial occupation on the property was incidental to his employment by Mr. Twaalfhoven, the then owner of the property. On his death bed, while in the care of the first respondent, it transpired that, Twaalfhoven promised to bequeath the property in question to the first respondent but proceeded to bequeath it to Ms Swanepoel, a neighbouring farmer. Since then, ownership of the property had been transferred three times, leading to its current owners bringing forth this application. Through all of this, the three occupants have remained in occupation of the property aforementioned.
[383] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.
[384] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13. Instead, the landowners contended that the occupiers owed it to themselves to prove if there was a housing shortage in their income bracket and why they could not live with the first respondent's daughter, who had since moved to Limpopo.
[385] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 6 SA 294 (SCA).
[386] *City of Johannesburg v Changing Tides Properties*. 2012 6 SA 294 (SCA) in *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.
[387] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

of including them in the residential development.[388] The High Court ruled that the factors above clearly tilted the scales of justice in favour of the occupiers.[389] The eviction application was denied, effectively enabling the occupiers to remain on the property indefinitely.[390]

Classprop

In *Classprop Pty Ltd* v *Nini Crescent Legode and Others*,[391] (hereafter *Classprop*) an application for the eviction of Ms. Nini Crescent Legode, an 84-year-old pensioner who has lived at the property in question for over 22 years, was brought before the High Court.[392] The application also sought to evict all those who lived on the property through her, namely her grandchildren.[393]

Ms. Legode's defence 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.[394] 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, at best, did not comply with the Alienation of Land Act,[395] for Ms. Legode to take transfer of the property.[396] The

[388] Sec. 4(7) of the PIE Act 19, 1998: "(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."

[389] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

[390] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13.

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

[392] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 1-4.

[393] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 5-22. The case arose as a result of Ms. Nini Crescent Legode's occupation of the property from which eviction was sought under an oral lease agreement with an option to purchase. Her ward councillor informed her that she should stop paying because the house was a municipal building and did not belong to Mr. Dockrat. Acting on this information, she approached the Court in order to obtain an interdict to stop the harassment and to protect her unhindered possession and occupation. This application was successful. Furthermore, Ms. Legode approached the City Council for further clarity on the ownership of the property, to no avail. Meanwhile, Mr. Dockrat sold a supposedly vacant house to the applicant, Classprop, unbeknownst to Ms. Legode. As a result of the Classprop's demand for vacant possession of the property and Ms. Legode's counter claim based on the events described above, the application to the High Court was made

[394] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 29.

[395] *Alienation of Land Act* 68 of 1981.

[396] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 32-36.

agreement between Ms. Legode and a Mr Dockrat, on which Ms. Legode sought to rely to prove her title to the house, was held to have no contractual nexus with Classprop, on the basis of which a contractual right could be asserted.[397] Notwithstanding, the enquiry did not cease after the determination of an unlawful occupancy.[398]

Quoting secs. 4(7) and 4(8) of the PIE Act, the High Court set out an often-blurred distinction and departure of the Act from common law evictions.[399] 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. Instead, he continued, justice and equity conjoin both subsections to the effect that once a court has determined that the applicant is owner and the occupier has no defence or countervailing right, it may not grant an order for eviction unless it has additionally decided that the order would in light of all relevant circumstances be just and equitable.[400] To that end, Classprop's failure to address the just and equitable requirement as part of its application was fatal.[401]

Taking this into consideration, the Court reasoned that granting the eviction order would have the undesired effect of putting a vulnerable indigent woman and her grandchildren on the street. This proposition was judged to outweigh the counter effect of an innocent third-party property landowner suffering the consequences of a dispute in which it was not a party.[402] More so in the case of Classprop's title being contested, the decision of which could still favour the occupants. Ms. Legode had claimed ownership and contested Dockrat's (from whom Classprop acquired the property) right to transfer ownership to Classprop.[403]

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[397] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 29-35.
[398] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 35.
[399] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 38. Sec. 4 of the PIE Act 19 of 1998.
[400] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 38-51.
[401] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 38-42. The Court held that this was more important because the facts presented a poor elderly woman who had lived on the property for over 22 years and a household headed by a woman residing on the property with her grandchildren whose identity was unknown.
[402] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 47-55.
[403] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910. The eviction was, in part refused because there was an ongoing disagreement regarding the occupier's (Ms. Legode's) legal

The Court then explored the meaning of its decision, which is pertinent to my primary research question. The main research question in this thesis remains that of ascertaining the legal position of unlawful occupiers who remain on land belonging to another in the particular instance where a court has denied to evict for the substantive reason that it would not be just and equitable to do so. The Court reasons that, dismissing an eviction application as unjust and inequitable in the current circumstances does not grant Ms. Legode and her grandchildren any permanent legal right to continue occupying the house.[404] 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.[405] 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.[406] Although this is one of the few potential cases in which a court began the process of defining the legal position of an unlawful occupier under the circumstances at hand, the court can be seen to have been fact bound from proceeding any further. In this regard, I am hesitant to grant the benefit of the doubt that, but for the title dispute, the court in this instance may still have gone as far as it inadvertently did.

Grobler

In *Grobler v Phillips and Others*,[407] (hereafter *Grobler*) the set of facts followed an 84-year-old widow who lived in a residential house on the property with her disabled son, Adam.[408] The widow had lived in the property's residence with her parents since 1947, when she was eleven years old.[409] The land was once part of a much larger farm.[410]

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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 seen in *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* [2022] ZACC 28.

404 *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 52.

405 Ibid.

406 Ibid.

407 *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 5

408 Ibid.

409 Ibid.

410 *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 6-10. Part of the dispute is this case was whether ESTA or PIE applied in this instance. The High Court further held that it would be just and equitable for Ms Phillips to not be evicted and remain on the premises both under PIE and ESTA. It refused to grant the eviction order because such an order would be unjust and inequitable. Among these were the widower's long tenure in occupation of the land, the widower's old age, and the fact that she shared the property with her handicapped son.

She stayed in the house after marrying her late husband, who worked on the farm.[411] This matter moved from the Magistrates Court right up to the SCA. I only deal with the court's reasoning in the SCA below.

In the SCA, the court reasoned that her ongoing occupation was completely safe until 2009, thanks to the permission of subsequent owners, some of whom agreed that she had been granted a lifelong right of occupation and had committed to honouring it.[412] This landed her in the safe zone of ESTA until 1991, when the last piece of what was previously farmland was encompassed by urban expansion.[413] While she no longer enjoyed the absolute protection granted by ESTA secs. 2(1)(b) and 8(4) as a vulnerable person under that statute, her position as a vulnerable person had nonetheless not changed, notably in the context of PIE.[414] To that end, the Court opined that it would not be just and equitable to evict, because: (i) Ms Phillips had an orally granted life-long right of occupation, which was not disputed, and she could not reasonably have been expected to know that she had to register it in order for it to be enforceable; (ii) of her advanced age; (iii) she had lived on the property since she was 11; (iv) she resided with her disabled son; (v) the urban development of the property, which caused her to lose protection under ESTA was beyond her control.

In the interests of justice and equity, the SCA held that PIE recognizes that, in appropriate circumstances, the right to exclude may under some circumstances give way to the right of vulnerable persons to a home.[415] The SCA also weighed in on the landowners' tender to find the widow an alternative.[416] To that end, the SCA determined that despite the aforementioned overriding considerations of justice and

[411] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 11-15. It is crucial to remember that she was never the home's owner. It was claimed that the farm's former owner had granted her a lifelong right of occupation. The owner believed that because it was not reduced to writing and registered against the title deeds of the land, an orally conferred right of occupation was by law not enforceable against succeeding owners of the property. The owner served Ms. Phillips with a notice to vacate and went before the Magistrate's Court, which approved the eviction order on the grounds that PIE's provisions were applicable.

[412] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 49-51. The SCA reasoned in its deliberations that the property was part of a farm for the majority of her time there. Due to events beyond her control, the farm was gradually swallowed up by the increase in urban development.

[413] Ibid.

[414] This Act applies in respect of all land throughout the Republic.

[415] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 50.

[416] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021): para 52-59.

equity, changing an order not to evict in favour of granting an order of eviction subject to the widow's accommodation would clearly be contrary to the widow's wishes and would amount to no less than compelled ejectment.[417]

The SCA stated once more that the reasonableness or otherwise of an unlawful occupier's reluctance to vacate was not a significant issue.[418] The subject came in a tangential and in a belated manner.[419] In the circumstances, the true issue was the dignity of an elderly and frail woman and a person with impairments, and giving in to the belated offer, even if it were in good faith, would erode the widow's dignity rather than safeguard it.[420] On that score the appeal did not succeed and the occupiers remained on the land.[421]

3.3 Distinguishing between orders to remain

The three types of orders mentioned above have one thing in common: the orders issued in each of them have resulted in unlawful occupiers remaining on private property or land without a legal countervailing right to do so. The third type of order described above, as well as the first two types of orders, differ from one another in a variety of ways. In this section, I focus on the distinctions between the three types of orders in an effort to identify the instances in which the claim to remain as put out in this thesis arises.

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[417] Ibid.
[418] Ibid.
[419] Ibid.
[420] Ibid.
[421] See *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32 (20 September 2022).
The Constitutional Court's judgment in the case that had been reserved had just been released as of the time of this submission. The order arrived too late to accordingly be included in this submission. It is sufficient to note that the court appears to have made every effort to avoid the scenario in which the occupier would continue to reside on another person's property without having a countervailing right to do so. The court order accepts that the landowner has made an offer to provide the unlawful occupier with alternative accommodation. The order emphasises that in such instances the unlawful occupier may not unreasonably exercise a preference of where to stay. I contend that the court order is no different from the order in the SCA. The assumption of an alternative form of accommodation at the behest of a landowner does not necessarily regularise the stay. If anything, it does confirm that they may be instances where to positively obligate a private landowner is the best avenue to vindicate the rights and interests involved. On the other hand, this order, in part, should be seen as an inadvertent attempt to define the conditions of remaining. That is what the unlawful occupier may or may expect of and against the landowner in the instance of remaining. The court would do well to fully engage and define such continued day to enhance security of tenure.

For the purposes of this evaluation, I narrow the area of distinction to just two components. These are the kind of order issued as well as the burden that the order places on a private landowner.

3.3.1 First type of orders

The first type of orders is those in which the court grants an eviction order but delays its implementation until suitable alternative land is secured where individuals who will be evicted can resettle. The effect of the first type of orders might be interpreted as preventing the abrupt evictions of vulnerable occupiers if the result will leave the occupiers without land (homeless).[422] The first type of orders, as well as all the other types of orders that have been identified, share the concern of keeping the unlawful occupier on land. The difference as it will become clear is in the manner that the potential of being without land is approached and/or weighted.

In the first type of orders, the court grants the eviction of the unlawful occupiers and only in the second instance insists on and seeks to find a balance between the States' statutory duty to gradually facilitate the release and redistribution of land to those without, on the one hand, and private landowners' right not to be arbitrarily deprived of their property, on the other hand.[423] That is to say, while in practice, the consideration of state-provided alternative housing as a factor comes before the question of whether it would be just and equitable to grant the eviction, this is not the case in theory.[424] The question of whether an alternative should be made available

[422] *Odvest 182 Pty (Ltd) v Occupiers of Portion 26 and Others* (19695/2012) [2016] ZAWCHC 133 (14 October 2016); *Berman Brothers Property Holdings (Pty) Ltd v M and Others* (23332/17) 2019 2 All SA 685 (WCC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (Pty) Ltd 2012 2 SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 6 SA 294 (SCA).

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

[424] See *City of Johannesburg v Changing Tides Properties.* 2012 6 SA 294 (SCA): para 56-58; See also Strydom & Viljoen 2017:1207-1261. The result is that the State's constitutional duty to progressively realising the right to housing, is narrowly construed to indicate that the State must provide alternative emergency housing on a temporary basis in eviction situations where the occupiers are likely to become homeless/landless. This has the effect of relegating the issue of justice and equitability, which considers and attempts to balance this reality with other elements like the identity of the landowner, previous uses of the property, future plans for the property, and the relationship with the occupiers, to a secondary role.

must be separated from the first inquiry, which is whether or not issuing the eviction order would be just and equitable.[425]

But this is not the point. The main focus is on the order. The first type of order is one in which the eviction request is granted. That is, the unlawful occupier is certainly expected to leave the property. The second component of this order however attempts to link the deadline to vacate with a date on which the State makes an alternative available. This is to avoid a situation in which the unlawful occupier is without a place to live/land during the interim period. The time between when the order is issued by the court and the "deadline day" creates a situation of remaining. The unlawful occupier continues to occupy another's land despite not having a countervailing right to do so.

The claim to remain as put forth in this thesis is founded on this proposition. This is not, however, the kind of remaining contemplated by the claim advanced in this thesis as will be obvious when the other orders are reviewed below.

The premise that State intervention is the only and best approach to addressing the interests of the unlawful occupiers is reaffirmed in this case. This stifles debate on the practicality and appropriateness of an order that may, in the right circumstances, impose an indefinite burden on private landowners. Nevertheless, in the absence of timely State provision of a satisfactory alternative, for whatever reason, the first type of order may result in private landowners unintentionally stepping in to fulfil the responsibility during the intervening period. Instances such as the *Berman Brothers* case come to mind.[426] The case is typical of instances where the order places a suspensive condition other than or in addition to the provision of an alternative.[427] In rationale and character, this type of arrangement does not include the necessary prospect of an indefinite fact of remaining.[428]

[425] Strydom & Viljoen 2017:1207-1261.
[426] See *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC)
[427] See *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC): para 52. This is contemplated in Berman Brothers by the suspensive provision that the unlawful occupant be evicted only once her daughter has completed her matric year.
[428] *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC).

3.3.2 Second type of orders

The second type of orders deal with cases where the eviction order is granted but then cannot be executed. In the second instance, the order might not or might, like the first, include a suspensive condition, to the effect that an alternative should become available. But here, execution is the problem. The *Modderklip* SCA and the *Fischer* case cited above are examples of when the impracticability of enforcing the granted eviction order eventuates, leaving the unlawful occupant on land belonging to someone else despite the court agreeing that such unlawful occupier should be evicted.[429] This alone marks a difference between the first and the second type of orders. However, in my argument, this distinction is negligible.

Another factor that contributes to the disparity is compensation for the limitation of the landowner's right to exclude. To underscore this point, in both cases in the second type of cases, the courts award some kind of compensation to offset the limitation.[430] However, there is a subtlety to be aware of here, one that could result in the confusion of two separate orders if the primary emphasis is placed on compensation. While there was a compensation order in *Blue Moonlight* SCA (an example of the first type of order) such compensation was ancillary to an eviction order.[431] There was no eviction order that had to be conducted in the *Blue Moonlight* SCA. In the *Modderklip* CC (an example of a second type of order) compensation was awarded only after an order to evict (now) had been given but not conducted. Although the State's housing policy was the compensable failing in *Blue Moonlight* SCA, here it was not the case. The eviction could not be conducted since it would have been impracticable to evict.[432] The second type of order, as in the first type of order accepts it as trite that the obligation to realise land rights for those without, solely rest on the State. Accepting the resulting loss on the part of a landowner on whose land evictees remain, courts have found it just and equitable to compensate the owner for the indefinite deprivation of the exclusive use and enjoyment of its land under this type of order.[433] The compensation makes good the landowners' loss such that in the end, while the unlawful occupier benefits by

[429] See case description of *Modderklip* and *Fischer* case in section 3.2.
[430] *Berman Brothers Property Holdings (Pty) Ltd v M and Others* 2019 2 All SA 685 (WCC).
[431] For a broader discussion on the difference between the two cases see Chenwi 2010.
[432] See Chenwi 2010:9-11.
[433] See *Fischer v Unlawful Occupiers and Others* 2018 2 SA 228 (WCC). *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

remaining on the land, the landowner does not make a related loss. This is especially true in the examples that follow the *Fischer* case, since the buyout compensation breaks the link between the unlawful occupier and the private landowner. The State, which is obligated to facilitate the fulfilment of the rights in need, is expected to offer these occupiers some type of leasehold or other formal tenure arrangement for their continuous occupation of what remains land belonging to another, albeit State land.

3.3.3 Third type of orders

The third type of orders comprises cases where the court denies an application for eviction on the grounds that evicting the unlawful occupants would be unjust and inequitable.[434] In contrast to the first two types of eviction orders, this third type of order does not grant the application for eviction. In the third type of order, the unlawful occupier remains on the property from which eviction was sought because the court does not sanction the eviction in accordance with statutory requirements. In this instance, the unlawful occupier does not wait for the administrative procedures to secure an alternative to take place before leaving the property. Therefore, unlike the other two types of eviction orders mentioned earlier, the remaining envisioned is not transitory. This is not to suggest that the remaining is permanent either; rather, it is intended to emphasize the fact that the order puts an end to the process until a fresh application is submitted, if and when it is submitted. In the meantime, the irregularity persists because the landowner and occupier have not reached a consensual agreement whereby the landowner assigns some of his or her rights to use and enjoy the property to the occupant. The private owner is denied the right to exclusive use, and enjoyment deemed compensable and outside the scope of private relations in the first and second type of order.

The essence of the third order is captured in *Classprop*.[435] The understanding is that denying an eviction application as unjust and inequitable in the current circumstances does not give the applicant any permanent legal right. Rather, its conclusion is not a

[434] *PE Municipality*; *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6; *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13; *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910; *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021).
[435] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 52.

conclusion in and of itself, but rather a postponement of the conversation to a later date for failure to meet the minimum threshold.[436] According to Van der Walt, this conversation is based on the understanding that whoever wants to evict someone from their home must go through a certain, potentially onerous process that includes, in the end, not only approaching a court to obtain an order for eviction but also persuading that court that evicting them is substantively just and equitable based on relevant facts and circumstances.[437] Regardless of the genesis/history of the dispute in eviction matters, this conversation is unavoidable.

To that end, the court in *Classprop* asserts that if circumstances change in the future, the landowner can file a new application to restart the conversation.[438] In this sense, one gathers that the unlawful occupier is entitled to a "participatory space" at the very least under this order.[439] This entitlement to a "participatory space", according to Van der Walt, requires the landowner to (re)account for the assertion of his interests against those who live on his land. This is within the specific context of their case and against the backdrop of broader considerations of substantive justice and fairness, and it allows those settled on the land to assert their interest and justify their presence, in the same context.[440] To my mind, it potentially entitles one to a lot more than just a "participatory space" in the strict sense described above. In a broader sense, it allows an unlawful occupier who would otherwise have had no access to the "rights market" to participate in the market for their acquisition. In this regard, it is worth noting that, in the strictest sense, the occupier in this situation is only entitled to be brought before the court and heard before being evicted. That is, if it just and equitable to evict.

Between the date of the order and the date of a change in circumstances, or the filing of a new application for eviction, whichever comes first, the occupier "remains" on the land at the expense of the landowner. That is to say, during that time period, a burden on the dominium is envisioned in which the landowner foregoes those rights ancillary to the occupation, and, in turn, those same rights are at the very least kept in

[436] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 52.
[437] Van der Walt 2012b:157-161.
[438] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 52.
[439] Van der Walt 2012b:157-161.
[440] Van der Walt 2012b:157-161.

abeyance, with benefit accruing to the occupier.[441] Being in that position offers an opportunity for such occupier to acquire through exercise/use other rights ancillary to his or her occupation, i.e., burial rights, in addition to the entitlement to be heard.[442]

The occupier may also hedge on this kind of court order to resist the landowner's or another party's efforts to evict them physically or constructively. This is due to the fact that, despite the occupation still being unlawful it is still incumbent on the landowner to get court authorization. The expectation is that the occupant may well stay on the land, barring a change in the circumstances considered in the initial application. This alone serves as a deterrent and increases the enduring character of the remaining under this type of order. The absence of a consensus, coupled with an implied indefinite delay on eviction until the situation changes, points to a unique scenario.

The preceding case description demonstrates that applying the just and equitable threshold to different sets of facts may result in a different outcome. The case list is not exhaustive. However, what is clear is that in some cases, temporarily limiting the landowner's ownership rights to allow the state to provide an alternative may be unjustifiable, whereas in other cases, eviction and relocation of the occupiers may be found to be unjust and inequitable.

In general, courts have the authority to allow, suspend, or deny eviction of unlawful occupants. To varying degrees, the three orders discussed in this section clearly demonstrate this. Based on the assumption that the third type of order is the one that gives rise to the claim to remain. I will now proceed to briefly highlight when and who is entitled to the order.

3.4 When is who entitled to the third type of orders

To recap, the goal of this chapter is to differentiate in order to pinpoint the instances in which the claim to remain as posited in this thesis may arise. Considering that the third type of orders covered in this chapter is wherein the claim emerges, in this section, I identify and attempt to synthesize factors that are commonly

[441] See section 4.2 for full discussion on abandonment/prescription.
[442] See section 4.3 for full discussion on burial rights.

highlighted in the issuance of the third type of court orders. In other words, in this section, I explore what kind of an unlawful occupier is under what conditions likely to get a court order not to be evicted from land because doing so would be unjust and inequitable. However, having said so, I recognise and acknowledge that the legislation governing evictions does not envisage a closed list of factors to be considered when making a just and equitable determination.[443] The discussion in this section does not seek to undo that wisdom or suggest that the value judgement envisaged can be reduced to an exact science.[444]

The aim here is to identify those factors that appear to be common across the different cases described under the third type orders with the view to distilling the practicalities that will in turn guide in the normative development of the content of the claim to remain. That is, practicalities that extend the standard duties and obligations that may accrue in the regular occupation of land belonging to another.

To undertake the aforementioned, I have elected to focus on the factors of how and when the duration of occupation, the location of the land occupation (placement) and the socio-economic position of the parties influence one's susceptibility to be granted this type of order. I will now evaluate these three elements in light of the case description in the third type of order described above.

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[443] See sec. 26(3) of the Constitution; secs. 4(7) and 4(8) of the PIE Act; secs. 8 and 11 of ESTA. See *PE Municipality*: para 13. The powers in sec. 4(7) and (8) of PIE as an example, constitute legislative recognition of the fact that the spectrum of eviction proceedings with which courts will be expected to deal is so broad and varied that it is not possible to try and legislate for every situation. Courts are in effect enjoined to decide the unique cases, not primarily on principles of the law of property, but rather on principles of fairness and equity.

[444] See *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA) at para 11-12. "There does not appear to have been a consideration of the precise relationship between the requirements of sec. 4(7) and s 4(8) in the context of an application for eviction at the instance of a private landowner. In some judgments there is a tendency to blur the two enquiries mandated by these sections into one. The first enquiry is that under sec. 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling into specific vulnerable groups are singled out for consideration. Under sec. 4(8) it is obliged to order an eviction "if the … requirements of the section have been complied with" and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of s 4 refers to both the service formalities and the conclusion under sec. 4(7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties."; See also *Baron and others v Claytile (Pty) Ltd and another* 2017 4 SA 180 (LCC): para 14; *Occupiers, Berea v De Wet NO and another* 2017 5 SA 329 (CC): paras 44-47.

3.4.1. Common threads in the third type of cases

As a recap, in the *PE Municipality* case, the court considered the circumstances under which the unlawful occupiers, 68 people, including 23 children, who live in twenty-nine shacks, occupied the land, as well as the length of time the occupiers had lived on the land for periods ranging from two to eight years and the lack of available acceptable and secure alternative land.[445] The undisputed declarations of the occupiers that they moved onto the land with what they thought was the owner's consent and have been there for a long time emerged from the facts in this regard.

The court in *Molusi* drew attention to the need to give sufficient weight to the hardship that would result from the eviction of farm occupiers who had been in occupation since around 2001 in relation to the occupiers' failure to pay the agreed rental on the due date.[446] This was despite that such failure constituted a lawful ground to terminate the right of residence and trigger the eviction process.[447] The overwhelming evidence that the eviction would leave the occupiers homeless in the absence of a viable alternative arrangement was the unmistakable reason driving the court's emphasis on the foregoing.[448] The court in *Molusi* emphasized its consideration in this regard by reiterating what had been explicitly stated in *PE Municipality*, namely, that current eviction legislation;

> "acknowledges that a home is more than just a refuge from the elements. It is a safe haven for personal intimacy and family security. It is frequently the only relatively secure area of privacy and quiet in what is (especially for poor people) a tumultuous and unfriendly world."[449]

The court considered the position of a 71-year-old widower who had lived on the land for more than 40 years, as well as two other residents, one of whom was the widower's daughter who had lived there her entire life, in *All Builders*.[450] As a result, the length of time the occupiers had occupied the premises, the circumstances under which they moved on to the premises, the presence of an elderly pensioner, the lack of an

[445] *PE Municipality:* para 1-2.
[446] *Molusi and Others v Voges N.O. and Others* 2016 3 SA 370 (CC): para 43- 45.
[447] Ibid.
[448] Ibid.
[449] *Molusi and Others v Voges N.O. and Others 2016 3 SA 370 (CC):* para 46*; PE Municipality:* para 17.
[450] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13: para 3.

alternative, and the landowner's unwillingness to meaningfully engage with the two occupiers with the goal of including them in their residential development plans persuaded the court that eviction would be unjust and inequitable.[451]

The court in *Classprop* considered, in part, that the application was to evict a poor elderly woman with a claim to title, the determination of which was still pending, who had lived on the property for over 22 years. It also considered that it was a household headed by a woman dwelling on the property with her children whose identification had not been proved.[452] It was believed in *Classprop* that granting the eviction order would have the effect of putting a vulnerable indigent woman and her grandchildren on the street, a proposition that was held to outweigh the counter effect of an innocent third-party property owner suffering the consequences of a dispute to which it was not a party (in part because that innocent third party had an alternative remedy to eviction – a contractual claim – against the person who had sold it the property).[453]

A widow's eviction could not be permitted in *Grobler* due to the widow's long tenure (over seven decades), the widow's elderly age, and the fact that she occupied the property with her handicapped son and that such occupation had been lawful to her knowledge throughout.[454] Despite the fact that private landowners had submitted a late tender to provide her with an alternative, the eviction was denied.[455]

The preceding court cases under the third type of order demonstrate that neither permanence nor length of occupation of a home have a guaranteeing impact on the granting of the order. The length of occupation is not a determinant in the sense that it triggers the consideration of the just and equitable inquiry, but it does influence the scaling of the occupier's appropriate circumstances relative to those of the landowner. Time spent in occupation, whether it is 2 to 8 years in the *PE Municipality* case or 40 years or more in the *All-Builders* case, or anything in between, is not itself an overriding factor.

[451] *All Building and Cleaning Services CC v Matlaila and Others* (2015) 42349/13: para 26-31.
[452] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 3-5.
[453] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) ZAHC 80910: para 47-55.
[454] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021).
[455] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021).

However, extended lengths or durations of occupation allow for the development of another significant factor within the just and equitable test: nestedness.[456] Nesting relates to the location in which one lives one's life, and more specifically, the integration of one's daily activities and place of residence. Reference can be made to those instances where an alternative has been availed for the occupier and or the prospect of the occupier finding an alternative is very much alive but the court still insists that these weighty considerations are to give way merely because an alternative abode is offered would negate the occupier's dignity rather than protect it.[457] One can also point to the *PE Municipality* case as example where the court concludes that eviction would not be just and equitable, in part, because the occupiers, having lived on the disputed land for 8 years, had integrated socially and lived close to work and schooling for their children.

Placement in relation to one's daily life extends beyond the physical to the psychological, emotional, and spiritual. To capture this consideration, reference can be made to the holding in *Mathale v Linda and Another*,[458] where the Court took cognisance of a pending dispute over the title to a property before another forum.[459] Referencing *Machele v Mailula*,[460] (hereafter *Machele*) where the irreversible impact of dislocation was considered to be so grave as to warrant the bypassing of a long standing principle against the appealability of interim orders,[461] the CC in *Mathale*

[456] The discussion of Nestedness in this section is highly influenced by De Villers 2017:72-74. See Nedelsky 2011:232-264; Nedelsky 1993:1-26.

[457] *Grobler v Phillips and Others* (446/20) [2021] ZASCA 100 (14 July 2021); *PE Municipality*. This is a point I submit was too easily forgone in *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32 (20 September 2022); *Snyders v De Jager* [2016] ZACC 55; 2017 (3) SA 545 (CC); 2017 (5) BCLR 614 (CC*); Oranje v Rouxlandia Investments (Pty) Ltd* [2018] ZASCA 183; 2019 (3) SA 108 (SCA). The key issue is not the occupant undeservedly selecting the option that best suits him or her. It has to do with how much consideration the current occupier gives to the qualities of the space that have been established over time and go beyond but are associated with a certain physical structure. This is the factor that ought to be balanced with the other factors in arriving at a just and equitable decision.

[458] 2016 2 SA 461 (CC).

[459] *Classprop (Pty) Ltd v Nini Crescent Legode and Others* (2016) 80910/16 (GJ): para 45.

[460] *Machele and Others v Mailula and Others* 2010 2 SA 257 (CC). This was an appeal against an execution order authorizing an eviction despite the fact that an appeal against the eviction order was pending in the Supreme Court of Appeal.

[461] *Minister of Health v Treatment Action Campaign (No 1)* 2002 5 SA 703 (CC) in *Machele and Others v Mailula and Others* 2010 2 SA 257 (CC): para 21. "The rationale underlying the non-appealability of interim orders was stated by this Court in the following terms: The effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would

inextricably links placement to one's self-worth, esteem and dignity irrespective of whether the house that one loses through eviction can later be returned – it is the trauma and emotional, spiritual, and psychological disruption in itself that is irreparable harm.[462] The totality of the placement consideration is that which, when combined with the duration of such placement, considers not only the location in which one finds themselves. It also considers the location in which one finds themselves in relation to others - the extent to which one participates in activities related to such placement, such that the likelihood of an interference with placement severely impacts the ability to live life from that location or any other location. The ability/inability to replicate the life lived in another location is inherent in this understanding of placement. While considering the emotional, psychological, and spiritual resource required, it is also worthwhile to consider the impact of one's socioeconomic status on one's ability to replicate the same life in another location.

What this indicates is that the order and the claim that arises hereon is one that in its character reflects the essence of living in community.[463] The exercise of the claim ought to be open to practices that speak to this at the very least, i.e., the opportunity to live with or be visited by other people on land belonging to another.[464] The concept of belonging in this instance encompasses not only ownership but also the creation of a zone of comfort for non-right interests. In this sense, this compels one to descend into the contestation for belonging with the intention to disrupt the dominant discursive and non-discursive networks of belonging that enforce an individualistic approach to property.[465] In light of this, I find myself drawn to imagine how this might very well apply to practices involving burial and interment on such land, for example.[466] The preceding court cases under the third type of order also indicate that establishing a minimal threshold for regulating eviction processes in order to better safeguard and promote the welfare of the ignored, poor majority may help those who are not necessarily

render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."

[462] Brand & De Villiers 2021.

[463] De Villers 2017:72.

[464] See *Sandvliet Boerdery (Pty) Ltd v Mampies and Another* 2019 3 All SA 709 (SCA); 2019 6 SA 409 (SCA)

[465] Keenan 2014 in De Villiers 2017:72-74.

[466] See *Sandvliet Boerdery (Pty) Ltd v Mampies and Another* 2019 3 All SA 709 (SCA); 2019 6 SA 409 (SCA).

needy.[467] To this end, it would appear that one's socio-economic status does not necessarily disqualify one from participating in the conversation, but once there, it influences the weight given to other factors. The general outlook remains those socioeconomic indicators such as age, physical and mental disabilities, employment status, marriage status, and gender all count for something, leaving the inescapable conclusion that the well-off are less likely to be afforded the consideration that the more vulnerable are. That is, the more socioeconomically vulnerable the people facing eviction are, whether because they are elderly or young, disabled, with dependents and are unemployed, or for any other reason, the less likely their eviction will be deemed just and equitable, unless mitigating factors exist.

3.5 Conclusion

The legal framework created by the new normalcy offers a number of fundamental substantive and procedural safeguards that are available to occupiers regardless of the legality of their occupation. This new paradigm is based on the idea that land should be viewed as a resource that can be used, occupied, or possessed without actually being owned. Such possession or occupation expresses the constitutionally guaranteed right to adequate housing, as an example, and deprivation of such possession constitutes a violation of this right.[468]

In this chapter, I identify the three different instances in which a situation of unlawful occupiers remaining on land belonging to another may arise owing to the application of the substantive requirement of justice and equitability to eviction processes. A substantive distinction was drawn between those instances where remaining arises on account of an eviction application that has been granted, with the order executable on a future date and or, where on such a date, the order fails to be executed from those instances where remaining arises on account of an eviction application being denied on the basis that it would be unjust and inequitable to evict. The distinction serves to distinguish the order from which the claim to remain advanced in this thesis

[467] See also *Ndlovu v Ngcobo* 2002 4 All SA 384 (SCA); *Bekker and Another v Jika* 2002 4 All SA 384 (SCA).
[468] Wilson 2009:288.

stems from and those other orders in which a situation of remaining could potentially arise.

In the following two chapters, I consider the unlawful occupier's continuing stay without a voluntary agreement with a landowner and its diminishing influence on the landowner's right to exclude. This is on the basis that the claim to remain based on the third type of order reflects the unlawful occupier's continued stay in the absence of a voluntary arrangement with a landowner. To fully appreciate the diminishing influence of this position, the normative content of the claim to remain must first be formulated. In the following chapter, I examine the legal nature of claims that accrue to non-owners, which captures the tentative coexistence of occupier and landowner interests envisaged by the claim to remain, in order to deduce what else the claim to remain could imply besides an entitlement to a participatory space.

CHAPTER 4
ESTABLISHING THE NORMATIVE CONTENT OF A CLAIM TO REMAIN

4.1 Introduction

The preceding chapter's case law discussion demonstrates that the ideal balance of the landowner retaining full value, control, and use of the land under unlawful possession while not leaving the unlawful occupier without land is not always attainable. Three separate types of eviction orders exist inside this world of the increasingly unattainable. The third type of eviction order is particularly significant since it details orders in which the application for eviction was denied, placing private landowners in the inadvertent position of meeting the obligation to accommodate unlawful occupiers on their private property/land indefinitely.

The effect of the order in this case is of interest since it maintains the status quo as it existed before the eviction application. Two questions arise from this contemplation. The first is a query concerning the present situation on the land where the occupiers remain. A sub-question under this examination of the current situation asks what the future may hold. In this sub-question, I explore whether other claims or interests might develop because of the exercise of the claim to remain. The objective is to define the normative substance of the claim to remain, as well as to explore what other claims may emerge because of the claim to remain being exercised.

The question that follows this one aimed at establishing normative content is one that explores the legal implications of the now-established normative content. This second question is addressed in the following chapter. My interest in this chapter stems from the void that exists since no clear statutory provision nor jurisprudence has been developed to outline the duties and obligations of parties in these circumstances. Nonetheless, there are several examples in the South African legal system that capture the precarious coexistence of occupier and proprietor interests on the same land. In this chapter, I explore the normative content of the claim to remain by looking at the evolution of such examples in which the coexistence of landowner and occupier rights in the same land is envisaged. My objective is to analyze if any of the current

legal instances can be used to mirror the claim to remain. In section 4.2, I consider servitudes as an instance to postulate the practical configuration of the claim to remain. In section 4.3, I look at another example - mining rights. Another example, burial rights, is covered in section 4.4. I conclude this chapter and introduce the following chapter in section 4.5.

4.2 Servitudes

4.2.1 General overview

The law of servitudes presents one such instance which regulates a scenario in which two persons coexist on the same land in some relatable fashion. The purpose of this discussion is to provide indications as to what the content of the claim to remain might be through the prism of an established regulation of land interests between a landowner and another individual, as contemplated by the separation of ownership and use of property in servitudes. The approach taken in this section is not to establish whether it is possible to recognize the claim to remain as a category of servitudes, nor what the nature and content of such a claim would be if such recognition were possible. It is also not to establish under what conditions such a claim could be registered.[469] The objective of this section is not to interrogate servitude law; rather, it is to consider the legal nature of relationships within servitudes to help determine what can be expected from landowners and occupiers in the exercise of competing interests over the same land under a claim to remain.

As a start, even in cases where such an agreement never existed, it would not be unreasonable to conclude that the claim to remain is based, at least in part, on a conventional tenant-lessor obligatory interaction. I say this cautiously because there is a presumption in this case that the occupier is unable to meet the conditions of a regular stay and/or the landowner is unwilling to allow such a stay to continue. Nonetheless, the imagined co-habitation of the two interests is such that the

[469] Notwithstanding, my investigation of servitudes for commonality does not ignore the fact that the formation of new real rights reveals that servitude law is one of the most prevalent categories of limited real rights and a space where the courts have developed new real rights. See Van der Merwe 2002: 802; Van der Walt 2017:408, 408-420. See also *National Stadium SA (Pty) Ltd and Others v First Rand Bank Ltd* 2011 2 SA 157 (SCA).

landowner's interest is subordinated to the occupier's interest, and significant emphasis is placed on what the occupier can reasonably (humanely) be allowed to do while remaining on another's land.

A servitude presupposes a relationship between the servitude-holder and the owner of the land.[470] In that relationship, the holder of the servitude is theoretically in the stronger position pertaining to the unrestricted exercise of the servitude.[471] To this end, the owner of the land may only use the servient object in such a manner that no infringement is made upon the servitude-holder's rights.[472] In particular, they may grant other servitudes, provided that these new servitudes do not impact on the existing servitude.[473] This cohabitation of counter related duties and entitlements is managed by the requirement that the holder must exercise these rights in a civil manner, in terms of the *civiliter modo* requirement, taking into consideration the interests of the property owner.[474] While the above can be considered appropriate in regular counter-related interest interactions, the contempt for self-help encapsulated in the *civiliter* requirement presents the first of many disjuncture between the claim to remain and servitudes. This is because the claim to remain can be traced back to self-help prior to, and after, the court judgment denying the eviction application, enabling the occupants to remain on private property without a legally recognized right to do so.[475]

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[470] See Badenhorst 2006:321-323. A servitude is a limited real right or *ius in re aliena* that allows the holder to utilize a specified piece of land without being the owner, or to demand that the owner of said land refrain from exercising specific rights. To put it another way, a servitude claim over someone else's property limits the owner's rights while establishing a direct link between the holder of the claim and the owner/land to which it relates. Therefore, it can be said that the core function of a servitude is to afford the servitude-holder with a claim over the land of another

[471] For a general discussion on servitudes see Joubert & Faris 2004:459; Van der Merwe 1989; De Waal 1996.

[472] Joubert & Faris 2004:459; Van der Merwe 1989; De Waal 1996.

[473] Joubert & Faris 2004:459; Van der Merwe 1989; De Waal 1996.

[474] See *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 3 BCLR 271 (CC); *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 6 SA 440 (CC) explained what *civiliter modo* meant in reference to the common right by stating that; “For one thing, the common law requires that *a* servitude be exercised civiliter modo, that is respectfully and with due caution. Patently this would not include non-consensual bulldozing. Indeed, it would be no more than the sanctioning of self-help and the encouragement of the municipality to take the law into its own hands. Our society is based on the rule of law and the rule of law does not authorise self-help…. It concluded that civiliter modo does not include non-consensual action by the holder of a servitude.”

[475] See full discussion in section 4.2.3 below.

A distinction is made between two types of servitudes, namely a praedial servitude and a personal servitude.[476] Praedial servitudes are defined as a limited real right over one piece of land in favor of another piece of land.[477] Personal servitudes are a limited real right in favor of another person other than the owner and confer to that person the right to the use and enjoyment of the land of another, enforceable against an owner and his or her successors in title.[478] A praedial servitude is intended to enhance the use of the dominant land while the function of a personal servitude is to benefit the holder thereof, in an individual capacity.[479] The claim of an unlawful occupier to remain on land belonging to another is categorically excluded by the praedial conceptual formulation. The claim to remain as envisioned in this thesis is concerned with establishing a co-existence of two or more distinct individual interests on the same land, rather than enhancing the land's use through another piece of land.[480]

As a result, we are left with personal servitudes. The debate that follows is focused on personal servitudes, specifically the attributability of entitlements and duties inherent in the exercise of personal servitudes to the claim to remain. The discussion also considers what more can develop out of the exercise of the attributable duties and entitlements.

4.2.2 Personal servitudes

4.2.2.1 Introduction

The nature of personal servitudes is such that this type of servitudes is particularly meant for the benefit of specific persons over specified things for a determinable period.[481] To this end, different forms of personal servitudes have found expression in our common law. This consideration of personal servitudes as a legal claim that stands to be utilized in this instance to hypothesize the normative content of a claim to remain on someone else's land without a countervailing right to do so, focuses on three types

[476] Van der Merwe 1989: 459-469; Badenhorst *et al.* 2006:321-325; Van der Walt 2016:127.
[477] Van der Merwe 1989: 459-469; Badenhorst *et al.* 2006:321-325; Van der Walt 2016:127.
[478] Van der Merwe 1989:506; Badenhorst *et al*. 2006:338; Van der Walt 2016:455-464.
[479] For a discussion of further praedial requirements see Van der Merwe & De Waal 2010:548.
[480] Van der Merwe & De Waal 2010:548. See also Radin 1925. Refer to sec 4.2.2 for more distinguishing factors.
[481] Badenhorst *et al*. 2006:338.

of personal servitudes: use (*usus),* habitation (*habitatio)*, and usufructuary (*usufruct*).[482]

The selection of these three sorts of personal servitudes is influenced by the basic shared character of utilization of another's land. Furthermore, the nature of these servitudes requires that they be personal and consequently claimant-specific, as also envisaged in the application of the "just and equitable" consideration.[483] I now proceed to assess the characteristics of these identified personal servitudes that are applicable to the claim to remain.

4.2.2.2 Types of personal servitudes

Usus, Habitatio, Usufructuary

Usus

The servitude of *usus* entitles the holder of the right, the *usuary*, to use the land or house of another, to gather the fruits of such land for his or her own/agency's reasonable needs with the surplus accruing to the owner.[484] This right to use is conditional on the preservation of such land, i.e., without having a detrimental effect on such property, to the point where the *usuary* may not alienate or cause the alienation of the land or transfer his claim to another person.[485] The *usuary* may also lease out a section of the house as long as they remain in possession of the majority of the property subject to the servitude.[486] The *usuary* is allowed to live in the house with family, servants, and guests.[487] The purpose of this type of claim on someone else's land is to offer a use benefit to the holder, such that if the land's extent exceeds what the *usury* objectively needs, expenses will accumulate for the excess and the *usuary* will be accountable.[488]

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[482] Van der Walt 2016:455-464.
[483] See discussion in Chapter 2.
[484] See Hall & Kellaway1973; Van der Merwe & De Waal 2010: para 601-603.
[485] Sec. 66 of the Deeds Registries Act 47 of 1937. Van der Merwe & De Waal 2010: para 601-604.
[486] Badenhorst *et al*. 2006:341; Van der Merwe & De Waal 2010: para:602; Hall & Kellaway1973:177. See also *Johannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS:729 – commercial use for profit.
[487] J*ohannesburg Municipality v Transvaal Cold Storage Ltd* 1904 TS 722:729.
[488] Van der Walt 2016:491.

The character of the right of use, as described above, appears not to be attributable to the claim to remain in the following ways. It is reasonable to suppose that in the described situation, an unlawful occupier remaining on someone else's land would make use of the land and gather fruits to the extent that any further use found to be extraneous to his or her needs would result in condemnable action. To the extent that the right of use also envisages the use of land for specified commercial purposes that have the effect of bringing in profit or commercial gain for the *usuary*, the "just and equitable" rationale for dismissing the eviction application cannot envisage profit at the expense of the landowner. This is because the standard enables a non-consensual limitation of the right to exclude in order to accommodate the unlawful occupant for an indeterminate amount of time as a matter of last resort.

Habitatio

Habitatio, or the right to habitation, is essentially an occupying right that allows the servitude holder and his or her family to live in a certain building or on a piece of land.[489] Clear from the above definition is that the holder of a right to habitation has the right to stay on someone else's land as long as he or she does not harm the property's substance.[490] The holder of this right can also lease or sublet the property to a third party.[491] The right to habitation is personal to the holder and consequently expires when the holder dies, but not when the grantor dies, unless the claim was granted in *precario*, in which case the grantor's successors in title, in any case have the power to renounce the right.[492] A beneficiary of a right of habitation differs from a beneficiary of a usufruct and use servitude in that the beneficiary of a right of habitation only has the limited right to occupy the residential structure that is the subject of the right and is not permitted to harvest or use the surrounding land.[493]

In *Daniels v Scribante and Another* (hereafter *Daniels*),[494] the Court deliberated on the question whether an occupier could make improvements to her home to make it

[489] Van der Merwe 2010: para 605.
[490] Van der Merwe 2010: para 605.
[491] Van der Merwe 2010: para 605.
[492] Hall & Kellaway 1973.
[493] Van der Walt 2016:494; Scott 2011:155-169.
[494] *Daniels v Scribante and Another* 2017 4 SA 341 (CC) (hereafter *Daniels*). For a full discussion on *Daniels*, see Marais & Muller 2018; Davis 2019.

habitable without the landowners' permission?[495] The relevance of this case in the consideration of the Habitatio servitude is to consider whether the limitations inherent in habitatio i.e., those relating to the alteration of the substance of the occupied property are consistent with what is envisioned in the considered situation of remaining. I am aware that the *Daniels* case did not deal with an eviction per se. Daniels deals with legislation that regulates the stay, termination and eviction of persons who remain on farmland belonging to another by right. However, as indicated before in the research problem description and reaffirmed in this chapter's framework, there is no known precedent from which we can determine what occupiers may or may not do in a situation of remaining. This leaves no other option but to develop this content by relating to permissible practices where occupiers remain on land that belongs to another by right.

To that end, the element of undue enrichment, which the landowners in this case correctly asserted would be due for an offset despite the landowner's lack of consent to such improvements, and the manner in which the improvements were deemed objectively necessary are relevant for the purposes of this discussion under the use right.[496]

The CC in *Daniels* went on to say that the necessity to compensate occupiers for costly upgrades has no bearing on whether such conduct is reasonable. The fact that the occupier in this case elected to incur the costs of the changes on her own does not

[495] *Daniels*: paras 6- 9. The set of facts in Daniels followed Ms. Daniels, an occupier living in a dwelling on Chardonne Farm owned by Chardonne Properties CC and managed by Mr. Scribante. The point of contention necessitating the application, was Ms. Daniels action, at her own expense to effect basic improvements which included; levelling the floors, paving part of the outside area and the installation of an indoor water supply, a wash basin, a second window and a ceiling, on property she occupied in her capacity as an employee of the respondent. It follows that, after attempts at notifying the property owners, who said nothing in response to her written notification, works commenced. Ms. Daniels then received a letter from the respondents to the effect that she was not entitled to effect improvements on property belonging to another without being granted consent to do so by the property owner.

[496] I am aware that the claim to remain in discussion differs from the claim/right of an ESTA long-term occupier in that the latter has a clear statutory right, which is also articulated in the legislation to a great extent, whilst the former has no such right, and by definition has no right at all. Furthermore, the right of a long-term occupier under ESTA is an extension of a right that existed before, whether official or informal, by consent. (To this end, the *CC* held that the right to effect improvements and its consequent detraction of common law property rights of landowners flowed from a sec. 6(1) right of residence, which establishes a limited real right in land). The occupants who remain, on the other hand are those who either had consent to occupy but it was revoked or who never had consent at all. The examination of this case is pertinent to the exercise of the right to use and enjoy land belonging to another in a way argued to be surplus to the user's reasonable requirements for the purposes of this debate. It also is significant to the landowner's potential liability for the user's compensable action.

preclude the private landowner from assuming a positive obligation to the occupier. In light of this, the CC held through Madlanga J that,

"there is no foundation for interpreting the phrase the nature of the duty imposed by the right in sec. 8(2) to mean that if a right under the Bill of Rights has the effect of imposing a positive obligation, it will never bind a natural person or a legal entity.[497] Whether private persons will be bound, depends on several factors. What is paramount includes; what is the nature of the right;[498] what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the possibility for invasion of that right by persons other than the State or organs of State;[499] and, would letting private persons off, negate the essential content of the right?[500]"

While it has been argued that the effect of the *Daniels* case has not been to say that private parties bear an overall positive obligation to ensure that occupiers inhabit dwellings that are in a habitable state.[501] What the decision demonstrates is that a new approach to property — "one that recognises property on the periphery of society in situations where other non-property (constitutional) rights are at stake," as well as social claims that have yet to be formally recognised — "may be the best theoretical framework for understanding property law in a transformative constitutional setting."[502] The possibility to improve the land on which the remaining occurs and afterwards claim an enrichment lien may be plausible, although it is unattainable in the habitatio example. In this scenario, what to make of the landowner's inherent loss in tolerating the unlawful occupant, while the unlawful occupier, following eviction, returns with a claim for undue enrichment is intriguing. Is the enrichment, if any, undue? In my view, I do not imagine it to be so.

Furthermore, where a *habitatio* servitude entitles the holder of the right to grant a lease or sublease to a third party, there seems to be a divergence with the fact of

[497] *Daniels v Scribante and Another* 2017 4 SA 341 (CC).

[498] *Khumalo v Holomisa* 2002 5 SA 401 (CC): para 33 – "This Court was partly moved by what it called "the intensity of the constitutional right in question" to hold that "it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by sec. 8(2)." That case concerned the media's right to freedom of expression under sec. 16 of the Constitution.

[499] *Khumalo v Holomisa* 2002 5 SA 401 (CC).

[500] *Daniels v Scribante and Another* 2017 4 SA 341 (CC).

[501] See *Baron and Others v Claytile (Pty) Ltd and Another* 2017 5 SA 329 (CC) (hereafter *Baron*) -when the Court said that a positive obligation on a private landowner (in this case, to offer adequate alternative accommodation) can be imposed only in truly exceptional circumstances that consider the precise context and all relevant factors. For an analysis of the *Baron* judgment, see Van der Sijde 2020:74-92.

[502] See Boggenpoel & Slade 2020.

remaining.[503] The claim to remain is connected not only to the occupier in his personal capacity and the landowner in his capacity as the landowner, but also to the land from which eviction is sought. This is a fascinating point to examine. The order enabling the continued occupation of another's land is made through a process that considers both the landowner's and the occupier's personal vulnerability to eviction. As a result, if the occupant dies, the necessity to remain disappears given the absence of an occupier to remain. The same does not apply when the landowner dies, because the occupier's perceived need to remain persists. The presumption is that a new landowner will be able to submit a new eviction application, weighing vulnerabilities unique to them rather than those of the predecessor against those of the occupier. This would establish a fresh, but not necessarily different, basis for remaining.

Usufruct

A usufruct, on the other hand, is a personal servitude that grants the holder the exclusive right to use and gather the civil and natural fruits of another's land, with the obligation to return the land/property to the owner without causing any damage to its substance.[504] The usufructuary's claim does not imply ownership of the land. Instead of the surplus accruing to the owner (as in *usus*), the right to possess and enjoy the property, and fruits to the exclusion of the owner is granted.[505] As a result of the owner's exclusion during the life of the usufruct, this servitude requires the servitude holder to meet the *salva rei substantia* requirement.[506] Here, a negative obligation is paired with a positive obligation to protect the object of servitude from being destroyed or deteriorated.[507]

The character of a usufructuary, which allows for exclusive use and enjoyment by a? non-owner, including for profit, providing such use and enjoyment does not detract from the property's content and economic destination, allows for a summarized

[503] See *Moyeni v De Vries and Others NNO* (Case no 808/19) [2020] ZASCA 128 (13 October 2020): para 6.
[504] Grobler 2015:34-101; Van der Walt, AJ 2016: 464-475.
[505] Ibid. See also Van der Merwe 1989:508; Van der Merwe & De Waal 2010:581.
[506] See full discussion in Grobler 2015:34-101 - This requirement demands that the *usufructuary* must use and enjoy the object of the *usufruct* in such a manner that the substance and the economic destination of such property is not circumvented.
[507] Grobler 2015:34-101.

debate. Apart from the lack of a voluntary agreement by which the owner relinquishes any right to the holder, the claim to remain as envisioned in this thesis does not contemplate profit to the benefit of an occupier at the expense of a landowner, as argued under the right of habitation and use.

Most importantly, the “just and equitable” measure on which the claim to remain is based does not contemplate the “othering” of either the landowner or the occupier's interests. That is, an occupier who remains on someone else's land cannot have the freedom to enjoy and utilize the land and or property from which eviction is sought to the exclusion of the property owner as contemplated through a usufruct. The factors that are considered leading to the just and equitable decision not to evict aim to ascertain, amongst other things, the current and intended use of the land in question, including the harm (financial or otherwise) that would befall the landowner if the eviction were not granted.[508] These factors point towards the intention not to exclude the landowner from the possession and enjoyment of the same land. Rather, the landowner is excluded from exercising the right to exclude. If I may add, this right does not pass to the occupier. In another sense, this situation reflects the view that the effect of the court order not to evict is not a guarantee of participation inside the participatory space. It prevents the occupier from being excluded from the space. It is another matter whether they eventually enter the space and can make their interests acknowledged. What becomes apparent is that this situation cannot be solved by leaving one out. In this regard, the situation warrants a third way.[509]

On a level that cuts across the three types of servitudes discussed above, the following demands reiteration. Personal servitudes are ended instantly when the exercise of the servitude right is rendered permanently impossible.[510] This could be because of the destruction of property related to the servitude. It is important to note that if the property is recovered, the servitude will be immediately reactivated. This reactivation feature of personal servitudes is unlikely to be attributable to the claim to remain. A claim to

[508] See sec. 4 of PIE; sec. 8 of ESTA.
[509] Refer to section 6.2 below.
[510] Hall 1973. See *Kidson and Another v Jimspeed Enterprises CC and Others* 2009 5 SA 246 (GNP) - The Court decided that the true determination for termination should be whether it is possible to rebuild, as the servitude can only be terminated when it is no longer possible for the land to support the infrastructure, or alternatively, when the holder of the right dies.

remain on another's land without a countervailing right to do so as a contemplation of legislation that does not apply retrospectively, i.e., after the eviction, is more likely to suffer a different fate. While there is a reasonable chance that the courts will award another type of relief, it cannot be in the form of restoring the unlawful occupancy.[511] In this light, the core of a claim to remain can be defined as an injunction against the loss of land but not the acquisition of land once lost.[512]

Personal servitudes also cease to exist if the fundamental rights linked to the servitude's objective are exercised for the advantage of the owner of the servient property, whether intentionally or inadvertently.[513] The concern here is that the owner retains absolute, unfettered control of the property, which violates the *nulli res sua servit maxim*. The *nulli res sua servit maxim* precludes one from holding a servitude over one's own property.[514] The circumstance envisioned here is one in which an unlawful occupier leverages his or her claim to remain in such a way that the benefit element that accrues to such an unlawful occupant is negated. One example is when an unlawful occupier enters an arrangement with the landowner that regularizes his or her presence on the land.

All three types of personal servitudes are attributable to the claim to remain to the extents mentioned above. The above attempt was not intended to be a thorough description of the claim's content, but a building block, as there are more examples to be discussed later. To recap, the goal of the preceding discussion on servitudes has not been to fit the claim to remain into the category of servitudes, but to discover what reasonable content the claim could have by looking at servitudes as an example of how to evaluate and manage occupier and landowner entitlements to the same land.

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[511] See *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA). *Jordaan J* accepted that, in instances where an unlawful eviction is conducted, there is liability in an action for damages. However, he queried to what end? Citing first, the lack of substantial value in the property destroyed, which I might add is a common character in the eviction of the most vulnerable who in most instances make up the majority populous of unlawful occupiers. Secondly, the profitability of pursuing a claim for more substantial damages, which would be costly and time insensitive to the occupiers' need for immediate repossession. Criminal charges: *Jordaan J* also noted that the occupiers could lodge a criminal complaint for the contravention of sec. 8(1) of PIE, which is a criminal offence. Although a prosecution could have both an instructional and an inhibitory effect, it would still provide no material benefit to this current group of occupiers who stand evicted.

[512] *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

[513] Van der Merwe 1989:383.

[514] Van der Merwe 1989:383.

In that regard, and continuing to use personal servitudes as an example, I now consider what other entitlements the occupier may exercise.

Inheritability

Since personal servitudes cannot be passed down from one to another, terminating at the time of the servitude holder's death, or at the end of predetermined periods, or the occurrence of a predetermined future event, whichever occurs first. The following issues may arise in respect to the exercise of the occupiers' claim to remain. The first of these concerns is the termination of servitudes for reasons other than death.

To that end, the third type of eviction order discussed in Chapter 3 and the subsequent claim to remain are inextricably linked to the consistency of such assessed unique factors. If a predetermined or undetermined event occurred that caused a notable change in the occupier's perceived circumstances, the claim would be terminated, but not in the same way that a personal servitude would be canceled. I underline that it would not be the same since, under he considered situation of remaining, a new eviction would have to brought to consider amongst other relevant factors, a change in circumstances between then, when a court found that it would not be just and equitable to evict, and now. To obtain a just and equitable conclusion, these elements will be weighed against the landowner's circumstances.

While I believe the above would be the position. Scholars on servitudes have debated whether personal servitudes can be transferred from one person to another.[515] This is less significant for my purposes but for the proposition it presents in the context of the dependents of a claimant. That is, the position of dependents whose ongoing occupancy was based on the holders' claim to remain. Is it possible to link the inheritability characteristic of personal servitudes to the claim to remain in this situation? In the context of ESTA, the position of occupiers who are occupiers, as

[515] See Van der Merwe 1989. Joubert & Faris 2010:496; Badenhorst *et al*. 2006:338; Van der Merwe 2013. See also *Resnekov v Cohen* 2012 1 SA 314 (WCC) where the applicant relied on the decision in *Durban City Council v Woodhaven Ltd* 1987 3 SA 555 (A) in which the court left open the question of whether a personal servitude could be alienable through an agreement between the parties.

contrasted to those who occupy the land as an extension of those who occupy the land in their own right, has been addressed.[516]

To that end, it is established that the occupier may not have more family members on the landowners' property than is justified by just and equitable considerations when the occupier's right to family life is balanced against the landowner's ownership right.[517] That is, if it is just and equitable, an occupier exercising his or her right to family life may live on the farm with members of his or her family even without the owner's consent.[518] Upon death, sec. 8(5) of the ESTA states that the right of residence of an occupier who was his or her spouse or dependent may be terminated only on 12 calendar months' written notice to leave the land, unless such a spouse or dependent committed a breach contemplated in sec. 10 (1) of the ESTA.[519] It serves to underscore that an ESTA long-term occupier's claim/right is not exactly comparable to that of the claimant under exploration in that the former has a clear statutory right that is also articulated in the legislation to a large extent, whereas the latter does not have such a right, and by definition has no right at all. In this case, a new application for the lawful eviction of the dependents, who are now in unlawful occupation of the land without a just and equitable reason to remain, would have to be lodged.

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[516] See *Klaase and Another v van der Merwe N.O. and Others* (CCT 23/15) 2016 9 BCLR 1187 (CC); (hereafter *Klaase*). The facts follow Mrs Klaase, who moved onto the farm shortly after Mr Klaase began working on it in 1972. Mr Klaase worked as a general labourer and shared a home with his father. The couple were blessed with three children in their entire 30 year stay on the farm; *See Hattingh and Others v Juta* 2013 3 SA 275 (CC) - which had to assess whether an occupier's right to family life as provided for in section 6(2)(d) of ESTA included two of her adult sons and daughter-in-law whom she had given consent to stay on the premises with her.

[517] *Hattingh and Others v Juta* 2013 3 SA 275 (CC).

[518] Sec. 6(2)(d) of ESTA provides, in relevant part: "Balanced with the rights of the owner or person in charge, an occupier shall have the right—. . . (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997."

[519] *Klaase and Another v van der Merwe N.O. and Others* 2016 9 BCLR 1187 (CC). Sec. 8(7) of ESTA reinforces the notion that an occupant who was the spouse or dependent of an occupier as defined is not an occupier as defined. It reads in part "if an occupier's right to residence has been terminated in terms of this section, or the occupier is a person who has a right of residence in terms of subsection (5) . . ."

Prescription

An interesting thought is spawned by the above reference to ESTA is that of people who move onto the land through another but eventually become occupants.[520] This interest is premised on a scenario in which a dependent occupier stays on the premises for longer than the prescribed period of time with the knowledge of an owner who sits back and does nothing to evict the dependant occupier.[521] In this context, I am specifically interested in drawing on acquisitive prescription as an element of servitudes.[522] To that point, I am drawn by Singer's moral reflection on the logic of acquisitive prescription, which holds that "it is morally wrong for the genuine owner to enable a relationship of dependency to be developed and then to cut off the dependent party."[523] I proceed on the assumption that nothing in the law prevents a landowner from asserting his or her own ownership interest against a dependent or any other person who moves onto the land, subject to the court dismissing the eviction application in the intended manner, in favor of an occupier who has since died.[524] The requirement for acquisitive prescription provides that servitudes can be acquired through prescription if the individual making use of the servitude has done so openly

[520] *Klaase and Another v van der Merwe N.O. and Others* 2016 9 BCLR 1187 (CC). It was held that on determining the meaning of "occupier" as defined in section 1(1) of ESTA, the starting point is the Constitution. Sec. 39(2) of the Constitution enjoins courts, "when interpreting legislation . . . [to] promote the spirit, purport, and objects of the Bill of Rights".

[521] Sec. 3 of ESTA amongst other things provides: "(4) For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year or more shall be presumed to have consent unless the contrary is proved. (5) For the purpose of civil proceedings in terms of this Act, a person who has continuously and openly resided on and for a period of one year shall be deemed to have done so with the knowledge of the owner or person in charge." (Emphasis added.) In terms of ESTA, it would appear that the latter category is subject to a process that seeks to ensure not only that the termination of the right of residence is lawful, as is the only requirement of the first category alluded to above, but also that the cumbersome requirements of justice and equitability are ventilated.

[522] The Prescription Act 18 of 1943 and the Prescription Act 68 of 1969 provide that a servitude is acquired by prescription if the acquirer employed or exercised the rights of a holder of a given type of servitude in accordance with the acquisitive prescription requirements. It is worth noting that the Act makes no reference of or extends the prohibition of acquisitive prescription to personal servitudes. In any case, my focus in this debate is on whether the requirements of prescription indicated may be imagined in the acquisition of something more than a claim to remain. See Van der Merwe 1989:533. This idea spawns from *Community of Grootkraal v Botha NO and Others* 2019 2 SA 128 (SCA). The case dealt with impoverished Black farm workers who managed for longer than 200 years, during Apartheid, in harmony with a succession of white landowners, to constitute their community around their use and occupation of a piece of land – against a landowner's desire to evict them. While the legal argument based on prescription was eventually abandoned, the SCA did make a few points that have triggered the consideration of prescription in this regard.

[523] Singer 1988:667.

[524] See sec. 3 & 4 of Act 68 of 1969.

and as if he were allowed to do so.[525] The "as if he were allowed to" has seen the courts add that the occupier/possessor be an adverse user to ensure that a clear intention to hold possession/occupation as if owner is established.[526] The essence of the "adverse user" requirement is that the possessor must use or possess the property without acknowledging the rights of the owner, i.e., a lease or other legal arrangement that recognizes the ownership of another party.[527]

On the side of the owner, the test in acquisitive prescription appears to be one of negligence. Negligence not only in scenarios where the owner should have known of the irregular lengthy occupation of his or her property, but also in cases where the owner, despite being aware and vested with the legal authority to cease the occupancy, decides to do nothing about it.[528] On the side of the possessor/occupier, acquisitive prescription, in the context of servitudes, has commonly referred to the acquisition of a real right through possession of another person's movable or immovable property, or the use of a servitude in respect of immovable property, for a

[525] Sec. 1 of the Prescription Act 68 of 1969. As "if allowed to do so" is synonymous with "as if owner". See *Sapphire Dawn Trading 42 BK v De Klerk and Others* (693/2008) [2009] ZAFSHC 11 (12 February 2009): paras 8-10; *Cillie v Geldenhuys* 2009 2 SA 325 (SCA): paras 6-8 where the threshold is accepted to be similar to the one found in Roman law's concept of civil possession. Civil possession recognises possession where such possession is accompanied by animus domini (mental) and corpus (physical) possession.

[526] See *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 5 SA 222 (C): para 30; *Wood v Baynesfield Board of Administration* 1975 2 SA 692 (N) 702; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C). See Marais 2011 - argues that while not a requirement in either the 1943 or 1969 Acts, the requirement has been interpreted as a supplemental requirement for prescription.

[527] See Sonnekus & Neels 1994:313; Marais 2011. See also *Swanepoel v Crown Mines Ltd* 1954 4 SA 596 (A):604.

[528] *Cillie v Geldenhuys* 2009 2 SA 325 (SCA): para 13 - The defence of knowing or not knowing about the unauthorised use does not hold in the context of acquisitive prescription.

period of 30 years, without force (*nec vi*),[529] openly (*nec clam*),[530] and without the owner's consent (*nec precario*).[531]

For my purpose in this discussion, the *nec precario* requirement is particularly interesting. This is in the context of determining whether a dependent or any other person who moves in with an occupier who remains on land belonging to another after a court has denied the application for eviction for reasons that eviction would not be just and equitable, can obtain some type of claim much greater than that put forward in this thesis through the avenue of prescription.[532] In this context, I believe the two other aforementioned requirements are of a factual nature, such that one is either publicly on land belonging to another without using force to remain in such open occupancy or not.[533] What remains is to prove *nec precario*.

To that end, there are two factors to take into account: the first is whether the possessor's possession is unlawful simply because it is done without the owner's consent, and the second is whether it is unlawful regardless of the owner's consent because of a provision of law that forbids such possession.[534] Prescription cannot benefit the possessor in the latter situation.[535] While possession that is without

[529] This was the position in Sec. 2(1) of the Prescription Act 18 of 1943 which has since been replaced by Sec. 6 of the Prescription Act 68 of 1969. See Marais 2011 describes the requirements under the 1943 Act. Regarding the *nec vi* requirement Marais goes on to say that the fact that the possessor must continuously possess the property for 30 years helps eliminate the acquiring of ownership through forceful possession, as it is extremely improbable that someone will be able to forcefully maintain possession over property for the full 30-year period to which I agree. See Badenhorst *et al*. 2006:165; Carey Miller & Pope 2000:168; Sonnekus & Neels 1994:312-313; Van der Merwe 1989:275-276. See *Wood v Baynesfield Board of Administration* 1975 2 SA 692 (N):697; *Bisschop v Stafford* 1974 3 SA 1 (A):8; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 2 SA 464 (W):468.

[530] *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 2 SA 464 (W):468. The *nec clam* requirement demands that occupation is open even without actual knowledge on the part of the owner, as long as the possession is open for all to see who want to see, including the owner. The *nec clam* requirement entails that possession be “open” and was retained as one of the requirements for prescription in the Prescription Act 68 of 1969.

[531] *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 2 SA 464 (W):468. The *nec precario* condition prohibits a bilateral legal arrangement in which the grantor consents to the grantee exercising possession over the relevant property, with the grantor having the right to revoke this consent at any time. Like the *nec vi* requirement, the nec precario provision was removed from the 1969 Act.

[532] I do not undertake the labour of determining what kind of claim may be acquired, but endeavour to prove possibility. However, the underlying idea is that whatever is greater, obtained by prescription, will be limited in breadth and extent to what was performed in those 30 years and nothing more. It cannot be the acquisition of ownership of occupied land in this circumstance.

[533] See Badenhorst *et al.* 2006:165. Van der Merwe 1989:277. See also Van der Merwe 2007:512 - the possession need only be open vis-à-vis the public, actual knowledge of the possessor’s actions on the part of the owner is not required for purposes of prescription.

[534] *Swanepoel v Crown Mines Ltd* 1954 4 SA 596 (A):604-605.

[535] See Mostert & Pope 2010:181.

permission from the landowner is presumed to be possession *nec precario*.[536] Issue may be raised in the specific context detailed in this thesis over the impact of the court order enabling the continued possession in light of the absence of the owner's consent and the tentative nature of the owner's option to recover the possession. That is, it may be argued that the third considered court order, barring a change in considered circumstances, serves as a legal impediment to the landowner claiming his ownership against the person(s) who are the subject of the application.

There are two ways to present the issue. The first is to look at the court order from the perspective that the landowner cannot fully enforce all of his or her ownership rights in the absence of a change in the circumstances of an occupier. The second, considers the view that the court order enabling the occupiers to remain is an acknowledgement of the landowners' ownership rights; in both scenario's, prescription would be invalid for failing to satisfy the necessary *animus domini*. Although the aforementioned points are worthy of discussion, they are not what I wish to highlight at this time.[537] I wish to highlight the potential position of those unlawful occupants who later move in with an occupant to whom the court order relates and proceed to stay on the land after the occupier has left. These kinds of occupiers cannot be accused of lacking *animus domini*. At least not in the manner described above.[538] This particular kind of occupiers is not excluded from acquiring something much more at a later stage. In a scenario where the occupier stays on for the relevant period of time, for prescription purposes, reasonable apprehension of the intention to occupy as if they are the owner may be implied. Similarly, the owner will be unable to claim that they were unaware of such occupation. In such instance, such occupier acquires title to the land.

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[536] *Campbell v Pietermaritzburg City Council* 1966 2 SA 674 (N):681.

[537] In future research projects, I plan to expand on this point.

[538] As I have indicated elsewhere in this thesis, a court order enabling the principal occupant to remain on another's land does not legally prevent the landowner from asserting his or her rights. The point I now make here should not be interpreted as a capitulation. The door is, without a doubt, always open. See Van der Walt 2015:162-222. South African law does not require bona fides and therefore a mala fide possessor who satisfies the requirements can also acquire a servitude prescriptively. See also Hall 1973 - It is important to remember that prescription is, by definition, a form of original acquisition. This means that the title of the person who acquires a servitude by prescription is unaffected by the instability of any previous tenure arrangement or title. Also see *Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 5 SA 222 (C): para 26; *Minnaar v Rautenbach* 1999 1 All SA 571 (NC) 577; *Barker NO v Chadwick and Others* 1974 1 SA 461 (D):466; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972 2 SA 464 (W):479; *Swanepoel v Crown Mines Ltd* 1954 4 SA 596 (A):606.

The thought of occupiers acquiring something much more than the claim put forward is also inherent in the next example through which I seek to postulate the content of the claim to remain. This example is that of burial rights.

4.3 Burial rights

4.3.1 Introduction

To reiterate, the objective of this chapter is to develop the normative content of the claim to remain and to understand what other rights can emerge independently from that content. This section's purpose is to capitalise on a common fundamental aspect of burial rights and the claim to remain, which involves the interaction of occupier and landowner claims to the same piece of land. The discussion of burial rights in this section has two interrelated purposes: first, to help establish the substance of the claim to remain by examining the possibility that an unlawful occupier can be buried and or bury another person on land belonging to another while in the position of remaining. Second, and related to the first, I look to establish whether the right may arise independently and separate from the claim to remain. That is, if it can last long after the claim to remain has ceased. To do this, I will first provide a comprehensive overview of burial rights in order to establish the backdrop for novel applications. Then, in the context of the claim to remain, I address the two indicated objectives of this chapter.

4.3.2 General overview

It has long been customary amongst Africans to bury deceased family members nearby their living relatives' homes in family graveyards.[539] This practice is cross culturally accepted and believed to be an essential cog of the successive spiritual integration and transcendence between the living and the dead.[540] The burial of a family member in African custom has an indefinite role that extends beyond the

[539] Ngubane 2004:171-177.
[540] Ngubane 2004:171-177.

physical act of internment and into ethereal space.[541] In other words, it extends beyond a plot of land with dimensions of 2 300 mm in length, 900 mm in width, and 2000 mm in depth, and a tag of economic indifference. Between the living and the dead, the land serves as an existential conduit.[542] Traditional cultural practices, such as burial customs, reflect the values and beliefs of generations of people in a community, anchoring the practice in space and time.[543]

When the material conditions that existed at the time the practice was created no longer exist, or at least not in the same way, this raises a challenge. This challenge can be summarized as follows in the context of South Africa. Sol Plaatjie describes the dispossession of land from the South African native as a situation in which the South African native found himself not only without land ownership, but also as an untitled and outlawed occupier who needed permission from white dispossessors, now landowners, to continue living and practicing his/her long-standing practices on what had been his/her own land prior to dispossession.[544]

In the context of practices ancillary to land occupation and use, such as burying deceased family members in familial gravesites, the new white landowners assumed through title the discretion to allow or not to allow occupiers to practice burial rites on the land.[545] This discretionary power meant that the continuation of burial practices was subject to the landowner's consent, which could be withdrawn unilaterally at any given time.[546] As put by Parker and Zaal,[547] the situation was such that no indigenous black person had the right to bury a deceased family member on land that he or she occupied but did not own. As a result, the occupier had no familial ground on which to

[541] Ngubane 2004:171-177. Also see *Nkosi and Another v Buhrmann* 2002 1 SA 372 (SCA) 376: para 6, for example, the appellants stated: “It is our custom and religious belief that when a member of our family passes away, he/she gets only physically separated from us but spiritually that person will always be with us and is capable of sharing a day-to-day life with us though in a different form. It is against this background that a graveyard to us is not only a place to bury our deceased, but a second home for those of us who live in the world of spirits.”

[542] *Nkosi and Another v Buhrmann* 2002 1 SA 372 (SCA) 376.

[543] *Nkosi and Another v Buhrmann* 2002 1 SA 372 (SCA) 376.

[544] Ndebele 2013. See also Bekker *et al*. 2004:203-217 where the point is made that the resultant urbanization and urban cemeteries have not been ideal to the continued practice of traditional African burials (own emphasis).

[545] Parker & Zaal 2016:1-28.

[546] Parker & Zaal 2016:1-28.

[547] Parker & Zaal 2016:1-28.

bury their family member and had to rely on favors from white landowners when implementing the practice of proximate familial burial.[548]

To solve this issue and control this particular relationship between those without land on which they practice burial rites and the landowners, the legislature passed legislation in terms of the ESTA.[549] It is within the prism of this piece of legislation that I seek to engage the outlined question in this section.[550] I proceed under the assumption that, under the circumstances considered in this thesis, an unlawful occupier is nonetheless expected to engage in all activities reasonably associated with occupation.[551] This is attributable to the fact that doing otherwise would prevent them from living in dignity on the land, which is what the legislation that enables remaining on land belonging to another, is intended to avoid.[552]

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[548] Parker & Zaal 2016:1-28.

[549] Sec. 6(2) of ESTA reads "...without prejudice to [he generality of the provisions of sec. 5 and subsec. (1). and balanced with the rights of the owner or person in charge. an occupier shall have the right— (a) to security of tenure: (b) to receive bona fide visitors at reasonable times and for reasonable periods: Provided that — (i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land to safeguard life or property or to prevent the undue disruption of work on the land; and (ii) the occupier shall be liable for any act. omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage;
(c) to receive postal or other communication: (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997; (e) not to be denied or deprived of access to water; and
(f) not to be denied or deprived of access to educational or health services." Sec. 6(4) of ESTA in turn determines that - "any person shall have the right to visit and maintain his or her family graves on land which belongs to another person, subject to any reasonable condition imposed by the owner or person in charge of such land to safeguard life or property or to prevent the undue disruption of work on the land."

[550] See *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC): para 53 where the court offered the interpretive lens through which to view ESTA and other land reform legislation. The court held that "…As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to the context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous." See also *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC); *Daniels v Scribante* 2017 4 SA 341 (CC).

[551] See *Sandvliet Boerdery (Pty) Ltd v Mampies and Another* 2019 3 All SA 709 (SCA).

[552] See also *Daniels*: paras 27-29.

To recap, the purpose is to determine whether in instances where a court has dismissed the eviction application because to evict would not be just and equitable in the circumstances implies that such occupier can perform burial rites on such land. If so, whether the performance of such burial rites during that time does not open the door to the acquisition of burial rights, such that even if the claim to remain expires, the right to bury does not. I now procced to unpack this contemplation.

4.3.3 Burial rights and the claim to remain

According to the *ESTA*, an "occupier" (farm dweller) has the right to bury a deceased relative on the farm if three conditions are satisfied: the person requesting permission to bury a family member must be an occupier;[553] the deceased must have lived on the farm with the occupier prior to his or her death;[554] and there must be a long-standing custom whereby farm dwellers or occupiers have been granted permission to bury deceased family members on the farm.[555]

The aforementioned can be seen as two distinct rights combined. The first is that an occupier has the right to bury a deceased family member who was living with them at the time. The second is the right of an occupier to be buried by family members on land belonging to another on which the occupier was resident on. The following

[553] An occupier is any "person residing on land which belongs to another person", who has since 4 February 1997 had consent of the owner or another right in law to reside on the land, but excluding any person who uses the land for industrial, mining, commercial or commercial farming purposes or any person earning over R5000 a month (s 1(1) read with para 2 of Regulation R1 632 Government Gazette 19587, 18 December 1998). Until the ESTA's amendment in 2001, the definition excluded labour tenants as defined by the Land Reform (Labour Tenants) Act (ESTA s 1(1)(a) deleted by s 6(a) of the Land Affairs General Amendment Act 51 of 2001.

[554] See, for example, *Bührmann v Nkosi & another* 2000 1 SA 1145 (T): paras 49 and 54; *Serole & another v Pienaar* 2000 1 SA 328 (LCC):335B-G - the courts viewed the ESTA's protection of occupiers' religious and cultural rights as eliminating the ability to bury deceased family members on land owned by others prior to the modification to the act that added sec. 6(2) (dA). The Land Affairs General Amendment Act 51 of 5 December 2001 introduced a provision dealing with burial rights, subsec. (dA) to sec. 6(2) ESTA and sec. 6(5), affording occupiers in terms of the Act, the right, "...to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists." Sec. 6(5) subsequently followed with the reading that, "The family members of an occupier contemplated in section 8(4) of the ESTA shall on his or her death have a right to bury that occupier on the land upon which they were resident at the time of death, in accordance with their religion or cultural belief, subject to any reasonable conditions which are not more onerous than those prescribed and that may be imposed by the owner or person in charge." See *Sandvliet Boerdery (Pty) Ltd v Mampies and Another* 2019 3 All SA 709 (SCA).

[555] For a full discussion on burial rights see Van Niekerk 2007; Van der Walt 2002; Bekker *et a*l. 2004; Parker & Zaal 2016.

discussion utilizes these two entry points to consider the position of an unlawful occupier who remains on land belonging to another without a countervailing right to do so in the context of burial rights.

Starting with the right that is given to the occupier to bury a deceased member of his or her family who at the time of that member's death is residing with such occupier, the provision is made subject to the existence of an established practice. The term "established practice" is defined in sec. 1(1) of ESTA to mean;

> "A practice in terms of which the owner or person in charge or his or her predecessor in title routinely gave permission to people residing on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief..."

The *SCA* in *Dlamini and Another v Joosten and Others*,[556] had the opportunity to flesh out this requirement. To that end, the Court held that the correct position is that the practice must exist for "people living on the land" and not peculiar to the particular family in question and or family of the deceased.[557] The approach laid in *Dhlamini* is the burial right is in the character of a personal servitude that the occupier has over the land on which he has a legitimate right of residence at the time of the death of a family member who was living there at the time.[558] The impact of which is, once given to any of the residents on the landowner's property it cannot be unilaterally withdrawn and disallowed to that particular resident.[559]

In order for an "occupier" to enjoy protection under sec. 6(2) (dA) of the ESTA, they must first establish occupancy by way of right. In terms of this requirement, it would appear that the category of unlawful occupiers contemplated by this thesis do not

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[556] *Dlamini And Another v Joosten And Others* 2006 3 SA 342 (SCA): para 19.

[557] *Dlamini And Another v Joosten And Others* 2006 3 SA 342 (SCA): para 15 - The deceased could not be buried in the family burial ground on Bockenhoud because, according to the Act, she had not lived there at the time of her death. The court determined that the two farms in question had different cadastral boundaries. Although land was not defined under the Act, it was decided that it should be understood to mean land that is registered in the owner's name based on the context of its usage. The Dlamini's subjective belief that the three farms belonged to one individual was deemed to be immaterial for the purposes of the applicable legislation.

[558] *Dlamini And Another v Joosten And Others* 2006 3 SA 342 (SCA): para 16.

[559] *Dlamini And Another v Joosten And Others* 2006 3 SA 342 (SCA): para 22.

qualify for the practice of burial rights because of the lack of right to be on the land. The implication of this to the purpose of establishing whether an unlawful occupier who remains on land belonging to another in instances where a court application for their eviction is dismissed because it would not be just and inequitable to evict can bury his or her family member residing with him or her on land belonging to another can be summed up in the following way. Taken together the above requirements mean that absent prior permission to bury leading to establishment of practice, an unlawful occupier who is now without and or has never had any rights to be on farmland belonging to another cannot be expected to exercise burial rites on such land. The first of the two entry points mentioned above ends with this.

On the second entry point, that is, the right of an occupier to be buried by family members on land belonging to another on which the occupier was resident on.

The same however cannot be said for the right afforded to family members of an occupier to bury that occupier on the land upon which they were resident at the time of death. The right to bury that occupier on the land upon which they were resident at the time of death does not make mention of the requirement of an established practice. This right, however, is also by special consideration extended to an "occupier" contemplated in sec. 8(4).[560] The character of the "occupier" envisaged in that particular provision is an occupier resident on land belonging to another for a minimum period of 10 years and has reached the age of 60 years; or is an employee or former employee of the owner or person in charge, and because of ill health, injury or disability is incapable of rendering his services to the owner, i.e., long-term occupiers.[561] Again, the character of the occupant implies consent to occupy, which is not the case in this hypothesis. And so, as it appears, there is no way around for an unlawful occupier to access the right to bury which is attached to the right of residence.

[560] Sec. 6(5) of ESTA.

[561] Sec. 8(4) of the ESTA states that; "… (4) The right of residence of an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and—
(a) has reached the age of 60 years; or (b) is an employee or former employee of the owner or person in charge, and because of ill health, injury or disability is unable to supply labour to the owner or person in charge, may not be terminated unless that occupier has committed a breach contemplated in sec. 10(1)(a), (b) or (e): Provided that for the purposes of this subsec., the mere refusal or failure to provide labour shall not constitute such a breach."

As a result of the foregoing, I accept that an unlawful occupier who remains on another person's farmland when a court has concluded that eviction would not be just and equitable does not have the right to bury a family member there or to be buried there themselves. Despite this, the cases of *Nhlabathi and Others v Fick,*[562] (hereafter *Nhlabathi*) and *Sandvliet Boerdery (Pty) Ltd v Mampies*,[563] (hereafter *Sandvliet*) offer extra concessions that deserve consideration.

For my purposes, what still stands out is the position of a family member who has no right, and/or has never held a right in his or her name, on farmland owned by another, but finds himself/herself there and, as a result, stands to be evicted by a court order under PIE. This would be the case, for instance, if the unlawful occupier moved onto the land of an unsuspecting landowner or lived with the deceased resident due to a prior relationship. I now consider the assertion that an unlawful occupier who remains on land belonging to another in these delimited circumstances could make use of an ESTA entitlement by relying on a long-standing custom involving a member of their family who was legally occupying the property.

In *Nhlabathi,*[564] an application was brought in terms of sec. 6(2) (dA) and sec. 6(5) of ESTA, seeking an order to bury a deceased family member of the applicants who at the time of death no longer resided on the farm.[565] Notwithstanding the eventual determination that the deceased was a “resident” on the land on which the applicants wished to bury him, for my purposes, *Nhlabathi* is still significant for the following considerations.[566] The Land Claims Court(hereafter LCC) in *Nhlabathi* pointed out that, in so far as the statute requires that all occupier rights, including the right to bury, be balanced against the rights of the landowner, there was nothing to substantiate a tipping of the scale against the first applicant's right to bury his late father on the farm, aside from the possibility that the applicant might be evicted from the farm in the near

[562] *Nhlabathi and others v Fick* LCC 42/02 [2003] ZALCC.
[563] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA).
[564] *Nhlabathi and others v Fick* LCC 42/02 [2003] ZALCC - The applicants, a widow and the eldest of the elven children of the late sixty-five-year-old Kiti Elijah Nhlabathi brought this application against the respondent in his capacity as the owner of the farm.
[565] *Nhlabathi and others v Fick* LCC 42/02 [2003] ZALCC - At the commencement of the hearing before *BAM J* and *Gildenhuys J*, the applicants ditched their reliance on sec. 6(5) and proceeded only on sec. 6(2) (dA) of *ESTA*.
[566] *Nhlabathi and others v Fick* LCC 42/02 [2003] ZALCC. The LCC found that, aside from departing to seek medical help, which he never returned from, the deceased was a resident on the farm and, as such, is a resident as defined by ESTA.

future.[567] In responding to the question on the existence of an established practice, the LCC relied on the existence of other burial plots on the ground reserved for farm laborer's to reaffirm that an established practice only had to exist in regard to the land. That is, no specific family or tenant had to buried there to meet the requirements of an established practice.

In *Sandvliet,*[568] when the deceased died, her parents, who did not live on the *Montina* farms, and the respondents, who regarded her as their own daughter, wanted her to be buried with the rest of her family at the *Middel-Plaas* graveyard.[569] This was in keeping with a long-standing custom of burying kin in the same graveyard so that the graves could be easily visited and washed, and so that the deceased may give comfort. [570] Simply put, the issue in *Sandvliet* concerned whether a burial right could be asserted against a landowner with regard to an ancestral graveyard located on land where neither the occupier seeking to bury a family member, nor the deceased had a dwelling on such land to regard it as part of their "residence." The respondents claimed that as a result of their long-term and uninterrupted use of a portion of the appellant's land for religious and/or cultural purposes, they had acquired a limited real right in the form of a private servitude to bury deceased members of their family in accordance with their religion or cultural belief, as an established practice in respect of the land.[571] They asked the LCC to recognize that limited real rights to land may be acquired first through long-term use under these circumstances, secondly through the development of the common law of acquisition of limited real rights in terms of sec. 39(2) of the

[567] *Nhlabathi and others v Fick* LCC 42/02 [2003] ZALCC.

[568] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA): para 2- 8. The appellant, Sandvliet Boerdery (Pty) Ltd, is the owner of various, adjacent parcels of registered land commonly known as Bo-Plaas and Middel-Plaas. The respondents, Mrs. Maria Mampies and Mr Hendrik Mampies, are a retired, married couple. They were close relatives of the subject of the burial site dispute, the late Ms Magdalene de Wee (the deceased), who was the daughter of Mrs. Mampies' biological brother. Mrs. Mampies' maiden family has resided and worked at Onder-Plaas and, the other Montina farms as they were not aware of the farms' boundaries, for generations. They regarded the Montina farms as one unit, as there were no discernible boundaries between them, and Mr Engelbrecht operated them as such. Ownership of the farms passed from Mr Engelbrecht, in 1991, to several successive owners over the years. According to the respondents, the latter change in ownership brought new, strict, and unreasonable rules for the occupiers. They were not allowed to conceive children whilst living on the farms. Many families were forced to sell their livestock. They were prohibited from receiving visitors at their homes. They were also denied access to the Middel-Plaas graveyard. After numerous failed negotiations, the new successive owners launched eviction proceedings in 2015 against thirty families among the occupiers.

[569] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA): para 9.

[570] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA): para 10.

[571] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA).

Constitution, and thirdly through the creation of a special constitutional remedy in terms of sec. 38 of the Constitution.[572]

The LCC found that the respondents had gained a servitude from their usual practice of burying their deceased family members on the land with the landowner's approval, which could not be withdrawn arbitrarily.[573] The landowner, on appeal, argued in the SCA that the respondents could not claim a burial right, which is an incidence of the occupier's right of residence contained in sec. 6(1) of ESTA, because where the occupiers and the deceased resided when she died, and where the respondents wanted to bury her, are separate registered cadastral units of land, of which the appellant owns only one, namely the land with the proposed burial site.[574] The *Dlamini* decision relied on by the landowners was criticised for construing the term "land" narrowly. Focus was placed on the definition of "land" rather than "reside".[575] As a result, the respondents argued that the SCA had to interpret "occupy" in a purposeful manner to reflect a broader concept than the word reside and must be understood to encompass the right to bury.[576]

The primary aim of the SCA judgment was to determine whether the respondents satisfied the requirements for the right to bury set forth in sec. 6(2)(dA).[577] While the first two qualifications are inconsequential for my purposes, the key problem that the SCA had to answer was whether the deceased resided there. To this end, the Court reiterated its interpretation of the *Dlamini's* definition of "land" in sec. 6(2)(dA) on the

[572] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA).

[573] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA). Since the landowners treated both farms as one and permitted the occupants to do the same, the court determined that the boundaries between them were artificial, and this conclusion was unaffected by the ownership shift. The court concluded that the appellant's ownership rights would not be further violated than was already allowed by *ESTA's* sec. 6(4), which permitted visits to the Middel-Plaas cemetery.

[574] *Sandvliet Boerdery (Pty) Ltd v Maria Mampies & another* 2019 3 All SA 709 (SCA): paras 11-12. This argument was put forward on the basis of the court's ruling in *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA). A burial right under sec. 6(2) (dA) was found to be claimable by an occupier against the owner of registered land, the extent of which could be objectively determined only by reference to its cadastral description.

[575] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): para 13.

[576] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA).

[577] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): para 18. Sec. 6(2)(dA)-"(a) that they are occupiers within the meaning of the ESTA; (b) that the deceased resided on the land at the time of her death; and (c) that there was an established practice under which the owner or person in charge or his or her predecessors routinely granted permission to people residing on the land to bury deceased members of their family."

fact that the ESTA governs the interaction between land occupiers and owners.[578] In addition, the Court noted that the burial privilege granted by these provisions is an application of the occupier's right of residence found in sec. 6(1) of the ESTA, which is in the nature of a registrable real right held by the occupier over the land at the death of a family member who at the time of death resided on that land.[579] The challenge is whether a person who regularly engages in enough activities in respect to land to consider it as a component of the land on which they reside.

Without devaluing the specifics of the case, which saw the potential exclusion of persons who, in this instance, were permitted to bury their relatives and create an ancestral burial ground on adjoining land that the current landowner had previously owned.[580] The SCA held that it was unimaginable for the legislature to intend to deprive this small group of vulnerable occupiers of a critical right that was specifically enacted to formally attach the right to bury to an occupier's right to residence and thus strengthen her right to security of tenure.[581] According to ESTA, there is a recognized burial ground, which the respondents are free to visit because it houses the graves of their deceased relatives, therefore the landowner would suffer less in this case than what was at stake for the occupiers.[582]

For my purposes, both the *Sandvleit* and *Nhlabathi* conclusions appear to have implications for an unlawful occupier's prospective entitlement to exercise burial rights on another person's land even though they did not have permission to be there or to do so. Notwithstanding, the specifics of each case, as well as the fulfilment of the requirements of standing and an “established practice” embedded into sec. 6(2) (dA) enquiry, will determine the conclusion. It would appear that those who lack the legal right to be considered “occupiers” in the strict sense, such as those who are still on another person's property after a court has denied an application for eviction, may still not ordinarily find themselves with such rights to be buried on such land. My understanding is that the two cases mentioned above are not precedents for providing

[578] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): paras 20-22.
[579] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA).
[580] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): para 23.
[581] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): para 24.
[582] *Dlamini & others v Joosten & others* 2006 3 SA 342 (SCA): para 24- 30.

persons without land rights, the right to be buried on someone else's property in the circumstances presented in this thesis.[583]

I now move to another example that exemplifies the tentative co-existence of two distinct rights to the same property, namely mineral rights, in order to help develop the normative content of the claim to remain.

4.4 Mineral rights

4.4.1 Introduction

To recap, the objective of this chapter is to develop the normative content of the claim to remain and to understand what other rights, if any, can emerge independently from that content. In pursuit of this objective, in this section, the claim to remain as advanced in this thesis is positioned against mineral rights law. The common thread connecting the claim to remain, and mineral rights law can be summed up as the non-consensual encroachment on the ability to use and enjoy the totality of one's own land ownership rights. Considering instances where the land is the subject of a claim to remain against instances where the land is the subject of mineral rights, I specifically wish to capitalise to the extent possible on the parallel landowner vis-à-vis occupier/mineral right holder position.

Simply put, in order to help establish the substance of the claim to remain, I consider firstly, where comparable, that an unlawful occupier in the considered circumstances may engage in one or more of the broad activities that are envisioned in the exercise of mining rights relative to existing surface rights. In this regard, I do not intend to suggest that a person who occupies property unlawfully and remains to do so is entitled to a mining right. Second, I analyse how mining rights and surface rights are exercised on the same land with the purpose of determining if the manner in which they are exercised may be attributed to the exercise of claim to remain and landowner rights on the same land. More specifically where conflict arises. In order to undertake

[583] See *Hattingh & others v Juta* 2013 3 SA 275 (CC): para 63; *PE Municipality*: para 23. These cases emphasise that eviction legislation tries to fairly balance and reconcile the opposing claims, taking into mind all parties' interests and the precise circumstances that are important in each individual case. The effect of which is not to grant burial rights willy-nilly.

the above stated objectives, I begin this section by providing a broad overview of the development of mineral rights law in South Africa. In this broad overview, I highlight the benefits of using mining rights as an analogy to build the content of the claim to remain. I proceed thereafter to consider the claim to remain in relation to attributable characteristics in mining rights law identified in the overview.

4.4.1.1. General overview

This section's consideration of mineral rights comes after a development in the enactment of the the Mineral and Petroleum Resources Development Act,[584] (hereafter MPRDA*)* that allows for the State to exercise sovereignty over and custody over minerals for the benefit of all South Africans.[585] The MPRDA empowers the State to grant mining rights on private land without the owner's consent.[586] This has the effect of enabling the holder to conduct mining or prospecting operations on the land without the landowner being able to stop them once the permit has been issued.

To this end, the MPRDA appears to adopt a different approach to ownership from common law, which sees ownership as a collective of rights that comprises all conceivable legitimate claims to a piece of land, some of which an owner may assign to third parties who afterwards get a limited actual right in the land.[587] Prior to the MPRDA, the mining rights law regime did indeed mirror the above. Similar to the task at hand, the courts developed the concept of a mineral right (which includes exploration and mining rights) by drawing a parallel to the concept of a *usufruct* servitude.[588] In common law, the landowner had total control over everything relating to the land, both above and below ground, and could freely transfer that sovereignty

[584] Mineral and Petroleum Resources Development Act 28 of 2002. (hereafter MPRDA).

[585] *Sechaba v Kotze and Others* 2007 4 All SA 811 (NC): para 15; *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (hereinafter *AgriSA*-case).

[586] MPRDA: secs 16-21 & secs 22-30.

[587] See Badenhorst *et al.* 2006; Van der Schyff 2006:46-48.

[588] The evolution of the mining laws in South Africa adopted a common law perspective through the usage of servitudes. This is because Roman-Dutch law did not have mining laws. See *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499. In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T):29G-H serves as an example of instances where it is obvious that the court struggled with the definition of mineral rights in the context of South Africa. In this decision, the court found that section 25 of the Constitution did not apply to mineral rights. The high court argued that if sec. 25's architects had wished to particularly protect mineral rights, they would have done so, as is the case in other jurisdictions.

to another if they pleased.[589] Such that the extent of limitation prepondered by the exercise of the mining right was a non-issue in so far as the basic assumption is that the landowner had given his/her assent to this restriction on his ownership rights.[590] In turn, the holder of the mining rights was directed by the consensual agreement governing the relationship of two contracting parties, in addition to the standard duty to utilise those rights in a way that did not unduly interfere with another's use and enjoyment of the property.[591]

What the MPRDA currently provides for is in fact a far leap from the common law.[592] The MPRDA provides for the restriction of a landowner's right to the benefit of another, without the guarantee of the landowner's consent.[593] At this stage, for my purposes it is worth highlighting that the first is that the law underlying the claim to

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[589] See *Hudson v Mann* 1950 4 SA 485 (T):488B E-F. The court decided that minerals remain the property of the landowner as long as they are underground; they only become his property as movables when they are severed. The adage superficies solo credit, which literally means "anything attached to a specific piece of land belongs to the owner of that land," reflects the concept of ownership. See also *Glen v. Glen* 1979 2 SA 1113(T) - "The right of ownership is the most comprehensive real right that a person can have in respect to a thing. The premise is that, with regard to immovable property, a person is free to do as he pleases with and on his property. This apparent unrestricted independence, however, is only partially true. The limitations imposed thereupon by the law serve to restrain an owner's absolute power."

[590] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 2 SA 1 (CC)*:* para 104. See Cronje 2014:20. See Badenhorst *et al*. 2006:324. See Badenhorst & Mostert 2011:1-3. See *Master v African Mines Corporation* 1907 TS 925 - the court considered that the *usufructuary* had the entitlement to mine for minerals in a way that was reasonable and did not change the fundamental character of the land to which the right relates, and that upon termination of the right, the usufructuary was required to pay the dominus the value of the minerals he had taken while keeping any interest that had accrued.

[591] See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA):para 22 - the court held "absent any express or tacit term of the grant, the mineral rights holder is entitled, by virtue of a term implied by law, to conduct open cast mining when it is reasonably necessary in order to remove the minerals, provided that is done in a manner least injurious to the interests of the surface owner". See also Van der Walt 2016:192-222.

[592] In this case, the argument is that even though a more holistic view of property relations and ownership was established, this should not be interpreted as meaning that right holders had greater claims than under the common law system. See sec 5(1) of the MPRDA provides as follows: “A …mining right …granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No 16 of 1967), is a limited real right in respect of the mineral …and the land to which it relates.” Sec. 11 (1) provides that a prospecting right or mining right may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister; Sec. 17(6) A prospecting right is valid for the period specified in the right, which may not exceed five years; See sec. 23(6) - A mining right is valid for a period specified, which period may not exceed 30 years. See also *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa* 2011 3 All SA 610 (SCA).

[593] *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA) - Under the MPRDA, the surface rights landowner cannot stop or veto the grant and exercise of rights to minerals upon compliance by the mineral right holder with the notification and consultation provisions of the MPRDA. See also *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 ZAGPPHC 218 (14 March 2014): para 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC).

remain and the law now underlying mining rights are similar to an attributable extent, on an approach to property ownership that reflects the possibility of limiting private land ownership without the owner's consent. Again, the purpose here is not to enter a thorough study of the developments in mineral rights, but to explore the developments within the mineral right jurisprudence as far as such developments relate to the exercise of mineral rights activities on land on which occupation rights also vest. The intention is to explore the non-consensual nature and effect of a right to mine held over land belonging to another with the hope that it would aide in the content development of a claim by an unlawful occupier who remains on land belonging to another without consent.

To this end, sec. 5(1) of the MPRDA defines prospecting and mining rights as restricted real rights in the minerals and the land to which they pertain.[594] The rights and obligations of owners of prospecting and mining rights and the entitlements that right holders gain are listed by this Act. Sec. 5(3) among other things, states that the holder of a prospecting or mining right is permitted to enter the property to which the right pertains and to engage in any activity related to prospecting or mining, so long as the activity in question does not violate the MPRDA's rules.[595]

For my purposes, two related questions that I seek to traverse for the purposes of further developing the content of the claim to remain turn on the delineation of the obligations vis-à-vis the entitlements envisaged in the sections above. The first relates to a general overview of the entitlements that a mining rights holder may exercise in relation to the practical manifestation of his or her right on land belonging to another. By their very nature, mining activities are considerably extensive than what may be anticipated when occupying someone else's land under the considered circumstances, which are typically housing-related. Nevertheless, I embark on a

[594] Sec. 5(1) of MPRDA. Mining Title Registration Act 16 of 1967.

[595] See sec. 5(3) of MPRDA – "(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting [or] mining, … as the case may be; (b) prospect [or] mine, …, as the case may be, for his or her own account on or under that land for the mineral … for which such right has been granted; (c) remove and dispose of any such mineral found during the course of prospecting [or] mining, …, as the case may be; (d) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond[s]) remove and dispose of any diamond found during the course of mining operations; (e) carry out any other activity incidental to prospecting [or] mining … operations, which activity does not contravene the provisions of this Act."

comparative discussion centered around the *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another case,*[596] (hereafter *Maledu*) case in which the tentative co-existence of mineral rights and ownership interests to the same land was seminally decided. This is to suggest that the position of the mineral right holder is somewhat comparable to the position of the unlawful occupier who endeavors to exercise certain claims on land that is already under regular occupation and/or private ownership.

Second, and related to the first, is the question that also arises from sec. 5(3) of MPRDA that establishes a prospecting and mining right holder's legal right to access the land to which the right relates. The issue at hand is whether, as stated in the MPRDA, the right to enter immediately grants the holder access across an unburdened section of land to ease passage to the prospecting or mining site, or if such access must be separately negotiated and compensated. This entitlement is discussed differently from the other entitlements because of its potential to find a distinct and independent right for the mineral rights. For the purposes of this discussion, I do not wish to enter into an argument over which viewpoint constitutes the accurate interpretation of the MPRDA, but rather to identify the contemplation as being due to the content of the claim to remain. To this end, I make use of the *Joubert v Maranda Mining Company (Pty) Ltd*,[597] (hereafter *Joubert*) to contextualise and consider the impact of this contemplation on the content of the claim to remain.

[596] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC) - the facts follow the first applicant, *Ms. Grace Maledu*, together with 38 other applicants, all members of the *Lesetlheng* village community. *Ms. Grace Maledu* together with the Lesetlheng village claimed to be owners of the farm, occupying, and conducting farming operations thereupon. Reflecting this state of occupancy, the farm was informally sub-divided into thirteen portions or plots which were allocated to 13 families. Exercising exclusive control, the families erected houses and shacks on the farm for their occupation or that of their employees, erecting stock kraals and pig pens as part of the ongoing farming operations.

[597] *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA).

4.4.2 The claim to remain and mineral rights

Maledu

In *Maledu,*[598] the respondents' (mining right holder) rights to mine for platinum group metals and associated minerals on the farm, granted to them under the MPRDA were at odds with the applicants' interests.[599] The applicants (surface right holders) contended that the inevitable consequence was such that peaceful and undisturbed possession and enjoyment of the farm was impossible because of the planned physical expression of mining rights on land under occupation.[600] In order to get out of the uncomfortable situation that had arisen as a result of the respondents' mining operations, the applicants obtained a spoliation order against the respondents in 2015.[601]

Shortly after the applicants were successful in getting a spoliation order, the respondents went to the High Court.[602] The respondents asked the High Court to issue an order evicting the applicants and anybody else whose right to occupy derives from theirs, together with an interdict barring the applicants from returning to the farm.[603] The High Court was confident that the respondents had followed all procedural requirements when applying for a prospecting right and a mining right in respect to the farm as well as when attempting to exploit those rights.[604] The applicants sought leave

[598] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 10-15.

[599] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 6-8. Owning to the racially discriminatory laws of the past, the applicants claimed that the contested ownership of the farm arose as a result of a legal hurdle barring the transfer and registration of title into the names of the applicants as purchasers and Black landowners. Consequently, the transfer of ownership of the farm was passed in title to the Minister who held it in trust for the entire community of which the Lesetlheng community is a part, leaving the issue of land ownership contested. However, for the purposes of the judgement the ownership wrangle was considered inconsequential and to this end, the Court took it as common cause that applicants had a right to the land.

[600] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 10-15.

[601] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[602] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[603] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[604] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 20-24 - "In support of its approach in this regard the Court relied on sec. 2 of IPILRA, to find that this provision does not contemplate that each person who is a holder of informal rights to land should be consulted. It found that section 2(4) makes plain that when land is held on a communal basis – as was the case with the farm – it suffices that a decision was taken by a majority of the affected persons. amongst others, on the following considerations: (a) it accepted the respondents' say-so that

to appeal in the High Court and in the SCA with no success, leading up to the application coming before CC.[605]

According to the CC, a mining right grants the holder certain restricted real rights with regard to the mineral and land to which it relates.[606] It enables the owner of a mining right to enter the property to which the right relates with his or her employees, bring any machinery or equipment onto the property, and build, construct, or lay down any surface or underground infrastructure that may be necessary for purposes including, but not limited to, the mining, removal, and disposal of any mineral to which the right relates that is discovered during mining.[607] This invariably triggers the *civiliter modo* requirement, which requires both the landowner and the mining right holder to exercise their respective rights in tandem to the extent that it is reasonably possible.[608] In the case of mineral rights however, this requirement is more nuanced and unique.[609]

To explain this, the CC quoting Malan J in *Hudson v Mann,*[610] (hereafter *Hudson*) had this to say;

> "I have been referred to a number of decisions from which the rights of the holder of mineral rights appear well defined. Such a holder (and the holder of a notarial mineral lease stands on the same footing) is entitled to go upon the property, search for minerals and if he finds any to remove them. During his operations he is entitled to exercise all such subsidiary or ancillary rights, without which he will not be able effectively to execute his prospecting and/or mining operations. When the owners can enjoy their respective rights without any clashing of interests, no dispute is, as a rule, likely to arise. The difficulty arises, as has happened in the present

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all members of the Bakgatla-Ba-Kgafela community, inclusive of the applicants, were consulted both before and after the grant of the mining right; (b) that the community resolution taken at the *kgotha kgothe* of 28 June 2008 to conclude a surface lease agreement with IBMR supported the respondents' assertion that they had consulted with the affected parties; (c) that agreement had been reached with the affected parties to relocate them to alternative land that had been identified; (d) that the respondents had engaged Managing Transformation Solutions (Pty) Limited as project managers to consult, negotiate, plan and implement the relocation of the affected parties."

[605] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 25.

[606] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[607] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[608] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[609] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC).

[610] *Hudson v Mann* 1950 4 SA 485 (T):488B-H.

> case, when the respective claims enter competition and there is no room for the exercise of the rights of both parties simultaneously..."

The claim to remain naturally presumes the exercise of all such subsidiary or ancillary rights, without which the occupier will not be able to live a meaningful life on such land. The order allowing an unlawful occupier to remain on another's land, as well as the just and equitable imperative underlying it, also serve as a conduit for remaining in optimal psychological, spiritual, and cultural health and with human dignity.[611] It is a conduit for an escape from the fringes of the human condition, needing, in addition to the right to be heard and the right to enjoy that dignity that ordinarily accrues to regular occupation.

However, it does not end there. In *Hudson*, Malan J continues,

> "…the principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict, the use of the surface rights must be subordinated to mineral exploration. The solution of a dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz., whether the holder of the mineral rights acts bona fide and reasonably while exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time, cannot derogate from the rights of the holder of the mineral rights."[612]

[611] See *Mathale v Linda and Another* 2016 2 SA 461 (CC); *Machele and Others v Mailula and Others* 2010 2 SA 257 (CC).

[612] *Hudson v Mann* 1950 4 SA 485 (T):488B-H in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 59.

Hudson was cited with approval in *Finbro Furnishings (Pty) Ltd v Registrar of Deeds, Bloemfontein,*[613] in which the following was stated:

> "[T]he tendency of our law [is] to reconcile, as far as possible, the competing claims of the mineral lease holder and the surface owner. Although our law tries to strike such a balance a situation may well arise in which the conflict of rights is insoluble."

The situation under consideration here is one in which the unlawful occupier's exercise of the claim to remain encroaches on a combination of landownership rights. Does this suggest that, according to Malan J's reasoning in *Hudson*, the ownership right can be subordinated to that of the unlawful occupier in the case of remaining? This is to consider that the unlawful occupier who remains on another's land without a countervailing right to do so acquires more than just a claim to be heard and to exercise the privileges that typically accompany regular occupation. Could it be that the unlawful occupier also acquires the liberty to subordinate the landowner's rights if both parties cannot utilize a common entitlement at the same time? To what extent one may ask?

In *Maledu*, the *amici* argued that even though the exercise of a mining right does not constitute expropriation in the traditional sense of the word, its practical effect is equivalent to expropriation in that certain incidents of their ownership or occupation rights are negatively impacted.[614] The CC ruled that a mining right's invasive nature renders it inconceivable to dispute that a holder will infringe on the rights of the owner of the land to which the mining right pertains.[615] The more invasive the mining operations are, the greater the extent of subtraction from a landowner's dominium.[616]

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[613] *Finbro Furnishings (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 4 All SA 388 (AD):415. See also *Trojan Exploration Company (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (SCA):126A-E.

[614] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 71-72.

[615] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 98-102.

[616] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 102.

Nevertheless, it cannot be, because of the envisaged conflict that the occupiers are deprived of their informal land rights and are therefore liable to eviction.[617] The existence and validity of the respondents' mining rights is not a contra indication of an unlawful occupation of the same land. The mere presence of a mineral right does not in and of itself constitute an end of the rights of any other occupant of the contested land.[618]

According to the common law, the landowner could not use the property in a way that would conflict with the use of the holder of the mineral rights, and if the landowner did, the holder of the mining rights could enjoin the use or intended use of the land.[619] But the development as encapsulated and envisaged in the interpretation of sec. 54 of the MPRDA, plainly allows for land to which a mining right relates to continue to be lawfully occupied despite the existence of such a mining right.[620] Sec. 54 of MPRDA provides for compensation(expropriation when all else fails) to be paid by the mineral rights holder to remedy the infringement of the surface rights holder in instances where the exercise of both interests cannot be pursued without extensive detriment to the surface holders unburdened extent of land.[621]

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[617] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 106-109.

[618] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 106.

[619] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 75.

[620] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 110.

[621] Ibid. See Sec. 54 of the MPRDA sets out: "The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question – (a) refuses to allow such holder to enter the land; (b) places unreasonable demands in return for access to the land; or (c) cannot be found in order to apply for access. (2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1) – (a) Call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit; (b) Inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act; (c) Set out the provisions of this Act which such owner or occupier is contravening; and (d) Inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions. (3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer any loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage. (4) If the parties failed to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act 42 of 1965), or by a competent court." See *Maledu and*

Maledu is significant in the context of the claim to remain for the consideration that one claim does not always have to give way to another where there is a conflict.[622] In order to achieve the MPRDA suggests that where reconciliation is not possible the landowner (surface rights) effectively has a second chance to interact with the parties involved and to request compensation(expropriation).[623]

The claim to remain cannot be coupled with the compensation consideration suggested above. This is because, taking compensation into account negates the positive obligation that separates the third type of court order—which gives rise to the type of remaining under consideration—from the type of remaining envisioned in the second type of court orders.[624] To what extent, though, can one reasonably anticipate that the landowner will repudiate another party's established claim to the same land? The idea that the landowner could limit access to the encumbered piece of the property via the portion of the property that is still in their control, for instance, is intriguing.

Joubert

In *Joubert v Maranda Mining Company (Pty) Ltd*,[625] (hereafter *Joubert*), the dispute between the surface right holder (appellants) and the mining right holder (respondents) concerned the construction of a new access road over the property of surface rights holder to the mining area.[626] The matter was sent to the SCA on appeal after the court a quo decided that the mining right holder had established its rights to enter the land because the validity of the mining permit had not been disputed. [627]

Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 1 BCLR 53 (CC): para 38.

[622] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 1 BCLR 53 (CC): para 46. See in this regard *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 ZAGPPHC 218 (14 March 2014): para 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); Gumbi 2012; Badenhorst & Olivier 2011; Humby 2012; Van der Schyff 2016: para 12.5.2.

[623] Van der Schyff 2016: para 12.5.2.

[624] See discussion in chapter 5 on the implications of the claim to remain on property rights.

[625] *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA).

[626] For a full discussion of the Joubert case see Van der Schyff 2019. For full facts of the case see *Joubert* at para 2-10.

[627] See *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA): para 12. The SCA set down the relevant scheme of the Act as one which is "..apparent from s 27(5)(b) that, once an application for a mining permit is accepted by the regional manager, the latter must notify the applicant for the permit to submit an environmental management plan and to consult with the owner of the land

Van der Schyff places the issue in *Joubert* in its proper context, which, in my opinion, contributes to a better understanding of the subtleties of the law. I cannot do better than to begin my consideration of the SCA's decision with this contextualization.[628] In *Joubert*, Van der Schyff explains that the court was given the opportunity to decide whether the mining right included the right of access over another's land or whether this was a right that needed to be established separately from the mining right since the MPRDA is silent on the subject.[629]

Prior to the new scheme coming into place, it was implied that a landowner who sold their mineral rights had also granted all ancillary rights, including the right to access the designated prospecting or mining area through the property of such landowner.[630] The designated area to which the mining right relates may be entered in order to conduct authorised extractive activities, and only this area may have minerals extracted for disposal from it.[631] This is still undisputed.[632] The same presumption, however, could not be applied to a landowner who, under the new system, did not at the minimum have the authority to decide whether mining could take place on their land because this authority now vested in a third party, namely the government.

To use the example of a claim to remain, it is undeniable that the necessity for access is justified in this instance when a specific occupation site that is the focus of a claim to remain does not border a public road. Whether the claim to remain necessarily involves the claim to access is the key question for my purposes. More than that, it is also ascertain whether the landowner whose land is subject to a claim to remain must

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or occupier or any other affected parties, and submit the results of this consultation to him within 30 days. This envisages consultation after the lodging of an application for and before the grant of a mining permit. Furthermore, in terms of s 5(4)(c), once the permit is granted no mining activities may be commenced by the permit holder unless it has notified and consulted with the owner or occupier of the land in question. In *Meepo v Kotze & Others* 2008 1 SA 104 (NC):114D-E, the view was expressed that in order to prevent any major infringements on the landowner's property rights, the legislation made provisions for necessary dialogue between a landowner and the holder of or application for a permit. Consultation is the means whereby a landowner is apprised of the impact that prospecting (or, I would add, mining) activities may have on his land. I am in respectful agreement in this regard with this view, even though that case was concerned with access in relation to a prospecting right.

628 Van der Schyff 2009.
629 Van der Schyff 2009.
630 Van der Walt 2016:341.
631 Van der Walt 2016b:341.
632 See *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA).

allow access over the entirety of his or her property because a portion of it is subject to court enabled occupation. Is it practical and reasonable to expect that such access over the unburdened extent must be established separately from the claim to remain?

The SCA found that, in fact, access to the mining area itself was all that was asked. The SCA rejected the appellants' claim that the holder of the mineral rights had effectively asked for access to the entire parcel of land containing the access road.[633] Based on the court's order, other parts of the landowner's property that do not bear the burden of a counter claim do, in reality, share the obligation of giving access to and entry over, to the benefit of the other party.

To this end, it is incomprehensible that a claim to access is not inherent in the claim to remain. Any argument to the contrary would not only betray the practicality of occupation. This issue has already been placed within the framework of constitutional responsibilities to protect the security of non-property constitutional rights where the enjoyment of those rights depends on access to land in *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others*.[634]

The fact that no court has attempted to analyse how this regime-changing development will affect how holders of prospecting or mining rights will approach their rights and the additional burden this development places on landowners has garnered criticism.[635] For my purposes, this objection adds to the growing list of criticisms, including this thesis, that courts are reluctant to develop the content of property rights.

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[633] *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA): paras 11-15. In determining whether the court a quo was correct in finding that the mining right holder had established a clear right to access. The court concluded that the respondent was also given the right to build a new road to the mineral rights site when the permit was awarded and the environmental management plan was approved by citing sec. 27(7)(a), which grants holders of mining permits the right to enter the land to which such permit applies.

[634] See *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape, and Others* (Legal Resources Centre as Amicus Curiae) 2004 4 SA 444 (C):448-451.

[635] Van der Schyff 2019 claims that this is a result of the way cases are brought before the courts, which results in the courts not considering the property right implications of the interpretation of the statute's provision granting a right holder the right to access over the property of the landowner whose land is subject to the prospecting or mining right in order to allow the right holder to enter a prospecting or mining site. The unwillingness to address the obvious property rights ramifications of one other interpretation, which considers the viability of the right being imposed on potential access routes over other properties, is also contemplated here.

4.5 Conclusion

As can be seen from the preceding discussion, the claim to remain arises as an implicit outcome of laws aimed at, among other things, transforming the South African property law system by including the landless majority. Legislation to this effect appears to be moving at the same speed as the judiciary's innovative adjudication stride. As a result, attempts are made to assess the breadth of new claims that have emerged because of changing societal demands for land to supplement a lagging statutory structure. The claim to remain outlined in this thesis is an example of such emerging claims. In this chapter, the normative content of an unlawful occupier's claim to remain on someone else's land after a court application for their eviction has been denied because eviction would be unfair and inequitable, is discussed. As envisioned in this chapter, the claim incorporates, without a perfect match, components deriving from a litany of examples found in the common law and statutory law that espouse the tentative interaction of occupier and proprietor interests in the same land. I do not assert that the content developed in this chapter and the examples that were used to construct it cover the totality of the claim. Instead, I see this chapter and the thesis as the start of a project that will go on long after this contribution. Within this project, the concepts presented in this chapter will be challenged and expanded upon to give a more complete picture of the identified claim.

As stated in the chapter's introduction, this chapter is aimed at developing the normative content of the claim to remain as well as an understanding of what other rights might emerge because of exercising the claim to remain. In the next chapter, the legal ramifications of an occupier's extended presence in the context described circumstances against the landowner’s wishes will be considered.

CHAPTER 5
THE CLAIM TO REMAIN AND THE RIGHT NOT TO BE ARBITRARILY DEPRIVED OF PROPERTY

5.1 Introduction

The new constitutional arrangement heralded new rights and liberties that would influence the interaction between occupiers of land and the owners of such land.[636] The introduction of such rights and liberties commandeered the enactment of various pieces of legislation putting into effect rules and regulations to guide the interrelation of occupiers and the title holders of the land.[637] It is through the rules and regulations guiding the interrelation of occupier and title holder interests that we come to see an unlawful occupier continue to occupy someone else's land albeit without a countervailing right to do so.[638] The uniqueness of this result lies in the fact that the situation deviates from a typical relationship between an occupier and landowner on the same parcel of land. The deviation arises from the absence of a contract or other arrangement that would regularize the occupancy and place it directly under the influence of the owner's entitlement to do as he/she wills with the object of his ownership. Additionally, it differs from the typical illegal occupation of someone else's land. This continued occupation is completely legitimate. It is a circumstance that carries with it the authority of a court of law.

In the previous chapter I examine certain operational aspects of the deviation to determine whether the position reflected therein might fit into one of the established categories of claims that capture the tentative co-existence of occupier and landowner interest to the same land. The outcome shows that the claim to remain does not quite fall into the predetermined categories that have been explored.[639] However, the claim to remain shares some characteristics with the recognised categories on the way to its own unique destiny.[640] To the extent that I, in the previous chapter, explore the

[636] Liebenberg 2010:273, 311-312; Van der Walt 2011:521; Pienaar 2014:770-771.
[637] Pienaar 2014:770-771. See also discussion in chapter 2 above.
[638] See discussion in chapter 2 and 3 above.
[639] See discussion in chapter 4 above.
[640] See discussion in chapter 4 above.

normative content of the claim using the recognized categories of claims against landowners as a guide, this chapter is no different, to the extent described below.

In this chapter, I continue on the same pathway of developing the content of the claim to remain on land belonging to another despite not having a countervailing right to do so. I examine the impact on the landowner's ownership right of a claim that aims to maintain an otherwise irregular occupation that lacks a reciprocal legal, economic, and, some could argue, moral, undertaking between the occupier and the landowner.[641] Simply put, I contemplate or ask what to make of the impact on the landowner's ownership right of the court's decision not to evict on the grounds of justice and equity. I undertake this work in this chapter because the courts have not done so in the cases where an order to remain is made.

I do this with the view that the court is unwilling to define the position of an unlawful occupier who continues to occupy someone else's property under the aforementioned circumstances nor the breadth of the sec. 25 right in such circumstances.[642]

In Chapter 1, I suggest that this unwillingness is exacerbated, among other things, by the conflicting interests that took shape during the Constitution's drafting, resulting in a document that presents more than one plausible way to read it. Much more than this, the broader focus remains to highlight the fact that the opportunity to influence and control the discursive and non-discursive interpretive narrative is available to everyone, but those without property (outsiders) are unable to take advantage of this opportunity. This lack of opportunity constrains agency within the disruptive space wherein property relations are redefined and reimagined.

In section 5.2 of this chapter, I investigate the possibility of the court's engagement with the claim highlighted in the thesis being hampered by the sec. 25 constitutional framework. In section 5.3, I undertake the exercise contemplated by sec. 25 to consider the claim to remain in the context of the right not to be arbitrarily deprived of

[641] Badenhorst *et al.* 2006:91.

[642] I contend that the court has been unwilling to identify and define the scope of the sec. 25 right when an unlawful occupier continues to occupy someone else's property (see Chapter 3), the discussion in this chapter references instances outside of the claim to remain where the sec. 25 right has been described and only to the extent that such other instances are relevant/ attributable to the claim as characterized in the chapters above.

land.[643] The assessment will simultaneously consider the potential for additional, distinct instances of expropriation and/or deprivation of another's property that may arise from one or more adverse uses of another person's land during the subsistence of the claim. Throughout, I continue to highlight the court's hesitation, the discursive and non-discursive limitations imposed by the sec. 25 framework with reference to jurisprudence that has developed around the sec. 25 right.

5.2 Politics of the sec. 25 right

The claim to remain arises from the considered position of those who continue to occupy someone else's land without having a competing right to do so. In Chapter 1, I set out as an analytical background to this thesis, how the structure of the legislation may be an impediment to an interpretation that aims to effectuate tenure reform.[644] In particular, I locate the area of this impediment as arising from the tension between conflicting interests that stood at the pivot of South Africa's historic Constitution making discussions.[645] In this section, I briefly consider this tension but this time, in relation to the sec. 25 right to property. In that respect, I am careful not to repeat that which has been detailed in Chapter 1 but to set out the extra-legal context through which to read the discussion in this chapter.[646]

In my view, the tension between the conflicting interests in particular to sec. 25 can be summed up as follows: sec. 25 (and its predecessor, sec. 28 of the Interim Constitution) represents a political settlement. An attempt at reconciling the rights and interests of the largely white minority who were in possession of the land at the time the Constitution came into effect and the largely Black majority who did not have land at the time and sought to acquire it.[647]

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[643] Van der Walt 2004:870.
[644] Refer to section 1.3.2.
[645] See Ebrahim & Miller 2010:118; Spitz & Chaskalson 2000 Ebrahim 1998. See Klug 2000:124–136.
[646] Refer to section 1.3.2.
[647] For a full discussion on the history of the political constitutional making process see Chaskalson 1995:224. See also Chaskalson 1994. See Pienaar 2014:167. The assertion that sec. 25 calls for a "clearly more reform-centred and comprehensive land reform approach" than its predecessor, in my opinion, does nothing more than concede the existence of a rival counter approach, against which ground has been made up. See also Zimmerman 2005:380-385. See sec. 28 of the Interim Constitution Act 200 of 1993 entitled “Property”, provided as follows: “(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such

This is not to suggest that the protection of private property rights solely applies to rights acquired during the Apartheid era. It also applies to property rights (ownership) acquired since the adoption of the Constitution. This includes restitution claims and redistribution initiatives. Sec. 25 reflects this by providing some protection to current property owners by prohibiting arbitrary property deprivation while also advancing equitable access to land and a framework to pursue land reform.[648] According to the numerical mix of interests in sec. 25, the six provisions that address land reform may appear to reflect a much more reform-oriented approach to property rights when compared to the three that safeguard the default (overwhelmingly white) landholding benefit.[649] More significantly, sec. 25 like most socio-economic centred rights is horizontally applicable.[650]

Naturally, it is crucial to highlight the politics of sec. 25 are not only a matter between black vs. white interests to land. Other identity categories such as, sex, age, and gender ought to be considered. While it might have been reasonable to consider Black people to represent the interests of those without land and to organise agency in that vein under apartheid, today, that may not necessarily still be apt. The extension of land ownership and land rights to the hitherto excluded groups cannot be equated (conveniently) to reform and the successful enchantment of property relations. This

rights; (2) no deprivation of any rights in property shall be permitted otherwise than in accordance with a law; (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

[648] Interim Constitution Act 200 of 1993:sec 28. In order to resolve the negotiation impasse and advance the successful transition from the old regime to the constitutional democracy, the African National Congress reneged on their initial draft land and property clauses that had focused on equitable redistribution of land and contemplated the use of expropriation to service land reform in order to address poverty and landlessness. Sec. 25(1) of the Constitution prohibits arbitrary deprivation of property. Sec. 25(2) provides that property may be expropriated only in terms of a law of general application "for a public purpose or in the public interest" and subject to compensation; sec. 25(4) specifies that "the public interest" includes "the nation's commitment to land reform"; and sec. 25(2) – (9) sets out the parameters of expropriation and land restitution.

[649] See also Klug 2018:34. Since neither the government nor the courts, nor the legislature, have used this section for political ends thus far, Klug contends that it is time to put it to use. It suffices to say that, given the property clause's specific reference to section 36, its inclusion may indicate that the property clause embodies the social function of property and serves as a reminder that property rights are not absolute and that they are just as subject to the limitations clause as other rights, if not more so.

[650] See sec. 8 of the Constitution, 1996. See Chirwa 2006; Cheadle 2005. See also *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

manipulation of the participatory space will further fragment the voice of those without land. The interests of persons without land will continue to be neglected and limited in discussions of property rights and perhaps this is more detrimental than any other constraint outlined here.

Nevertheless, Wilson,[651] explicates the dynamics introduced by the current constitutional dispensation. He explains that at the advent of the current constitutional dispensation, two defensive rights, fought a war of attrition.[652] These were sec. 25(1),[653] and sec 26(3),[654] of the Constitution. These two provisions, as well as the supporting legislation passed to give effect to the latter, have prompted fierce legal and ideological debates in South Africa about land ownership and use.[655] Where there was once certainty about who would win a legal dispute over land control and under what terms, a new framework was developed virtually overnight. This framework sets the value-based prerequisites of non-arbitrariness, justice and equity.[656] In other words, the premise that an owner cannot be denied(arbitrarily) use and enjoyment of his property, and that an occupier cannot be evicted (unjustly) from it, is mediated by expressions embodying values whose content is not static and variable, at least on the surface. The above assertion can also be linked to that of Wilson and Dugard who cite the uncertainty surrounding the choice of equality being pursued as a plausible reason the court could be reluctant to examine the conflict between private ownership and rights of unlawful occupation for instance.[657]

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[651] Wilson 2009.

[652] Wilson 2009.

[653] Sec. 25(1) of the Constitution, which states that: “No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property”.

[654] Sec. 26(3) of the Constitution which states that: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

[655] Wilson 2009. See Woolman 2013. The point here is that the Constitution sells itself short by underdetermining the nature and extent of the transformation required. The Constitution, in this case, does not unambiguously link the demand for transformation with limiting or redistributing property rights or leaving them undisturbed. It leaves the space open for further contestation and domestication.

[656] Woolman 2013.

[657] See Wilson & Dugard 2011; See Klare 1998:150; Albertyn 2007 “substantive equality”, transcends an "inclusive" trajectory (also known as "inclusive equality") that "would correspond with a liberal idea of inclusion into the status quo." Inclusive equality is on the one hand described as an "affirmative" reform strategy with the goal of redressing "inequitable outcomes of social arrangements without upsetting the underlying framework that creates them." On the other hand, substantive equality calls for an obligation to change "the power relations that support the status quo" and to eliminating systemic inequities.

This ambiguity over the type of equality that should be pursued is also related to the conceptual ambiguity in our constitutional jurisprudence on the definition of property and the expectations of the property clause. As a result, a wide-open gates posture is assumed, which would safeguard under section 25, any claim that can be slightly connected to property. In general, it has a dual impact. The focus of the property clause is relegated to the duty of managing challenges, which are generally directed against public interest informed regulation. In this position, the court either glosses over the constitutional protections afforded to the entitlement or treats the right to property as evident. The courts are not given any room in this regard to contribute to the long-term development of the property clause's content and direction.

The Constitution's provision requiring land reform and equitable redress for private parties indicates that the Constitution's authors came to the inevitable conclusion that the State might not be able to address the engineered disequilibrium very effectively without the Constitution's land reform provision applying to private holdings. This is because, although the State had been the perpetrator of the injustice, the benefits thereof had ultimately devolved into the private sphere. I offer three passages that reflect on this point.

The first, from Mamdani,[658] who makes this point clear when he discusses the post-apartheid process of reconciliation and recalibration, as follows:

> “Where the focus is on perpetrators, victims are necessarily defined as the minority of political activists; for the victimhood of the majority to be recognized, the focus has to shift from perpetrators to beneficiaries. The difference is this: whereas the focus on perpetrators fuels the demand for justice as criminal justice, that on beneficiaries would shift focus to a notion of justice as social justice. A focus on power that links power to privilege links perpetrator to beneficiary, racialized power to racialized privilege, and puts at centre-stage the relationship between beneficiary and victim as the majority. To recognize this difference is, I think, key to thinking through how to make the reconciliation durable."

[658] Mamdani 1998.

The second, Froneman J in *Shoprite Checkers*:[659]

> "the pre-constitutional conception of property … entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what Indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines. That history of division explains the concerns both the previously advantaged and disadvantaged still have. The former fears that they will lose what they have; the latter that they will not receive what is justly theirs." [660]

The third, Pretorius AJ in the *Baron* case,[661] reflects on the opportunities lost by adhering to a precise classification of a horizontal or vertical application of the Bill of Rights and to highlight that;

> "a strict classification is likely to leave unattended the question whether within the relevant constitutional and statutory context a greater "give" is required from certain parties."[662]

While the primary objective of this chapter is to ascertain the impact on the landowner's ownership right of a claim that aims to maintain an otherwise irregular occupation, the objective is also, in part, to consider already at this stage, the political overtures that pervade the interpretation of the sec. 25 right.[663] The consideration of jurisprudential and academic argument in this chapter serves in achieving the primary objective in part, but to the degree that it goes further than that, it serves to draw attention to a contested terrain. In this space, the debate is on how far the State should be allowed to intervene in private affairs. This discussion is only a small part of a broader one that tries to investigate the underlying barriers that contribute to the courts'

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[659] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC).
[660] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC): para 34.
[661] *Baron and Others v Claytile (Pty) Limited and Another* 2017 10 BCLR 1225 (CC).
[662] *Baron and Others v Claytile (Pty) Limited and Another* 2017 10 BCLR 1225 (CC).
[663] See Chapter 6 below. Where these overtures are discussed in relation to the way forward regards a much more lasting solution to the recurring security tenure crises.

reluctance to engage the standoff and to develop the content of a claim that seeks to protect nonright interests.

5.3 Sec. 25 and the claim to remain

5.3.1 Introduction

The establishment of a climate that would let the process to repair, rectify, and redress the harm caused by the pre-constitutional state proceed, is a crucial tenet of the South African Constitution. The Constitution places limitations on private ownership, enforcing a balance between the interests of those who own property and those who do not, while considering the history of dispossession, in part as a response to this injury.[664] That is to say, notwithstanding its perceived fault lines, sec. 25 asserts the necessity to not only protect existing rights to property but also to promote the acquisition of property rights by those who do not already have them in the wake of a disempowering past.[665]

To fulfil the requirement, legislation has been promulgated. This law, among other things, provides for substantive procedures that consider the circumstances of an unauthorised occupant and the landowner in a just and equitable manner. The law considers the realities of an unlawful occupier and the landowner, specifically with regard to each party's sensitivity to the granting or denial of the eviction application.[666] The legislation provides a discretion to evict or not when evaluating the circumstances. When the discretion is exercised and the decision is reached not to evict, the unlawful occupier remains on the property despite the fact that there is no agreement between them and the landowner.[667]

This substantive outcome above, I contend poses a restriction on the landowner's ability to use and enjoy the portion of his property that the occupier is still on. On that point, in this section, I consider the effect that the envisaged legislative discretion has

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[664] See section 5.2.

[665] 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): para 49 and 62.

[666] Refer to section 2.3.2.

[667] *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 49 and 62.

on the landowner's fundamental right to property. I undertake this consideration via the lens of court judgments that have engaged with the framework provided for in sec. 25 of the Constitution.[668] I start by setting out the framework below.

5.3.2 Sec. 25 requirements

Sec. 25 (1) of the Constitution provides that: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."[669] However, it does not end there. Sec. 25 goes on to demand that reasonable legislative and other steps be made to ensure that the right to property is gradually realized.[670] The importance of enabling residents to acquire fair access to land is highlighted, with priority given to persons or communities whose land tenure is legally insecure due to previous racially discriminatory legislation or practices.[671] Particularly, reference is made to the need to enable citizens to gain access to land on an equitable basis with priority being extended to persons or communities whose tenure of land is legally insecure because of past racially discriminatory laws or practices.[672] In this context, the sec. 25 framework provides for two seemingly counteractive duties.

The obligation for the State to take positive steps towards providing access to land for those that do not have land, in part due to the discriminatory past, is undoubtedly envisaged. The obligation to secure the land tenure and property of a present-day landowner, on whose land, in this thesis, the threat of, and or, the actual physical unlawful occupation eventuates, is also envisaged. The framework also outlines how to reasonably reconcile these two obligations that appear to be at odds with one

[668] This does not obscure the contention that relatively few judgements thoroughly engage the framework.
[669] Constitution.
[670] 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."
[671] Sec. 25 of the Constitution.
[672] Ibid.

another. The extent to which the need to make amends for the past interferes with the duty to protect the tenure of the current landowner is measured and harmonized into two constructs.

Two constructs — deprivation and expropriation — are introduced by the structural and interpretive requirements of sec. 25 outlined above.[673] The Constitution's sec. 25(1) states that “no one may be deprived of property” until certain conditions are met, which is where the term “deprivation of property” comes from. The term “deprivation” broadly refers to state encroachments on private property for the purpose of policing its use.[674] The term “expropriation” is used under sec. 25(2) of the Constitution to designate and allow for the state's unilateral termination of all of a particular property right holder's entitlements for the public interest or for a public purpose.[675] The doctrine of expropriation as enunciated in sec. 25 is associated with the requirement that the state obtains benefit, even if the entitlements it obtains are different from those the individual holder loses, and then make some type of payment as compensation.[676]

Insofar as it has become customary to distinguish between expropriation and deprivation based on how they differ from one another,[677] Van der Walt reiterates that deprivation involves restricting a person's ability to utilise, enjoy, and exploit their property, and it is not compensated.[678] On the other hand, expropriation refers to a circumstance in which the state obtains property for a public use or in the interest of the public, typically in exchange for compensation.[679]

As expected, a landowner who is about to endure a deprivation is likely to argue that it is an expropriation, because an expropriation attracts compensation from the

673 See Mostert 2003.
674 Van der Walt 1999:273-279. See also Marais 2015:18 describes deprivation as a measure sourced in the State's regulatory police power, usually affecting large groups of people in society more or less equally, with no compensation. On the other hand, expropriation is based on the state taking property from a particular individual or a small group of people for a public use or in the public interest in exchange for payment to the owner who has been affected.
675 Van der Walt 1999:273-279. Public interest, for my purposes is delineated to the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources including but not limited to land.
676 See Hopkins & Hofmeyr 2003:51; Allen 1993:572.
677 Van der Walt 2011:194-196.
678 Van der Walt 2011:194-196.
679 Van der Walt 2011:194-196.

State.[680] This has an effect on the evolution of the sec. 25 right's content. A dispute presentation that sets the focus on compensation leaves little room for the development of and reflection on interventions that may achieve a legally legitimate objective. Objectives to address the insecure tenure, where compensation is not envisaged such as the claim to remain are almost never presented before court to decide upon and be further developed.

The *First National Bank of SA Ltd. t/a Wesbank v. Commissioner of the South African Revenue Service and First National Bank of SA Ltd. t/a Wesbank v. Minister of Finance* (hereafter *FNB*),[681] decided by the CC, is widely regarded as having set the standard for how sec. 25(1) of the Constitution will be applied and interpreted in the future.[682] Later decisions have accepted this paradigm for constitutional interpretation.[683] Some people have also criticised it.[684] Notwithstanding, the case remains the guiding blueprint to the interpretation of the property clause. I do not intend to discuss the case at this time; this will be done in concert with the other cases in another section. Here, I outline how this discussion will develop using the standards outlined there.

Roux,[685] captures the interpretative framework as laid down in *FNB* as having set out the inquiry in seven questions:[686]

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[680] Sec. 25(2) of the Constitution provides for payment of compensation regarding expropriations, no such eventuality is foreseen for deprivations in terms of sec. 25(1).

[681] *First National Bank of SA Ltd. t/a Wesbank v. Commissioner of the South African Revenue Service and First National Bank of SA Ltd. t/a Wesbank v. Minister of Finance* 2002 (4) SA 768 (CC).

[682] Van der Walt 2011:193. See also Van der Walt 2004:864; Van der Walt 2004:67; Mostert 2010:242; Mostert 2007:3; Roux & Davis 2013: 20-26; Roux 2003. See also *Haffejee v eThekwini Municipality* 2011 6 SA 134 (CC):25; *Opperman v Boonzaaier* [2012] ZAWCHC 27 (17 April 2012): para 19.

[683] See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC); *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC); *Daniels v Scribante* 2017 4 SA 341 (CC).

[684] I acknowledge the existence of these arguments and counterarguments in this chapter but do not go into detail for purposes of this chapter. In this regard see Van der Walt 2015:198; Badenhorst & Young 2017; Swemmer 2017; Marais 2014:223. See also O'Regan J's minority opinion in *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng,* (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 1 SA 530 (CC): para 89.

[685] Roux 2006: 46–3.

[686] I am aware of a different question that this investigation frequently overlooks. This question concerns who qualifies for protection under section 25 (1). The question raised therein is whether juristic individuals would be eligible for protection under section 25. If the landowner is a private juristic person, for my purposes, the answer is yes. For a full discussion 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); *Shoprite Checkers (Pty) Ltd v MEC for Economic Development,*

"(a) Does that which is taken away from [the property holder] by operation of law [the law in question] amount to property for the purpose of sec. 25?

(b) Has there been a deprivation of such property by the [organ of state concerned]?

(c) If there has, is such deprivation consistent with the provisions of sec. 25(1)?

(d) If not, is such deprivation justified under sec. 36 of the Constitution?

(e) If it is, does it amount to expropriation for purpose of sec. 25(1)?

(f) If so, does the [expropriation] comply with the requirements of sec. 25(2)(a) and (b)

(g) If not, is the expropriation justified under sec. 36?"

I now proceed to consider these steps in more detail in the sections that follow. This is in as much as the law governing evictions allows for the notion of remaining on someone else's property without a countervailing right.

5.3.2.1 Is the interest at stake property for constitutional purposes?

The crux of this question is that the claimant (landowner) must establish that the interest being forgone is "property" as defined by sec. 25(1).[687] To put it in one of two ways, the issue at hand is whether what the occupier continues to use and enjoy when remaining, notwithstanding the lack of a countervailing right, constitutes property. Or, to put it another way, the question is whether the rights that the landowner can no longer exercise in relation to his or her property because the unlawful occupier remains, qualify as property for the purposes of sec. 25.

The focus of the first approach, in my opinion, is more on the physical character of what the landowner forgoes under a claim to remain. The second approach, however, is more concerned with the fundamental assumption that informs the ownership of a

Eastern Cape 2015 6 SA 125 (CC); *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC); Van der Walt 2011: 70. See also Roux 2003:2-9.

687 *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): para 46. See also Van der Walt 2011:108- 111.

legally recognised interest. The fundamental presumption is that the owner retains the ability to direct their will toward whatever advantage accrues to them. Although there is little that turns on the differentiation as far as it relates to a finding of property for my purpose. The second approach, in my opinion, is the high-water mark of what is at issue.

In this regard, I acknowledge that the concept of property is not limited to land, and to that extent, it would appear that there is no comprehensive definition of what constitutes property for the purposes of sec. 25.[688] To the extent that it is not limited only to land, I also acknowledge that the definition traditionally extends to include tangible property.[689] In the considered circumstances, this is a forgone conclusion. I say this because someone's land, or a structure attached to the land from which eviction may be sought, is the object of the claim to remain as developed in this thesis.

The extent to which I rely on intangible property does not suggest that the object of the claim to remain may be intangible; rather, it is to draw upon the principles that the courts have developed in order to advance the concept of property in that area.[690] This is in contrast to the development surrounding tangible property, which is frequently viewed by courts as self-evident that it is eligible for protection under sec. 25.[691]

I now consider the question raised in this step with the second, broader approach in mind.

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[688] See sec 25(4) of the Constitution. See also *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): para 51. The Court stated that ownership of a corporeal movable is at the heart of the constitutional property concept, "both as regards the nature of the right involved as well as the object of the right..."

[689] See Van der Walt 2011:114.

[690] See for example *Ex parte Optimal Property Solutions* CC 2003 2 SA 136 (C); *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC). See also Van der Walt 2016c:599. I also extend this approach to the other sec. 25 questions below.

[691] Despite this claim, the courts have shown a tendency to determine that the intangible interest in question qualifies as property for purposes of section 25 on a non-comprehensive basis with little consideration for future applicability. See *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC): para 71-83; *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC):36-42; *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC): para 84; *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 6 SA 331 (CC): para 57.

In *National Credit Regulator v Opperman* (hereafter *Opperman*),[692] the Court held that that property as defined by sec. 25 includes the purported right of a creditor under a credit arrangement to collect any money paid or items supplied as per the challenged Act. This is due to the fact that the claim is transferable to a third party by the applicant, just like any corporeal property he owns and has in addition to having a monetary worth.[693] This the court found to be in line with developments in other jurisdictions where personal rights have been recognised as constitutional property.[694]

In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* (hereafter *Shoprite Checkers*),[695] the Court had to decide whether a trading licence was property for purposes of sec. 25. It arrived at the conclusion that indeed it is. Two judgments arose in this case, that of Froneman J and Madlanga J.[696] Utilising the logic applied in *Opperman*,[697] Madlanga J took to characterising why a liquor licence in this case should also qualify for protection.[698] Madlanga J reasoned that;[699] a liquor licence is something in hand; it may be held indefinitely; it may be revoked in accordance with the law;[700] it holds an objective commercial value as it can be traded.[701]

Froneman J on the other hand, stated that the conception of property should be informed by constitutional values and rights and not restricted to the private-law

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[692] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC): para 57-61; *Opperman v Boonzaaier* (24887/2010) [2012] ZAWCHC 27.

[693] *Opperman v Boonzaaier* (24887/2010) [2012] ZAWCHC 27: para 18.

[694] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC): para 63. See also *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC): para 38.

[695] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): paras 1-2. The Court had to decide whether the termination of a licence by way of the introduction of a new legislative framework, coupled with the opportunity to continue selling wine with other liquor at separate premises but not in grocery stores, amounted to a deprivation of that property For a detailed discussion of this case, see Badenhorst & Young 2017.

[696] In the Shoprite case there was one other judgement penned by Moseneke DCJ.

[697] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC).

[698] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC): para 142. Madlanga J further referred to the decision of *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC).

[699] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC): para 143.

[700] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC): para 97.

[701] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape* 2015 6 SA 125 (CC): para 144. Madlanga J took note of the Concurring judgment of Moseneke DCJ that since the core nature of liquor licence is permission, subjective interest like economic and commercial value should not play a role in determining whether it is property. However, according to Madlanga J objective commercial value should come into “equation”.

notions of property.[702] As such, the correct approach to determining whether the interest in question qualifies as property for purposes of sec. 25 is one that holds that constitutional values such as human dignity, equality and freedom should play an essential role.[703] According to Froneman J, all property is subjected to regulation to some level, and the extent to which a specific extent of property is controlled depends on both the reason for which it is held and the objective of the regulation.[704] The purpose for holding the property ought to be closely related to the basic rights of the person holding it.[705] To this end, Froneman J argued that a liquor licence should be recognised as property if it satisfies other individual needs in addition to and/or apart from commercial ones.[706]

The object of the legislation under consideration is the eviction of persons form land. Land is in this instance extended to also include any structure affixed to such land. In its exposition the claim is after all a claim to remain on land belonging to another. Such land or structure from which eviction is sought I acknowledge is a property interest for purposes of sec. 25. To the extent that the consideration is of the entitlement to use and enjoy as an abstract embodiment of land, I put forward that such entitlement would be identifiable, hold commercial value, and relative permanency that mirrors property as per Madlanga J. Much more, it would also, as per Froneman J, relate to the existential interest of the affected landowner. The impugned just and equitable

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[702] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): para 43-60; *PE Municipality*: para 15.

[703] *PE Municipality*: para 137-139. Madlanga J's main concern was that Froneman J's, "waters down potency of the right to property" and rides on the 'coattails' of rights such as human dignity and freedom of trade. According to Madlanga J, the right to property should at first instance as is trite, be sought to be protected as a 'stand-alone' right. In his view, this does not mean that the right to property cannot be intricately linked to another right. Madlanga J and Moseneke DCJ agreed with the Froneman J's preface on the wider context and the need to be seen as attempting to strike a proportionate balance between the protection of existing private property rights and the "promotion of the public interest in the transformation of the current property regime as per Van der Walt 2011:33. It is apparent that both felt that Froneman had unnecessarily overextended his dependence on this backdrop.

[704] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): paras 43-60.

[705] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): paras 43-60.

[706] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): paras 59-61. To focus on "use pre-constitutional notions of vesting to determine the ambit of property" that requires protection under the Constitution would be "retrogressive".
See also *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC): para 59. See also Marais 2016:578; Rautenbach 2015.

legislative discretion is steeped in the interaction of the land (mostly for shelter) as conduit to the realisation of non-property constitutional rights (i.e., human dignity).[707]

[707] See *PE Municipality* case.

5.3.2.2 Was there a deprivation of property?

The question of whether there is a deprivation of property that warrants a sec. 25(1) inquiry must be considered once it has been determined that the interest affected is property for purposes of sec. 25. In *Harksen v Lane NO,*[708] decided under the Interim Constitution, the court was presented with an opportunity to write on what was then a blank canvass as to what deprivation entailed.[709] The CC therein chose to dwell on the loss by one and counter related acquisition of interests involved by another to characterise whether there was deprivation.[710]

In the *FNB* decision, the CC charted a new path that did not follow the simplistic differentiation envisaged in *Harksen*. The CC in *FNB* interpreted "deprivation" more broadly and away from the degree of permanency to mean any interference with the person's use, enjoyment, or exploitation of his private property.[711]

The *FNB* characterisation of "deprivation" was further qualified in *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* (hereafter *Mkontwana)* to found what has become the two schools of interpreting the question of whether there has been deprivation or not.[712]

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[708] *Harksen v Lane* 1998 1 SA 300 (CC) - the facts presented an unconstitutional deprivation/expropriation of property challenge to the reading of sec. 21(1) of the Insolvency Act of 1936 providing that upon the sequestration of an insolvent spouse's estate, the property of the solvent spouse vests in the Master of the High Court and, on appointment, in the trustee of the insolvent estate until such property is released.

[709] This opportunity was not without constraint. The change to a new legal system without the correlative change of the practitioners manning the system meant that the court in *Harksen* was faced with an extreme challenge of an old band setting a new tone.

[710] *Harksen v Lane* 1998 1 SA 300 (CC) - To this end, Goldstone J in the CC noted that the impugned section does not contemplate or intend that such transfer which the CC does concede occurs, should be permanent or for any purpose other than to enable the Master or the trustee to establish whether any such property is in fact that of the insolvent estate. In so doing, the CC also set expropriation apart from deprivation and held that deprivation does not entail the permanent acquisition of property by the State.

[711] *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. See Van der Walt 2011:203-204. See also Van der Walt 2004:867.

[712] *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) - The disputed provisions in the impugned legislation where challenged to the extent that a landowner could be prevented from selling the property to a buyer if charges accrued by a tenant or even an unauthorised occupant were unpaid in prior years. The only other contention to the above challenge was the view held by one of the parties that these restrictions just serve to delay the transfer of property in the absence of a certificate, rather than preventing it altogether.

The Court in *Mkontwana* found that deprivation is no more than, at the very least, a significant interference or restriction that goes above and beyond the typical limitations on property use or enjoyment found in a free and democratic society.[713] The criticism that has come at the back of this has been that this formulation restricts deprivations to state conduct that exceeds the normal regulatory function of the democratic state and effectively decimates the content of sec. 25(1) which gatekeeps the protection in sec. 25 and the right to access to justice.[714] In what follows the various courts have sought to find themselves in the above two characterisations.

In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* (hereafter *Reflect-All*),[715] to determine whether there was a deprivation of property, the Court referred to *FNB* to the extent that "any interference with the use, enjoyment or exploitation of private property involves some deprivation."[716] The Court also took account of *Mkontwana* to the extent that deprivation is found on the basis of "the extent of the interference or limitation on the use, enjoyment or exploitation" and secondly, that deprivation is also found on a "substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society."[717] This judgment, however, did not reflect the extent of interference expressed in *Mkontwana*. The Court simply held that the impugned Act had substantially interfered with the landowner's entitlement of use, enjoyment, and exploitation of their property.[718] Whether this

[713] *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): para 32. See also *Agri South Africa v Minister of Minerals and Energy* 2013 4 SA 1 (CC): para 67, where the Court stated that Sebenza was "deprived of components of its mineral rights in that the MPRDA brought about a substantial interference and limitation that went beyond the normal restrictions on the use or enjoyment of its property found in an open and democratic society."

[714] Van der Walt 2011:205-206.

[715] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*, 2009 6 SA 391 (CC): para 10 - The applicants challenged the constitutional validity of sections 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 ("Gauteng Transport Infrastructure Act"). The applicants argued that the provisions interfered with their rights to exploit their properties and that the respondent did not provide sufficient reasons for the deprivations.

[716] *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): para 57. See also Van der Walt 2011: 207.

[717] *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): para 32.

[718] Van der Walt 2011:207.

interference was beyond the normal restrictions found in an open and democratic society was left unsaid.[719]

In *Offit Enterprises (Pty) Ltd v COEGA Development Corporation (Pty) Ltd (*hereafter *Offit Enterprises (Pty) Ltd)*,[720] the Court held that, to find a case of deprivation, "the impact must be of sufficient magnitude to warrant constitutional engagement."[721] In *Shoprite Checkers*, it was "Interferences that are serious enough to have a legally significant impact on the affected person's rights."[722] In *Tshwane City*, the *Shoprite* measure of deprivation was upheld.[723]

Van der Walt contends that, while this development has added to the confusion by shifting the attention from the extent and excessive nature of the damage to the legal relevance of the impact on the landowner's claims, it is possibly the most fitting definition the court has produced.[724] For my purposes, the uncertainty is but one

[719] See also *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC): para 17 - Madlanga J stated that "whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment, or exploitation of the property concerned. Substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation." The court in *Chevron* however did not speak to the extent of the deprivation being unreasonable in an open democracy when it found that *Chevron* had been completely divested of the amounts of money paid to it in terms of the credit agreement Act which allowed for creditors not payback money from unregistered creditors.

[720] *Offit Enterprises (Pty) Ltd v COEGA Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC): para 30. The applicants appealed against various threats of expropriation by the respondents. The applicants argued that the continued effect of the respondents' conduct resulted in a deprivation of the full use, enjoyment, and exploitation of their land.

[721] *Offit Enterprises (Pty) Ltd v COEGA Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC): para 38. See also Van der Walt 2011:263.

[722] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): paras 73-76.

[723] See *Tshwane City v Link Africa* (Pty) Ltd 2015 6 SA 440 (CC): para 167 - According to this Court, deprivation is determined by the extent of the intrusion into the property or the limiting of its use or enjoyment. The Court further stated that the interference with property must be serious enough to have a legally significant influence on the affected party's rights.; See also *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 6 SA 331 (CC): 48-59 -The Court concluded that only in cases where the interference is significant would there be a deprivation. The Court interprets this to mean that the intrusion must be significant enough to affect the rights of the party being impacted legitimately. It is obvious that the restriction imposed by section 20A did not constitute a significant interference with the licensees' ownership rights over their gems.; See also *Jordaan v Tshwane Metropolitan Municipality* 2017 6 SA 287 (CC): 58-68 The Court stated that it was necessary to weigh the serious repercussions of imposing prior obligations on a new property owner. Because interference must therefore be "extensive to have a legally significant impact on the rights of the affected party," the Court determined that allowing the charge to take effect after the transfer would significantly impair or interfere with the transferee's ownership as well as the genuine security interest of the mortgagee, resulting in a considerable deprivation of property.

[724] See Van der Walt 2011:206-208, 264 and Van der Walt 2016:606.

concern. The other concern stems from the degree of relative open-endedness of the tests that measure the significance of the interference.[725]

Given the fact that the conclusion states that deprivation is any interference with the owner's property and that this interference must have a material adverse effect on the owner's use and enjoyment of the property, this approach's inclusion of relativism encourages resistance to change. Change always involves a significant amount of interference with the status quo. A fresh approach to property rights that aims to redefine them and promote change will always be seen as a significant interference.

I proceed to consider this in the context of the claim to remain on another's land as a result of legislation allowing for the courts to decline to evict an unlawful occupier in the exercise of their just and equitable discretion. It is such that, without a court order granting the eviction, the landowner cannot lawfully evict the unlawful occupier. This is despite the occupier not having a countervailing right to be there. The continued presence of the unlawful occupier on land belonging to another practically means that the landowner cannot exercise certain entitlements relating to that land on which the unlawful occupier remains.

It would seem that the legislation significantly impacts the landowner's legal ability to use and enjoy that part of his/her property on which the unlawful occupier remains. It would appear that deprivation is founded in this instance. This is notwithstanding the unique fact that the landowner retains the right to bring a new eviction application at any time.

5.3.2.3 Does the deprivation comply with sec. 25(1)?

5.3.2.3.1 Law of general application

The next consideration is whether the deprivation complies with sec. 25(1). Sec. 25(1) provides that “no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.”[726] In this step, two conditions must be satisfied. Particularly, the deprivation must be authorized by a

[725] It is worth noting that whether or not there is deprivation at this point has nothing to do with whether or not the deprivation is arbitrary or lawful.
[726] Sec 25(1) of Constitution.

law of general application, and it must not be arbitrary. Any limitation on property that does not meet these requirements is invalid, regardless of the public good it might serve.[727] I now briefly turn to discuss the requirement that the deprivation must be authorized by a law of general application before moving on to the complex requirement of non-arbitrariness.[728]

The law of general application requirement outlined above can be summed up as requiring that the law that embodies the discretion through which the landowner's entitlement to use and enjoy his or her property is legally impacted, must be a valid piece of law in the sense that it has been duly enacted and promulgated.[729] Here, the term "law" is used in a broad sense to refer to both original and delegated legislation and in the absence thereof, common law norms and customary law.[730] The underlying idea seems to be that the deprivation ought to be in line with the non-discriminatory principles of the rule of law and the general legitimacy principles of the Constitution.[731]

To this end, I contend that the eviction legislation giving rise to the claim to remain as outlined in Chapter 2, in which the consideration of a court retaining the discretion of both acceding to and or denying an eviction application because it would not be just and equitable to evict is one such law that satisfies the aforementioned requirement both in letter and in spirit.[732]

5.3.2.3.2 Substantive arbitrariness

The requirement that where deprivation ensues the law must not be arbitrary envisages two components that need to be considered. These two components relate

[727] Van der Walt 2011:219.
[728] See Van der Walt 2011:236-237. The law of general application is not given due attention, and the court typically only acknowledges the requirement without carefully and substantively examining what it might entail.
[729] Van der Walt 2012:28. See also Woolman & Botha 2003:51-52.
[730] Woolman & Botha 2003:51-52. Also see *S v Thebus* 2003 6 SA 505 (CC): paras 64-65.
[731] Van der Walt 2011:232.
[732] See Chapter 2 above.

to the test for substantive arbitrariness and procedural arbitrariness.[733] I now turn to analyse whether the deprivation caused is substantively fair.[734]

Two schools of thought have emerged to determine how we arrive at the conclusion that the deprivation is substantively fair. Before I outline these two schools of thoughts, I reiterate that the primary objective is to ascertain whether or not the law that gives courts the authority to decline to evict an unlawful occupier on the grounds that doing so would not be just and equitable is substantively arbitrary. More than that, the objective remains to bring attention to the ambiguity that permeates the interpretation of this step inside the sec. 25 right - an ambiguity which leaves ample room for and contributes to a reluctance to see the possibility of transformation that situations like the one this thesis is looking into present. The consideration of jurisprudential and scholarly debate on substantive arbitrariness, in this part, highlights, in my opinion, a microcosm of the overall ambiguity that comes about as a result of the interaction of opposing interests within the entire scheme of the Constitution as opposed to just the sec. 25 provision.[735] This kind of interaction contributes to an unwillingness to take part in the contested arena and to develop the right's content.

On the substantive arbitrariness issue, the Court in *FNB* held that a deprivation is arbitrary as defined by sec. 25(1) when the relevant law has an insufficient justification for the deprivation.[736] The court can be seen to have established two measures for establishing sufficient reason. These measures are not mutually exclusive, but I will discuss them separately.

To establish whether there is sufficient reason for deprivation, according to Ackermann J, a complex array of contextual factors should be considered. These factors include

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[733] 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):para 100; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 1 SA 530 (CC): para 34; *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC): para 35.

[734] I reiterate that it is the law itself — and not the cause of action — that is being assessed in sec. 25. It is imperative to make a distinction between the two. In this case, the law that permits a situation in which the courts may decline to evict an unlawful occupier because to do so would not be just and equitable is of issue as opposed to the claim to remain.

[735] See discussion in Chapter 1.

[736] *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): para 100.

the relationship between the means employed and the ends required to be achieved; the relationship between the deprivation's purpose, the person who owns the property impacted by the deprivation;[737] the nature of the property and the degree of the deprivation must be considered.[738] These factors point to two different measures in one. These contemplated measures are a rationality review on the one hand and a proportionality review, on the other hand. Depending on the context, the test may occasionally call for a rationality review, while at other times it may call for something more akin to the proportionality review in sec. 36 of the Constitution.[739] Given the sliding scale, the cause of the deprivation must be more compelling where the extent of deprivation is larger, i.e., when it affects the majority or all ownership entitlements.[740]

The courts that have had to engage with this conflation and fluid approach to establishing substative arbitrariness have done so without adding any certainty. Instead, they have underscored the uncertainty of the precedent established here.

In *Mkontwana*,[741] the CC purported to apply the non-arbitrariness criteria established in the *FNB* decision.[742] The Court therein considered the relationship between the objective of the limitation and the extent of deprivation imposed by it when outlining how to determine if there was a sufficient reason for the deprivation.[743] The Court also took into account the connection between the cause of action, the owner of the property, and the property itself.[744]

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[737] *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): para 100.

[738] *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): para 100.

[739] *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): para 65-69. Depending on the particulars of each case, the standard for substantial arbitrariness varies along a continuum. See Budlender 1998; Chaskalson & Lewis 1996:13-14.

[740] Chaskalson & Lewis 1996:13-14.

[741] See also Van der Walt 2005b:75-76; Van der Walt 2011:248.

[742] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, *(KwaZulu Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC): para 34-39.

[743] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, *(KwaZulu Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC).

[744] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, *(KwaZulu Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC): para 34-40. At para 50-53, the Court concluded, after considering each of the aforementioned factors, that there was a close connection between the deprivation and the consumption charges, as well as between the owner and

This according to Van der Walt, found a separate version of the arbitrariness test, one that deviated from the one established in *FNB*.[745] That is, the complexity test outlined in *FNB* that takes relationships between different aspects into account appears to have been reduced to two questions. The first consideration is whether the reason for the deprivation is justifiable and convincing, secondly, whether it is appropriate in this situation to place the limitation on the property owner.[746] These two questions are closer to the rationality test as opposed to the contextualised, proportionality-focused test that was used in *FNB*.[747]

To recap, the goal of this discussion is to determine whether the legislation that allows courts to retain the option not to evict an unlawful occupant for just and equitable reasons is substantively arbitrary. In this way, the preceding two cases point to two distinct but interconnected methods of arriving at that conclusion. These are the proportionality review outlined in *FNB* and the rationality review outlined in *Mkontwana*. However, before I evaluate the affected legislation in the instance of the claim to remain, in light of the identified measures, I quickly consider a few cases that followed the two outlined above. This is to determine whether the uncertainty persists or if the courts have since resolved and created a clearer approach to this matter. Much more, this is to highlight the scope and room for discursive and non-discursive contestation that the uncertainty breeds. This uncertainty, I continue to argue, allows for the courts and those who work within this paradigm opting for the easy route along the path of a preconceived and less controversial conclusion, rarely challenging and striving to enhance this specific area of the sec. 25 right.[748] This contention regarding the sec. 25 right is intrinsically linked to the contended unwillingness to acknowledge and define the status of an unlawful occupier in the applicable circumstances as envisaged in Chapter 3.

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the consumption charges, and that there was no reason to expect that the property owner should not bear the risk of non-payment.

[745] Van der Walt 2011:249-250.

[746] Van der Walt 2011:249-250.

[747] Van der Walt 2011. See also *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 65 – the test "is a wider concept and a broader controlling principle that is more demanding than an inquiry into mere rationality."

[748] See also Brand 2009: 32-72 where general anti-transformative adjudication practices are discussed.

In *Reflect-All*,[749] the CC held that the relationship between the authorising statute, its objective, and the extent of the limitations it places, are all crucial to the arbitrariness test.[750] To this end, where there is a marginal or insignificant limitation, the limitation need only be rationally connected to the valid objective.[751] Where there is a severe limitation, the limitation needs to be proportionate to the objective.[752]

In *Opperman*,[753] the Court referenced *FNB* to hold that where the law in question does not adequately justify the specific deprivation, it would be substantively arbitrary.[754] The extent of the deprivation with regard to that property, the relationship between the reason for the deprivation and the nature of the property, must all be taken into consideration during the evaluation to determine whether there is sufficient reason.[755]

In *Shoprite*,[756] the Court held that a sufficient justification for a deprivation should "approximate proportionality" if it is intimately tied to other constitutional rights and values; otherwise, rationality may be sufficient.[757] The judgment in *Shoprite* has come under criticism. There are primarily two strands to this criticism. The first is that the rationale ignores scenarios in which other rights are not at all impacted, even when the severity of the deprivation calls for more than just rational justification.[758] The second is that contrary to what *FNB* intended to advance, the Court's normative

[749] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).
[750] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC): paras 49-50.
[751] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).
[752] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC): paras 53-60. The CC held that the Act achieves the proportionate balance between guarding the legitimate interests of the Province when guarding the proposed road network and guarding the individual property rights by allowing applicants to request modifications to route plans that are accepted under section 10(3).
[753] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC). See also Marais 2014.
[754] *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC): para 100.
[755] *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC): paras 68-72. The Court found that although the objective of the Act to protect unassuming creditors was laudable, the deprivation was not arbitrary because "it effectively removes an unregistered credit provider's right to restitution." See *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC): para 100.
[756] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC).
[757] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC): para 80-86. The Act's modification of the regulatory structure did not affect the holders of grocer's wine licences' fundamental rights or values thus, in this instance, deprivation stood to be evaluated on a rationality basis.
[758] See Swemmer 2017; Rautenbach 2015:830.

constitutional framework on the arbitrariness test automatically lowers the standard of scrutiny to rationality in all sec. 25 challenges brought by juristic individuals.[759]

In *Tshwane*,[760] further ambiguity was introduced by the method used to reach the conclusion that the deprivation in that instance was not substantively arbitrary. In that case, the impugned piece of legislation allowing for licence holders to build an electronic communications network or facility on someone else's property was compared to related and applicable laws to see if it was arbitrary or not.[761] In that quest, the courts found that the principles and regulations of the Act, requiring notice, consultation, and a compensation payment—just like in servitudes—pointed to a view that the potential deprivation was not substantively arbitrary.[762]

To this extent, it suffices to note that the legislation that envisages through the continued stay of an unlawful occupier, a continuation in the exercise of rights ancillary to occupation albeit without right, correspondingly limits the benefit of use and enjoyment of the land by the landowner in relation to that occupied space. That legislation just like in servitudes as was envisaged in earlier chapters espouses principles of notice and consultation but not compensation.[763] In comparison to the case in *Tshwane*, the absence of a potential compensatory offset to the limitation distinguishes the claim under investigation and warrants a more measured approach.

The complexity of factors contemplated by the just and equitable measure as a statutory requirement where the discretion is exercised not to evict an unlawful occupier from land belonging to another comes to mind in this measured approach. The objective here is not to go through what the courts considered in deciding not to evict a person in unlawful occupation.[764] The objective of this review is to draw a comparison between the just and equitable criterion and the consideration for

[759] Van der Walt 2015b:223-224.
[760] *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC): para 2 - the Court had to decide whether the licence issued in terms of the relevant Act, that saw the holders thereof being allowed to construct an electronic communications network or facility on land belonging to another, was arbitrary.
[761] *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC): paras 127-129.
[762] *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC): para 154. Van der Walt 2015b:226 is of the view that this approach is a sound one that rescues the Act from invalidity despite the extensive nature of the exercise.
[763] See Chapter 4 above.
[764] See case discussion in Chapter 3 above.

substantive arbitrariness as articulated in the above case law discussion. In the lack of parallels, the aim is to derive the required inferences.

As is now commonly accepted, the courts when considering an application for an eviction from land are enjoined both by statute and case law, to make "a value judgment" which is grounded in "morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment."[765] In particular, notwithstanding the unlawfulness of the occupation, it is demanded that the courts must further have regard to the interests and circumstances of the landowner, the occupier and everything else that is happening around them.[766]

To this end, it seems that, what is set to be considered under this veil of justice and equity is also linked to the objective and extent of the limitation imposed by the legislation: the relationship between the means employed and the ends required to be achieved; and the relationship between the purpose of the deprivation and the person who owns the property that is affected by the deprivation. According to the proportionality centred review in *FNB* what is considered is; the relationship between the purpose of the deprivation, the nature of the property, and the extent of the deprivation mirrors the consideration of the landowner's interests vis-à-vis those of the occupier, including but not limited to the following: the imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not immediately evicted from the land; the extent of hardship to the owner or any other affected person if an order for eviction is not granted, which exceeds the likely hardship to the unlawful occupier against whom the order is sought; and, if an order for eviction is granted and no other effective remedy is available, the interests of the parties, including the unlawful occupier. These are all factors considered as found in sec. 4 of PIE for example.[767] In the context of a claim to remain the following is worth mentioning in relation to establishing the relationship between; the purpose of the legislative measure; the landowner in relation to the property; the unlawfulness of the occupation

[765] See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 reflected in Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). See also *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 1 All SA 386 (SCA): para 18-19.

[766] *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 1 All SA 386 (SCA).

[767] See also case discussion in section 3.3 above.

and the impact of the continued stay. As per *Mkontwana*,[768] it suffices to note that the unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied. Where occupation was once regular, the duty to take reasonable steps to ensure the eviction of the occupier once it ceases to be regularised is with the landowner. If the owner performs these duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a lengthy period. Normally, it is the owner, not the municipality, who has the authority to take action to settle an issue emerging from the unlawful occupation of the land. It is accordingly not unreasonable to expect the owner to bear the duty to protect his or her own rights to his or her own property.

The relationship between the property and the inherent risk and negative impact of a continuation of unlawful occupation in these circumstances is apparent because unlawful occupation can only be spoken of in relation to land and land ownership. Property owners must carry the risk for a variety of potential events as an intrinsic incident of exercising the right of ownership, just as they would naturally bear the risk if the property were damaged or destroyed or movables were stolen. Suffice to say that law enforcement may be obligated to aid a landowner in preventing unauthorised invasion and occupation of land, and there have been occasions where the State has failed the landowner in this regard. In such instances, it is unreasonable to expect the landowner to bear the burden of any subsequent events.[769]

While this is at the statutory level, it is inconceivable that a just and equitable order of a court in that case would result in a different outcome at this level. As case law has indicated, legislative considerations are read in conjunction with broader considerations of fairness and other constitutional values to arrive at a value judgement that views the foundational values of the rule of law and the achievement of equality as interactive, complementary, and mutually reinforcing rather than distinct and in conflict.[770]

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[768] *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC): paras 59-51.
[769] See *Fischer* case discussion in chapter 3.
[770] See *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 2 SA 1074 (SE): para 35.

Given the foregoing, it does not appear that the claim to remain and the process in which it arises, as mentioned in earlier references to legislation such as PIE, is likely to result in a substantively arbitrary finding. Legislative checks and balances, such as those highlighted in PIE, are generally stricter when compared to the wider and more idealistic considerations at a constitutional level.

5.3.2.3.2 Procedural arbitrariness

The component of procedural arbitrariness has had a life of its own, but a life nonetheless linked to the substantive arbitrariness in a much more intricate manner. In this section procedural arbitrariness is considered for the purposes of establishing whether the law which sees the court retain a discretion to decline to evict an unlawful occupier who remains on land belonging to another without a countervailing right to do so, is procedurally arbitrary. Much more than that, it is to highlight the inherent misgivings that the jurisprudential and academic interpretation thereof has shown up. This is to the extent that such issues, in part, lead to reluctance to engage in the content development of the sec. 25 right.

It is important to note that the court in *FNB* simply provided additional information on how sufficient reasons can be confirmed and did not elaborate on the procedural unfairness criterion.[771] In *Mkontwana*,[772] the impugned provision was argued to be procedurally arbitrary for lack of obligating the municipalities to keep landowners updated regarding their debts concerning the services rendered on their properties. The significance of the *Mkontwana* case on the procedural component of arbitrariness is that the court appeared to suggest procedural fairness, for purposes of sec. 25(1), may be evaluated on the same basis as the test for just administrative action under

[771] Van der Walt 2011:265.

[772] *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*, *(KwaZulu Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC): paras 65-67. Also see *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); *National Credit Regulator v Opperman* 2013 2 SA 1 (CC); *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC*); Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC). See also Van der Walt 2012a.

sec. 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA),[773] at least where the use of administrative discretion is the cause of action.

However, even if the deprivation was not brought about by administrative action and procedural arbitrariness is decided in terms of sec. 25(1), procedural fairness stands to be determined based on the procedural fairness principles developed in administrative law, albeit within the context of sec. 25(1). This is simply because other suitable principles do not exist outside of administrative law.[774] To this end, the procedural test under PAJA looks for something similar to what is needed in a test for substantive arbitrariness, and for our purposes, what is considered in the just and equitable test, namely, a detrimental effect on the property owner.

Since *Mkontwana*, jurisprudential developments have tended to reflect this view without going into as much depth as provided above. In *Reflect-All*,[775] the Court found that the procedural challenge to the legality of the impugned Act should be rejected since the legislative initiative offered enough chances for landowners' views to be heard and taken into account prior to the declaration of the routes.[776] In both the *Opperman,*[777] and the *Chevron* case,[778] the Court held that a deprivation is procedurally arbitrary if the enabling statutory provision imposes deprivations without the oversight of a court.[779]

[773] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) - It must be noted that despite taking note of the procedural unfairness element, the *CC* in *Mkontwana* did not provide any insight into this phenomenon apart from accepting that every municipality is required to furnish the owner of the property with copies of outstanding bills for water and energy services given to occupiers of their property upon written request.

[774] See Van der Walt 2012a. See also Marais & Maree 2016. See also Roux 2013:37.

[775] Roux 2013:37.

[776] *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC): para 40-47. See also *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC): para 155. See Klaaren & Penfold 2008; De Ville 2003:224-228; Hoexter 2012:177-178. According to administrative law, one of the requirements for the right to a procedurally fair administrative action is the ability to influence the outcome of an administrative decision. The requirement that deprivation be authorised by law of general application, in instances when there is no administrative action or when the deprivation is directly imposed by legislation may already contain this guard against prejudice.

[777] *National Credit Regulator v Opperman* 2013 2 SA 1 (CC): para 69.

[778] *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC).

[779] *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC). See Van der Walt 2012a where Van der Walt cites decisions involving sec. 25 (1) and those resolved in light of sec. 26 as an illustration of how similar the underlying principles remain across the board. See for example *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

Van der Walt further warns against circumstances where the deprivation would be procedurally fair only provided the legislative scheme establishing the deprivation included an occasional review procedure to guarantee that the deprivation does not become arbitrary solely due to its longevity.[780] To this end, the scenario of an unlawful occupier whose considered circumstances, this is to say, those circumstances that make him/her/them vulnerable to the effects of landlessness considered against those circumstances of the landowner and the landowner's interests in the land do not change over a period of time. The likelihood and the effect of a consistent unjust and inequitable finding on the landowner's property right ought to be considered against this caution.

O' Regan J, for the minority, takes the view that the deprivation occasioned by sec. 10(3) in *Reflect All*, is significant in that it deprives a landowner of the right to seek permission to develop the land, to subdivide it or to change its land use with no temporal limit on the deprivation.[781] The purpose sought to be achieved by the deprivation is to protect the integrity of the planning system.[782] The importance of which ought to be juxtaposed with the way that purpose is achieved considering the extent of the undue invasion of landowners' rights which it visits on landowners. To this end, O'Regan J reasons that the legislation's failure to provide for any review of the preliminary designs negates the consideration that many of these road designs date back to the 1970s and 1980s and that this harbours an uncertainty of whether they will be built or not.[783] Landowners on the other hand remain deprived while this uncertainty persists.[784] While the limitation on landowners may be viewed as proportionate in instances where a reasonable possibility exists that the proposed road will indeed be built, it becomes disproportionate, arbitrary and of no public purpose when that possibility dissipates.[785]

This point is explicated to a situation in which the situation of remaining subsists for an inordinate period owing to an apparent lack of change in the considered

[780] Van der Walt 2012a.
[781] Van der Walt 2012a.
[782] Van der Walt 2012a.
[783] Van der Walt 2012a.
[784] Van der Walt 2012a.
[785] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* (CCT 110/08) 2009 6 SA 391 (CC).

circumstances of the parties involved. The resulting disproportionality that arises when the possibility of a change in circumstances is no longer foreseeable as it was when the order was initially given stands to be considered. This could be the case in the instance where, in addition to the claim holder, other unlawful occupiers settle on the same land. That is to an extent that while eviction of the claimholder remained a possibility in the face of a change in circumstances, the extent of invasion of the land by subsequent occupiers has the effect of rendering the future restoration of the use and enjoyment of the land to the landowner improbable. This instance envisages a potential of the third type of orders over time assuming conditions that may lead to those instances giving rise to the second type of orders as discussed in chapter 3.

The question here is whether or not a periodical review for reasons advanced by O'Regan J in *Reflect All* will suffice to cure the potential procedural arbitrariness.[786] As far as the claim to remain is concerned, the need for this may never arise in the presence of the ever-open window to bring another eviction, notwithstanding an existing claim.[787] The legislation, if anything, does not aim to insulate the claim holder against future eviction applications but it is intended to guarantee such a claimholder the opportunity to have his or her circumstances vis-a vis those of the landowner put to the justice and equity scale. The effect of a fresh eviction application would be to put into the justice and equity consideration factors relevant to the occupier and the landowner. Uniquely, this will not be for the first time. As a basis, the length of time the landowner's interest in the land to which the claim relates has been deprived will be one of the relevant factors that the landowner may choose to forward, as opposed to the sole one. This is certainly not to say that the new application is an attempt to resurrect a case that is *functus officio*. At best a court hearing a new eviction application may take notice of the previous decision but is no way bound by it.

In sum, the criteria for establishing whether the deprivation is procedurally arbitrary is not specified by the statute or the courts. The uncertainty that pervades this component has led to its ad hoc application and, in certain situations, its disregard in favour of the substantive arbitrariness component. Although it is unlikely that this

[786] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* (CCT 110/08) 2009 6 SA 391 (CC).
[787] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* (CCT 110/08) 2009 6 SA 391 (CC).

approach may lead to an erroneous conclusion, it reinforces the assertion made at the beginning of this section and in many other places throughout this argument that uncertainty breeds an anxiety to engage on the part of the courts.

The well documented consequence of this is that the sec. 25 enquiry is forever caught in the "arbitrariness vortex."[788] The argument here is that, for my purposes, the PIE enquiry triggered by a fresh eviction application may very well mean that question that the limitation may never be arbitrary. If it may never be arbitrary then it would mean that the question as to whether the limitation may be justified in terms of sec. 36 will not come up.[789] Neither will the question whether the limitation occasioned by the exercise of the legislative discretion not to evict an unlawful occupier from land belonging to another amounts to expropriation.[790] To put it another way, because expropriation is a type of deprivation, an expropriation must also meet the standards for a lawful deprivation in sec. 25(1), including the non-arbitrariness element.[791]

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[788] See Roux 2003:19-29 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. See also Van der Walt 2016a:424; Badenhorst *et al*. 2006:530-531; Currie & De Waal 2013:557-558. See also Hopkins & Hofmeyr 2003 - regardless of the fact that it may seem straightforward, it is always important to keep the door open for potential justifications for violating section 25 rights.

[789] See also Van der Walt 2011:196 - Once it has been accepted that a deprivation caused by the operationalisation of a law of general application will be valid, the presumption that such a deprivation passes the internal limitation (within sec. 25) stands to be equally accepted. Van der Walt summarily puts across the point that, if the requirements of sec. 25 are complied with there can be no limitation of the sec. 25 right. Simply put, the sec. 25 right can only be limited in instances where there is an unauthorised or arbitrary deprivation. See Van der Walt 2011:286 – Van der Walt argues at the back of Nhlabathi that the court's finding that if the limitation were an expropriation in conflict with sec. 25(2), and that it could be justifiable under sec. 36, was based on a "hypothetical assumption" and not on a finding that the limitation was indeed in conflict with sec. 25(2). See also *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape, and Others (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C) where the concession is made that the sec. 25 right can also be limited directly by other fundamental rights that are protected in the Bill of Rights.

[790] See *Haffejee v eThekwini Municipality* 2011 6 SA 134 (CC): para 27; *Du Toit v Minister of Transport* 2006 1 SA 297 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 544 (CC); *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC): para 53; *Reflect- All1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) as examples of cases that have either not followed the Roux methodology used in this thesis and or cases where despite the deprivation not being arbitrary, expropriation was still considered. See also Van der Walt 2011:225, 343.

[791] Roux 2003:18. See also Van der Walt 2011:76, 77. See also *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): para 59. See also Slade 2015:338.

Effectively, the potential of compensation being a balancing factor in the reconciliation of the interest of the individual (landowner) with that of the public (unlawful occupier) in instances where a landowner is totally deprived of all his/her rights in land (expropriation) may never arise through this gateway established by sec. 25.[792] Should it arise, compensation would need to be discussed under the deprivation question. This can only further obfuscate a complex enquiry, whose rationality review to proportionality test pendulum swing can be argued to be arbitrary in and of itself.

Considering the nature and character of the Constitution as far as it interrelates the advancement of the rights of the previously disadvantaged to the insecure tenure of the would-be unlawful occupier and accepting that the character of the unlawful occupier is not a constant, it nevertheless would appear that in some instances, an infringement of some landowner rights (not of all) when juxtaposed to a constitutional objective such as that of land reform, will be found to be constitutionally justified.[793] In essence, this uncertainty and complexity is why ad hoc compensating relief is granted in conjunction and through the gateway of remedies based on any other linkable section but not sec 25. That is, where there is a risk of an unlawful occupier "justly and equitably" remaining on land belonging to another for an indefinite period of time, courts have either left the looming question of the loss element of the entitlements to use and enjoyment unanswered or devised remedies that indirectly acknowledge the loss element by attempting to recompense. This should in part be seen as a notable difference between the second and third type of cases discussed in Chapter 3.

However, for the sake of completeness, I now reflect on the question of expropriation to the extent that it envisages certain elements that may be worth considering in the case of the legislation that enables the exercise of the discretion not to evict an unlawful occupier, occupying land belonging to another.

[792] Roux 2006.
[793] Roux 2006.

5.3.2.3.3 Is it an expropriation?

The question here is whether the deprivation of property amounts to an expropriation.[794] More pertinently, it is whether the claim to remain can amount to an expropriation, notwithstanding that which has been concluded prior to this section. Here, an expropriation that violates the requirements is set out in sec. 25(2); for instance, where the amount of compensation for expropriation is non-existent nor is it just and equitable.[795] To the extent that the third type of evictions and the kind of remaining that this thesis is focused on does not envisage compensation, I nevertheless concede that there are those instances where an expropriation that does not provide for compensation could be reasonable and justifiable under sec. 36.[796] However, this is not discussed here.

For my purposes, an important differentiating element that arises between deprivation and expropriation is that for it to be expropriation another person that is not the landowner ought to acquire the deprived rights permanently. Van der Walt,[797] criticises this categorical distinction that rests on the permanency of state acquisition as a criterion, cautioning that it leaves no room for cases that do not fit neatly into either. This categorical distinction is also without reference in sec. 28(3) of the Interim Constitution and the correlative sec. 25(2) of the Constitution. Argument is advanced that such a distinction fails to accommodate instances of deprivation when the State acquires property without the owner's assent.[798] Van der Walt and Botha,[799] caution that setting permanence as one of the requirements because other jurisdictions have demonstrated that expropriations can, at least in some circumstances, be temporary in nature.

Since the court in *Harksen* restricted applicants from essentially bringing forth cases that argued for both deprivation and expropriation and not either or, and since the CC per Ackerman J in *FNB* sought to lay down the interpretative framework for sec. 25 but did not proceed to consider expropriation, I rely on the *Agri-SA* case, a case in

[794] Roux 2003:4. For a broader discussion on expropriation see Du Plessis 2009; See also Lubbe, H & Du Plessis 2021; Sibanda 2019.
[795] Hopkins & Hofmeyr 2003.
[796] See *Nhlabathi and others v Fick* (LCC42/02) [2003] ZALCC 9. See also Van der Walt 2011:286.
[797] Van der Walt 2004b.
[798] Van der Walt 2005:347-349 i.e., asset forfeiture.
[799] Van der Walt & Botha 1998 citing *Attorney-General v De Keyser's Royal Hotel* 1920 AC 508.

which despite the deprivation not being found arbitrary, the court went on to consider if it had amounted to an expropriation.

To this end, the critical question before the CC was whether the conceded compulsory acquisition occasioned by the assumption of custodianship and the power to grant others what could previously have been granted only by holders, meant that the State acquired ownership of rights to these mineral and petroleum resources.[800] Differentiating this case from cases involving the acquisition of land for governmental projects such as road infrastructure as in *Reflect-All*, the CC held that in the case of mineral rights, the State did not acquire any mineral rights, including those of *Sebenza*.[801] Instead, the State became a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources could be realised.[802] The State did not acquire ownership or at least the (right to exploit) affected mineral rights nor did any third parties.[803] The rights in question still stood be acquired even by *Sebenza* itself, provided it had the means to do so after the expiration of the avenue dealing with old order rights.[804] The absence of State acquisition meant there was no expropriation halting the enquiry.[805] Van der Walt notes, however, that while acquisition is a likely consequence of expropriation, this does not imply that it is a necessary prerequisite for it.[806]

Froneman J argues in variation with the majority in *Agri-SA* that, if the MPRDA's custodianship and allocation system does not equate to acquisition of a competence previously held by private owners of minerals, then it follows that none of the pre-existing rights have been expropriated.[807] The question then becomes where or to

[800] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) - The applicants argued that expropriation had eventuated as envisaged by the ending of the rights of an expropriatee (Sebenza) and the consequential acquisition of new rights equivalent but not necessarily identical to those lost by the expropriatee.
[801] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[802] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[803] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[804] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[805] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[806] Van der Walt 2011:197, 345.
[807] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

whom they have gone? This question brings into the fore a similar contention that is likely to arise in a likewise reading of legislation giving rise to the claim to remain.[808]

Accepting that, the court order can be equated to the custodian and allocation system expressed in *Agri-SA*. Envisaged here is a momentary divesting of the landowner's benefit of use and enjoyment to that piece of land now subject to unconsented occupation by or through the instrumentality of State action and channelled to the occupier whose continued occupation is at the behest of and exercise of entitlements similar to those lost, if at all, by the landowner.

According to Froneman J, this interpretation compromises the equitable balancing between the protection of current property rights and the public interest under sec. 25 by effectively shielding from further scrutiny any legislative transfer of property from existing property holders to others so long as it is carried out by the State.[809] To that end, I do recognise that despite the lack of compensation and permanent state acquisition of the landowner's entitlement to use and enjoy that extent of land under continued unlawful occupation, the argument that the claim to remain in certain circumstances may amount to expropriation may very well be still made.

Nevertheless, Froneman J's concern is negated by the simple reasoning that an expropriation that passes the deprivation test in sec. 25 (1) is unlikely to be assessed and found wanting for lack of public purpose.[810] In the end, the arbitrariness vortex rears its anti-transformative influence. An influence without which much more could be considered wherein the (re)distributary and reformative aspirations of the Constitution could be further developed.

5.4 Conclusion

The courts above can be seen to have abdicated the step-by-step interpretative framework. This is as cases above invariably envisage little to no attempt to ventilate

[808] See *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32 (20 September 2022): para 37- the court unequivocally notes that PIE does envisage an expropriation of land from a private landowner from whose property the eviction is being sought.
[809] *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).
[810] Roux 2006:33; Du Plessis 2009:68-94.

question (a) to (g), in the process of answering all question posed in equal measure. Instead, the questions envisaged in step (a) to (g) are sacrificed at the altar of the question that asks whether there was sufficient reason for the deprivation. Considering the above it would seem that while the legislation envisages a deprivation of property as it were, this deprivation will neither amount to arbitrary deprivation nor expropriation of the landowner's right to use and enjoy the extent of his or her property that is under continued unlawful occupation.

Roux bemoans this "arbitrariness vortex",[811] where every step of the constitutional inquiry is subject to the arbitrariness test with the level of scrutiny swinging from a mere rationality review (minimum threshold) to a proportionality test (maximum threshold). Van der Walt makes the point that, while the arbitrariness vortex contemplated above may be optimal however problems arise in instances where deprivation occurs outside the scope of the sec. 25 right.[812]

In the context of evictions from land the impact of the arbitrariness vortex will only serve to confirm the test for arbitrariness in sec. 25. This does extraordinarily little to develop and consider the implications of the legislation far beyond that which the legislation itself contemplates. This is the running theme of this thesis. In this instance it is the arbitrariness vortex that manifests its anti-transformative force. An influence without which much more could be considered in terms of pushing the Constitution's redistributive and reformative provisions. In the case of an unlawful occupier remaining on another's land, the arbitrariness vortex avoids in this instance the development of jurisprudence around non-compensable expropriation where the circumstances envision a degree of relative perpetuity.

In the following chapter, I build on this point to suggest how land tenure reform might be further implemented in the context of these highlighted anti-transformative dynamics.

[811] Roux 2008.
[812] Van der Walt 2012a.

CHAPTER 6

CONCLUSION

"In a city on a corner stands a house that is grand/

Where in glory and in splendour dwell the magnates of the Rand/

What a system! What a crime!

We cannot mend it, we must end it

End it now and for all times . . .

Up above the mining compound where he joins the picket line/

He is a labour agitator and his life's not worth a dime . . ."[813]

While in the earlier chapters I discuss the goals and objectives of the study, in this chapter, I go over the earlier chapters, giving a brief summary and observations of the findings made. I also do one other thing: I attempt to express a viewpoint regarding the course of action to solve the issues raised at a systemic level. That is, even though I am aware of how important it is that I satisfy this mandate in this chapter because bringing attention to a problem is just as important as recommending a course of action, I approach this chapter from the viewpoint that, while there might not be a simple answer, there might be a sensible route to discovering one in the future. I also do this on purpose so that my thesis can be used as another point of reference in the development of my continuous engagement with the systemic issues constraining transformation in the South African paradigm.

The quote that introduces this chapter, comes from a song performed by British miners who lament a way of life in which they unwittingly underwrite the lavish lifestyles of mining magnates at the expense of their worthless lives. The discussion in this thesis is not so much about the rights of miners and the exploitative market in which they operate, it is in so many ways about a system. A system of leverage which keeps the

[813] The Robben Island Singers 2009.

interests of those without access to land on the periphery of the conversation on how to access that which they have been structurally kept from. It is, as I seek to impress in the introductory chapter, about the participation of those without, in an environment where those that have, regulate the entry to such conversations in one way or the other. It is about the obligation to address neutrality, where neutrality obscures the truth that contemporary norms are created by politically contested oriented principles of freedom, equality, and self-reinforcing rule of law. It is about the struggle for space and the opportunity to re-evaluate and reconstruct the interpretation and development of certain conceptions of property rights and ownership once space is secured.[814]

The need to re-evaluate and reconstruct the approach to and interpretation of property rights is exemplified, in this case, by the courts' apparent unwillingness to define the legal position of an unlawful occupier who remains on land belonging to another because removing such an occupier from land would not be just and equitable - with all its ancillary questions which I now recap below.[815]

In section 6.1 of this chapter, I provide a brief reflection on the chapters and primary questions that have grounded this thesis. In section 6.2, where I also wind up the chapter and the thesis, I consider how to approach the broader questions covered here as they pertain to the architecture of the law and the polity of those who arbitrate over it.

6.1 Observations

In this thesis, I examine the position of unlawful occupiers who remain on land belonging to private landowners owing to a court application for their eviction having been denied, because it would be unjust and inequitable to evict them.[816] I examine and attempt to describe the legal nature of the position of such unlawful occupiers and the manner in which once established, such a position, in its furtherance of the right

[814] Refer to section 1.1 above.
[815] Refer to section 1.2 and 1.3 above.
[816] Refer to section 1.1.

to security of tenure, counter-relates to the ownership rights of the landowner.[817] I do this simply because courts have yet to do so.[818] The argument I present as a contributing element to this state of affairs is the stated backdrop challenge posed by a neutral set of rules and legal approach, and how such neutrality, in the face of other influences lends itself to the retention of insecure land tenure.[819]

In Chapter 2, I go over the scope of the legislation that now governs evictions in South Africa, highlighting the significance of the just and equitable criterion. Furthermore, I discuss the developments in eviction law that gave rise to this criterion.[820] The objective of this exercise is to provide historical and present legislative background for land evictions.[821] The background, as depicted in that account, illustrates a history of land dispossessive racial laws and a modern legislative framework that aims to remedy some of that racially dispossessive history.[822] In other words, when set against this historical backdrop, the current eviction law represents an attempt to harmonise historically informed interests related with land ownership and/or occupation[823] - that is, the conflict between "individual rights and social obligations, the need to safeguard current private property rights while simultaneously serving the public interest, particularly but not entirely in the context of land reform," but also in the context of future social equality.[824] It is in this frame that I predicate the moral position of people who seek to remain (unlawful occupiers), occupying land that belongs to someone else, as a plight for those who may have been violently evicted from land and, more relevantly, those who were not forcibly evicted from land per se but rather had no land rights to lose and later (re)acquire.[825]

In sum, there are two inextricably linked significant factors that foreground not only how unlawful occupiers come to remain on another's land but also the entry point of neutrality in law and approach as a problem. The inclusion of the just and equitable

[817] Refer to section 1.1.
[818] Refer to section 1.3.
[819] Refer to section 1.2.
[820] Refer to section 2.1.
[821] Refer to section 2.1.
[822] Refer to section 2.2.
[823] Refer to section 2.3.
[824] Refer to section 2.3.
[825] Refer to section 2.3.

requirement addresses both parties' interests, i.e., what is fair to both the landowner and those who inhabited the property unlawfully.[826] In this consideration, an unproblematic one when taken at the hems. The concept of “just and equitable” is linked to the constitutional need to depart from a merely legalistic approach towards the consideration of external variables such as morality, fairness, societal values, ramifications, and circumstances.[827] To reach a "just and equitable" decision, one that takes these considerations into account, along with the criterion guidelines that compel a court to make a value judgement based on "morality, fairness, society values and implications," and any other variables, it is necessary to have a firm understanding of the historical background of who governs, who has access to, uses, and controls land.[828] The systemic anti-transformative challenges embedded in interpretation and procedural traditions find space in the scope and application of these value aspects.[829] If neutrality has a default, it is one that runs counter to the acknowledgement that while the displacement project caused (largely black) people to lose their way of life and expose them to a new dominant culture, it continues to contribute to the continuation of their indentured servitude on land. This is because the greater voice of those without land (majority Black people) is muffled not only because of structural shortcomings but also because it struggles to find amplification in an environment that is now foreign to it.

In Chapter 3, I examine how the just and equitable requirement as it was described in the preceding chapter is applied.[830] The current legal framework regulating evictions establishes a court-ordered process before an eviction can be granted lawfully. In this process, among other statutory requirements, such as procedural requirements like that of notice, the just and equitable criterion as a requirement finds expression.[831]

This expression of a just and equitable standard on evictions from land potentially comes up twice in the process leading to an eviction. That is, the court will only grant or deny an eviction if it will be just and equitable to do so; and second, if an order of

[826] Refer to section 2.3.
[827] Refer to section 2.3.
[828] Refer to section 2.3 and section 3.2.
[829] Refer to section 1.2 and section 3.2.
[830] Refer to section 3.1.
[831] Refer to section 2.3 and section 3.2.

eviction is granted, its terms, if any are to be attached, are also just and equitable. Conversely where the application for eviction is denied, the just and equitable consideration comes up only but once leading to that decision. Significantly, with this standard, we also come to terms with a situation in which people who are subject to eviction because of their unlawful occupation, nevertheless continue to remain on such land for a variety of valid reasons.[832] One of three scenarios may apply here.The first, where an application for eviction has been granted, but the private landowner is ordered to allow unlawful occupiers to remain on the land/property while alternative accommodation is being sought by the state.[833] The second, is an order where the application for eviction has been granted, but the execution of the order becomes impossible for one reason or the other.[834] I pause here to briefly recap the importance of the discussion of these two orders to the primary and broader issues raised in the thesis.

These two outcomes do not meet the outlined threshold because eviction is granted in both of them, which is contrary to the primary research question, which is to define the legal position of unauthorised occupiers who remain on another's property when the application for eviction is denied for just and equitable reasons.[835] That is, the landowners in both these scenarios were simply required, albeit for an extended time in these cases, to bear the presence of the occupiers who were eventually removed with and or without compensation for the unreasonable delay where such delay was occasioned.[836]

What remains to be gleaned from the case discussion of these two scenarios is that the courts' approach has been to avoid the possibility of imposing positive duties on private landowners, preserving traditional private law landlord rights by emphasizing the State's obligation to fulfil occupants' rights.[837] Evictions from private land are viewed as being assessed from a socioeconomic aspect as well as through the lens of the sec. 26 right, but not from a sec. 25 standpoint where probable regulatory

[832] Refer to section 3.2.
[833] Refer to section 3.2.
[834] Refer to section 3.2.
[835] Refer to section 3.2.
[836] Refer to section 3.2.
[837] Refer to section 3.2.

deprivation of use and enjoyment entitlements can be considered.[838] As a result, the coexistence of landowners' property rights and occupiers' rights, as also characterized later in Chapter 5, is devoid of content. In this view, the courts' seemingly preferred reliance on state-dependent resources in these two scenarios illustrates the larger tension between the moral, political, and constitutional imperative to redistribute and the cultural and methodological proclivity to retain and postpone.[839]

The third scenario represents situations in which an eviction order application is denied because eviction would be unjust and inequitable, and the unlawful occupier remains on private property indefinitely.[840] Unlike the other two forms of eviction orders, this third type of order does not grant the eviction application.[841] The unlawful occupier remains on the property from which eviction was sought in the third type of order because the court does not sanction the eviction in accordance with statutory requirements.[842] The fact of remaining in this scenario is not transitory. This is not to imply that the remaining is permanent; rather, it is meant to underline that the order ends the process until a new application is submitted, if and when one is presented.

Uniquely, the landowner and occupier, in the absence of a mutually accepted agreement in which the landowner transfers some of his or her rights to use and enjoy the property to the occupier, remain in an irregular tenure arrangement. Significantly, the primary research question comes about on the backdrop of the first two scenarios and the reasoning advanced there. That is to say, in a non-transitory stay on eviction, a burden on the dominium is envisioned in which the landowner foregoes those rights ancillary to the occupation, and, in turn, those same rights are at the very least kept in abeyance, with some benefit accruing to the occupier.[843]

Elsewhere, this burden is either inconceivable and reprehensible, and when there are no realistic chances of avoiding it, it is regarded compensable.[844] The case discussion

[838] Refer to section 3.2.
[839] Refer to section 3.2.
[840] Refer to section 3.2.
[841] Refer to section 3.3.
[842] Refer to section 3.3.
[843] Refer to section 3.3.
[844] Refer to section 3.3.

in the third scenario simply does not enter into this deliberation. When presented with the inescapable prospect of evicting an unlawful occupier from private land without the outlet of State intervention, the court appears to apply the statutory procedure up to the point where the eviction is denied without clarifying what this means for the parties involved. That is, in these types of instances, the court essentially answers the eviction question, leaving all other questions that devolve from that finding unanswered. This is not a casual act of judicial minimalism. It is a portrayal of a broader constraint. It is a constraint resident in the simmering contradiction between the desire to expand redistributive reform into private interactions, the need to safeguard the security of property rights, and the political, liberal organizing principle that informs the operating framework. In a sense, the case description conducted here not only elaborates on the contradictions set forth, but it is also consistent with and reflective of the effort needed every so often for a single or relatively small group of a much larger majority of people without rights to land to defend their non-right interests in land.

In Chapter 4, I discuss the probable normative legal nature of the fact of remaining that occurs as a result of the third scenario described above.[845] To achieve this, I compare the likely dos and don'ts of the envisaged stay on someone else's property. Similarities are drawn to scenarios that include the occupation, use, and enjoyment of someone else's property by right.[846] I do not assert that the content developed in this chapter and the examples that were used to construct it cover everything that may accrue under and through a claim to remain. What becomes evident in this regard is that, while the continued occupation described in this thesis shares some characteristics and applications with examples such as servitudes, it is different.[847] More so, the exercise without right has the capacity to establish, via use, separate claims covered by right, i.e., burial rights.[848]

The claim's non-exhaustive nature includes, without a perfect match, components derived from a litany of examples found in common law and statutory law that espouse the tentative interaction of occupier and proprietor interests in the same land. Another

[845] Refer to section 4.1.
[846] Refer to section 4.1.
[847] Refer to section 4.2.
[848] Refer to section 4.3.

example is mineral rights, where a non-consensual infringement on one's ability to use and enjoy the entirety of one's own land ownership rights is envisioned.[849] Whether the claim to remain necessarily involves the claim to access is one of the approximate questions considered here.[850] It is clear that the landowner whose property is the subject of a claim to remain is expected to bear the responsibility of enabling reasonable access over the unburdened extent of his or her property because a portion of it is subject to court-ordered occupation, and such access over the unburdened cannot be expected to be found separately from the claim to remain.[851] At a base level, the claim to remain is exactly what its name suggests — a claim to remain in use and enjoyment of that which is presumptively already in use and enjoyment.

In Chapter 5, I examine the legal implications of remaining on someone else's land in the manner outlined in the previous two chapters, on the landowner's property right to exclude as set out in sec. 25.[852] This endeavour's outcome establishes two things. The first, in terms of the primary research issue of defining the legal situation created by the considered conditions, is that the continued stay of an unlawful occupier, a continuation in the exercise of rights ancillary to occupation, albeit without right, limits the landowner's benefit of use and enjoyment of the land in relation to that occupied space.[853] More significantly, this limitation is as shown in the discussion dealing with this aspect is neither unlawful nor arbitrary.[854] It appears that the factors presented therein point to a finding of deprivation under sec. 25.[855] More significantly, the constitutional assessment of the limitation on the landowner's right to property appears to confirm what the legislative criteria that results in the fact of remaining essentially establishes. That is, the proportionality and rationality analyses established in cases where sec. 25 is applied mirror the evaluation of the landowner's interests as opposed to those of the occupier in, for example, sec. 4 of PIE.[856] This begs the question of why, after engaging in the legislative process, the courts fail to

[849] Refer to section 4.4.
[850] Refer to section 4.4.
[851] Refer to section 4.4.
[852] Refer to section 5.1.
[853] Refer to section 5.3.
[854] Refer to section 5.3.
[855] Refer to section 5.3.
[856] Refer to section 5.3.

develop the legislatively developed position to its logical constitutional of deprivation.[857]

In this thesis, I also went well beyond simply addressing the primary research question. In terms of the broader context, my primary claim is that little has been done, either through research or through the courts, to establish the legal standing of an unlawful occupant who continues to occupy private property after an eviction order is denied on the grounds that it would be unjust and inequitable.[858] In this context, the implementation of legal issues is haphazard due to the systematic and, to some extent, skilful avoidance of legal implications where the interaction of competing interests does not predict the emergence of a balance. Indeed, the position of unlawful occupiers vis-à-vis the landowner in the studied scenario when eviction is not just and equitable is one of many such examples where this is witnessed.

However, my point goes far beyond that. I am suggesting that the above-mentioned avoidance is generated in part by the Constitution's fundamental neutrality with regard to important notions of the good, conflict, and contestation at the altar of harmony. Given the long-standing power relations that continue to resemble apartheid, such as the numerical and racial disparity in land distribution, this fiction of neutrality works simply to sustain the status quo. The predisposition toward the status quo may manifest itself in intellectual pessimism to push legal elements beyond their initial impression of restraint where neutrality is the default operative setting. In this case, a reluctance to define and affirm the legal position of an unlawful occupier who continues to occupy another's property after a court has dismissed an eviction action on the substantive argument that eviction would be unjust and inequitable.

In part, the immediate response would be to advocate for a strategy that requires legal agents to reconcile with their ideological identity and, by doing so, to alter their perspectives (interpretation) to account for prejudice obscured by the fiction of neutrality that pervades the space in which they exercise their skill. To return to Rich, to recognise the impact of unequal power relations in limiting equal access to

[857] Refer to section 5.2.
[858] Refer to section 1.1.

being heard and, through being heard, being seen, having one's unique challenges (existence) understood, highlighted, and addressed - to remember that "poets do not go to jail for being poets, but for being dark-skinned, female, poor."[859]

6.2 Do we (a)mend it? Or end it, for all times?

Over the last two decades, a well-established critique of the South African Constitution has emerged, in which the idea of abolishing the Constitution is contrasted with modifying it.[860] This late in the thesis, my intention is not to delve deep into this critique, but rather to explore the main contention offered therein in relation to the broader problem described in this thesis. The broader issue is framed against the necessity to confront the constraint produced of the architectural fiction of neutrality, which has been proven to harbour an anti-transformative propensity of avoidance.[861]

That is, in my thesis, I have set out those factors that in part I believe stand in the way of achieving secure land tenure—namely, that in seeking to reconcile different interests, the operating legal framework adopts neutrality and universality, which tends to favour a legal approach that confirms, or at the very least acquiesces with the status quo. A status quo of tenure insecurity.[862] The kind which necessitates a systemic confrontation with the terms and conditions under which land is held, used, and traded by providing eligible persons who live on land they do not own and neither have no rights to, security. The broad question I raise in this situation, is whether the constitutional legal framework governing tenure reform fails to allow us to reimagine in unambiguous terms how we approach the recognition of non-right interests of those who occupy land they do not own and/or have no rights to.

More than that, I question whose interests are at the heart of how we relate to land and land rights. This is in light of the now established pattern that where opportunity for development is created, such development is neither conclusive nor far-reaching

[859] Refer to the epilogue in Chapter 2.
[860] For a full discussion see Castro-Gómez 2007:428–48; Ramose 2012:20-39; Ramose *et al*. 1991:4-21. Madlingozi 2014; Modiri 2018:300-325; Mignolo 2009:7-10; Douzinas 2007:51-57; Zitzke 2018.
[861] Refer to section 1.2 above.
[862] Refer to section 1.2 above.

enough to address what is at the heart of tenure insecurity, which is the extension and redistribution of land and land rights to those who need them. Having typified instances and manifestations of the research's broad question. The key question at this time is what structural changes must occur and at what level intervention must they occur for substantial change to be realised. This is in direct affront to the piecemeal solution to the persistent crisis of tenure insecurity (landlessness) envisaged in this thesis.

In the introduction, I assert that, while I use a critical perspective as a lens to analyse the questions highlighted in my thesis, I also seek insights from other perspectives that, in principle, contradict the critical perspective.[863] To be clear, I am not claiming that the critical perspective lacks realistic avenues within its own paradigm to solve any of the issues raised. Instead, I recognize that the issues may necessitate a non-traditional approach, particularly where tradition is conspicuous in the self-reinforcement of the undesirable.

In this regard, having gone through a thorough review of the structural limits that have contributed in part to the prolongation of insecure tenure, it is important to remark that, in summary, the thesis presented by those who believe the Constitution should be abolished is not without merit. The main argument advanced by proponents of such a perspective is the following: predominantly, constitution-making, and constitutional reform have enabled neo-settler colonialism by continuing institutional, socio-economic, and cultural conditions produced during settler colonisation.[864] That is, to the extent that I argue in the introduction that the autonomy, structure, language, and universality of the Constitution have been condemned for fostering rupture and natality, forging a new and unconstrained future, a future not bound to the past for restorative purposes but in principle bound to the past (for preservation purposes) through the (re)packaging and (re)presentation of politically specific concepts of freedom and equality, which effectively safeguard specific norm-based rules.

[863] Refer to section 1.2 and 1.4.

[864] See Castro-Gómez 2007: 428–48; Ramose 2012:20-39; Ramose *et al*. 1991:4-21; Madlingozi 2014; Modiri 2018:300-325; Mignolo 2009:7-10; Douzinas 2007:51-57; Zitzke 2018.

The gist of this argument as presented from this perspective is that, whereas transformative private law is seen as an affront to purism, the conceptual underpinnings of human rights are potentially as Western as hegemonic private law.[865] As a result, it is unsuitable for resolving problems that arise from within that paradigm, particularly in the African context, where the context is of a life that predates the current manifestation of resource contestation, which is considered to be exacerbated by the imposition of Western liberal principles.[866] That is, combining human rights and recognised African concepts such as ubuntu with a dominant private law system, in my opinion, will not inevitably result in a desirable private law system. A separate proposal is advanced. Instead of following either the purist or transformative approaches to the study of private law, this alternative provides a critical study of private law through an African philosophy, which calls into question what we consider to be absolute truths handed down from time immemorial.[867] This could be one method to provide a more appropriate reaction to the issues associated with the current private law and human rights constitutional paradigm.

To reiterate, the general growing relevance of this perspective, as well as its prevalence in this section of the thesis, where a systemic contemplation on what appears to be perpetuating that which the Constitution wishes to rid society of, occurs in the context of a recognition that the current transformational constitutionalism paradigm has not had the desired impact on the historically disadvantaged since its inception nearly two decades ago.[868] It is reflected in the conclusion that, while the unlawful occupier is protected from evictions without the permission of a court of law, an intervention aimed at, among other things, prohibiting wanton evictions from land and the resulting tenure insecurity, the unlawful occupier in possession of a court order stating that eviction from specific land is not just and equitable, remains insecure occupation as when the court was first approached.[869] This is due to the fact that, while the law (as limiting as it is) as illustrated in the preceding chapters allows the court and those who work in that space to go further and provide legal definition and certainty to

[865] Zitzke 2018.
[866] See Castro-Gómez 2007:428–48; Ramose 2012:20-39; Ramose *et al*. 1991:4-21; Madlingozi 2014; Modiri 2018:300-325; Mignolo 2009:7-10; Douzinas 2007:51-57; Zitzke 2018.
[867] Ibid.
[868] Refer to section 1.3.
[869] Refer to section 1.3.

the position of unlawful occupiers in this particular instance, this is not happening. While there are many plausible reasons as to why this is not happening, one such reason is that to do so, is considered too radical or perhaps against the balance of discursive forces within the constitutional paradigm. Colloquially put, it is not in fashion!

Do we mend it or end it, end it now and for all times? Although I am drawn to the abolishment stance on a fundamental level, whatever replacement sought must be centred on a common future that attempts to construct an episteme that will not fall short in the future, as the current does. That is, I advocate for epistemic disobedience in only those aspects of our usual epistemic relationship that have a retrogressive and exclusionary genetic constitution. In this context, I maintain the belief that African philosophy is better praised in being inclusive and doing the including as opposed to the dominant private law including African philosophy. Perhaps I am drawn to this plausible view because, as South Africa's former president once famously quipped, "I am an African."[870] To be clear, who is not an African? This is Africa!

Yet, change does not happen in a vacuum, which is the danger of zero-point observation or the hubris of the zero-point.[871] It cannot be merely a process of undoing everything as it were. It stands to be acknowledged that the process naturally incorporates the subjectivities, histories, and experiences—both positive and negative—of that which is being replaced. The task remains to distil the good from the bad and bring it under an organizing principle that ultimately serves all.[872] To that end, I leave the conundrum of whether we should mend it or end it, end it now, with the non-conclusive views above, hoping that as my engagement with the diverse perspectives on the subject deepens, a much more conclusive contribution on this question may be attempted.

Circling back to the land tenure context. South Africa’s eviction laws require a paradigm shift. When making this change, it would be prudent to keep in mind the

[870] Mbeki 1996.
[871] See Castro-Gómez 2018.
[872] See Castro-Gómez 2018 and Ramose 2012 where the epistemological basis of interpreting the South African Constitution, which overemphasises more than anything else a Western organising principle and hence a colonial order of legal knowledge that suppresses and marginalises indigenous ways of knowing and doing law is highlighted.

current security of tenure context. It would be prudent to consider both the opportunities and lack thereof costed by the assertion of the current property holding arrangement. A change or modification in the way property is held ought to be always sensitive to “new mischief”, allowing for the adjustment of current rights or the acknowledgment of new ideas of property with new contextualised auxiliary rights without affecting property rights' security. It should be mindful of the temptation to engage in a circular strategy of taking from one to give to the other of a finite resource.

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