Three / The right to housing*

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1 Introduction

South Africa faces an acute housing shortage. Millions of South Africans in need of housing occupy rudimentary informal settlements providing only minimum shelter, while thousands of others have no access to housing or shelter of any kind. The cause of this acute housing shortage lies, at least partly, in the apartheid policy of influx control, which sought to limit African occupation of urban areas.

The South African Constitution aims to address this stark reality, as it explicitly guarantees the right of access to housing, children’s rights to shelter and prisoners’ rights to accommodation. It also places a duty on the state - in the context of protecting existing property rights - to take reasonable measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

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* This paper is partly based on an earlier paper with the same title written by Karrisha Pillay and published in G Bekker (ed) A compilation of essential documents on the rights to accommodation, housing and shelter (2000).


2 See Constitution of the Republic of South Africa of 1996, sec 26, which provides as follows:

   (1) Everyone has the right to have access to adequate housing.  
   (2) The state must take reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of this right.  
   (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.  
   No legislation may permit arbitrary evictions.

3 Sec 28 provides as follows:

   (1) Every child has the right ....  
   (c) to basic nutrition, shelter, basic health care services and social services; ....  
   (3) In this section ‘child’ means a person under the age of 18 years.

4 Section 35:

   (2) Everyone who is detained, including every sentenced prisoner, has the right ...
   (e) to conditions of detention that are consistent with human dignity, including ...
   the provision, at state expense, of adequate accommodation ...

5 Section 25:

   (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.
These rights – included in the Bill of Rights with other civil and political and social and economic rights - engender different kinds of obligations\textsuperscript{6} and are all clearly justiciable,\textsuperscript{7} despite the fact that they may sometimes give rise to budgetary implications.\textsuperscript{8} The question is how any of these rights may be enforced in a given case.\textsuperscript{9} Unlike some of the other rights contained in the Bill of Rights, the rights related to housing and shelter do not have a long history of judicial enforcement in domestic contexts and our courts are therefore still grappling with the exact scope and content of these rights. The right of access to housing and other related housing rights have, however, come under judicial scrutiny and are also widely discussed and commented upon in international human rights bodies. It is to these sources that I shall turn to assist with the interpretation of the rights at hand.

\textsuperscript{6} In re: Certification of the Constitution of the Republic of South Africa 1996 (First Certification case) 1996 10 BCLR 1253 para 77, where the Court states: ‘It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.’


\textsuperscript{8} See First Certification case (n 6 above) para 77, where the Court states: ‘[W]e are of the view that these rights are, at least to some extent justiciable … [M]any of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us a bar to their justiciability.’

\textsuperscript{9} Grootboom (n 1 above) 1183 para 20; Minister of Health & Others v Treatment Action Campaign & Others 2002 10 BCLR 1033 (CC) para 99 where the Court states: ‘Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that intrusion is mandated by the Constitution itself.’
2 Interpreting the right to housing

South Africa’s Constitutional Court has now had the opportunity to consider the scope and content of the various social and economic rights in at least three different decisions. These three decisions - Soobramoney v Minister of Health, KwaZulu-Natal, Government of the RSA & Others v Grootboom and Minister of Health & Others v Treatment Action Campaign & Others - provide us with a framework within which the scope and content of the right of access to housing and shelter and the legal consequences of these rights can be evaluated. Moreover, the Grootboom judgment deals specifically with the right of access to housing and contains very specific pointers as to the nature and scope of the state’s obligations engendered by section 26 of the Constitution. In this section I shall set out the general principles guiding the interpretation of the various provisions before moving on in the subsequent section to a more detailed analysis of the scope and content of the rights under discussion.

10 Some commentators add a fourth case, namely Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others 2001 7 BCLR 652 (CC), where the Constitutional Court used sec 26 of the Constitution to justify action taken by the state to provide access to housing to people in need. The Constitutional Court held in this case that sec 26(3) of the Constitution was relevant when considering whether the state - as landowner - could justify the way in which it dealt with its property. It therefore established the principle that sec 26(3) would be relevant when deciding whether it had acted in a legally appropriate manner. In my opinion, however, it does not add anything fundamental to our understanding of the scope and content of the social and economic rights in general. Subsequent to the submission of this chapter to the editors, a further case dealing with the scope and content of a constitutional socio-economic right was decided by the Constitutional Court: Khoza v Minister of Social Development 2004 6 BCLR 569 (CC). The author could not consider this case in his analysis (eds).

11 1997 12 BCLR 1696 (CC).
12 n 1 above.
13 n 9 above.
2.1 Rights must be interpreted contextually

South Africa’s Constitutional Court has now reiterated on several occasions that the rights in the Bill of Rights cannot be interpreted in the abstract, but must be interpreted in the light of their context. What is required is the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This is because the rights in the Bill of Rights are interrelated and mutually supporting. The interrelated nature of rights requires that any interpretation of sections 26, 28(1)(c) and 35(2)(e) of the Constitution must take heed of other important and interrelated rights such as the rights to equality, human dignity, and the other social and economic rights. When interpreting any of these rights, one should furthermore do so with reference to the other social and economic rights contained in the Bill of Rights. I have argued elsewhere, that social and economic rights and the right to equality are particularly closely connected, but this view is not necessarily shared by other commentators on the work of the Constitutional Court.

The textual context is also important in as much as it may reveal a ‘carefully constructed constitutional scheme’ within which the various sections of the Bill of Rights should be interpreted. For example, in Grootboom the Constitutional Court found that the scope and content of the children’s right to shelter set out in section 28(1)(c) can only properly be ascertained in the context of the rights and obligations created by sections 25(5), 26 and 27 (the relevant social and economic rights). This is because there is an apparent overlap of these rights, and this overlap clearly has consequences for any understanding of the scope and content of the section under discussion.

Secondly, when interpreting the relevant provisions relating to access to housing and shelter, it is important to take into account the social and historical context in which the state’s action is being judged. What is important is to focus on the Constitutional Court’s understanding of the inegalitarian context within which it is called

15 As Yacoob J stated in Grootboom (n 1 above): ‘There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential’ (para 23). See also Minister of Health & Others v Treatment Action Campaign (n 9 above) para 24.
16 See Grootboom (n 1 above) paras 70-79; Treatment Action Campaign (n 9 above) para 74.
18 Grootboom (n 1 above) para 71.
19 As above, para 74. The consequences of this view for the actual scope and content of sec 28(1)(c) will be explored below.
20 Grootboom (n 1 above) para 25; Treatment Action Campaign (n 9 above) para 24.
upon to interpret the Bill of Rights. The Constitutional Court in Soobramoney already accepted this view when Chaskalson stated:21

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Thus, in evaluating whether government action or inaction in providing access to housing or other constitutionally guaranteed forms of shelter infringes any of the relevant provisions, one will have to take cognisance of the fact that many of South Africa’s poorest citizens have either no access to housing and/or shelter, or they only have access to rudimentary forms of informal housing. One will also have to take into account that many people have no choice but to live in the most desperate conditions, often on private or state-owned land not originally earmarked for housing. In particular, one will have to take note of the especially vulnerable position in which both women and children find themselves where they have no access to adequate housing. Where a state policy fails to take cognisance of these factors and, say, completely ignores the plight of the most vulnerable sections of the community, it will be highly relevant when coming to a decision on whether the state policy is reasonable and therefore constitutionally valid or not.

2.2 The role of international law in interpreting the right to housing

Section 39(1)(b) of the Constitution recognises the importance of international law in the interpretation of the Bill of Rights and accordingly requires consideration of international law in the interpretation of the Bill of Rights.22 Of course, this does not imply that judges must follow international law positions slavishly. It does mean, I would contend, that courts cannot completely disregard international law. This, in turn, requires that where courts decide not to follow the precedents of international law, they must at least give cogent and well argued reasons for why, after due consideration, they have decided not to follow international law. Moreover, international law will arguably be of particular importance in assisting with the interpretation of the social and economic rights provisions in the Bill of Rights because the international law relating to social and economic rights is often more developed and more nuanced than equivalent domestic law. In the context of the transitional Constitution, the term international law has been interpreted generously to allow recourse also to treaties such as the European

21 Soobramoney (n 11 above) para 8.
22 Sec 39(1)(b) states: ‘When interpreting the Bill of Rights, a court, tribunal or forum – … (b) must consider international law …’
Convention on Human Rights, to which South Africa is not a party and cannot become a party.\(^{23}\)

International law in this context includes those sources of international law recognised by article 38(1) of the Statute of the International Court of Justice, namely the international conventions, international custom, the general principles of law recognised by civilised nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations.\(^{24}\) The latter includes sources arising out of the international human rights conventions such as the comments and opinions of the United Nations (UN) Human Rights Committee, General Comments of the Committee on Economic, Social and Cultural Rights (Committee on ESCR), the comments of the European Commission, judgments of the European Court of Human Rights and judgments of the Inter-American Court of Human Rights.\(^{25}\) There are numerous other conventions that deal with the right to housing with reference to specific vulnerable groups. Examples of these are the Convention Relating to the Status of Refugees,\(^{26}\) the Convention on the Elimination of All Forms of Racial Discrimination (CERD),\(^{27}\) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)\(^{28}\) and the Convention on the Rights of the Child (CRC).\(^{29}\) In addition to these binding instruments, there are also a number of declarations that make reference to the right to housing. The most important of these

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\(^{23}\) J Dugard ‘The role of international law in interpreting the Bill of Rights’ (1994) 10 South African Journal on Human Rights 208 212; N Botha ‘International law and the South African interim Constitution’ (1994) 9 South African Public Law 245 248-252. In S v Makwanyane & Another 1995 6 BCLR 665 (CC) para 35, Chaskalson P ruled that public international law would include ‘non-binding as well as binding law’ and stated: ‘In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3 [the Bill of Rights].’ See also generally D Devine ‘The relationship between international law and municipal law in the light of the interim South African Constitution 1993’ (1995) 44 International and Comparative Law Quarterly 1; J Dugard ‘International law and the “final” Constitution’ (1995) 11 South African Journal on Human Rights 241 242; LM du Plessis & H Corder Understanding South Africa’s transitional Bill of Rights (1994) 121.


\(^{25}\) Botha (n 23 above) 248-252.

\(^{26}\) GA Res 429 (V) 1950; 189 UNTS 150.

\(^{27}\) GA Res 2106 (XX) 1965; 660 UNTS 195; 5 International Legal Materials 50 (1974).


are the Istanbul Declaration on Human Settlements and the Habitat Agenda.

The Constitutional Court provided more clarity about the use of international law in interpreting the social and economic rights provisions of the Bill of Rights in the Grootboom and Treatment Action Campaign judgments. In Grootboom, the Court emphasised that the use of international law may be directly applicable where the particular principle or rule of international law binds South Africa directly. But where such a principle does not bind South Africa directly, its relevance would be limited. In interpreting the social and economic rights provisions in the Bill of Rights, the influence of international law not directly binding on South Africa will be limited where significant differences exist in the wording of the provisions of an international treaty and the provisions of the South African Constitution. Thus, while the interpretation of the provisions of the International Covenant on Economic, Social and Cultural Rights (CESCR), as expressed in the General Comments issued by the Committee on ESCR, will be pertinent and helpful for the Court in interpreting the right of access to housing, the extent of the influence of the General Comments will largely depend on the specific context and on the texts of the provisions under discussion. In Grootboom, the Court relied directly on General Comment 3 issued by the Committee on ESCR to explain the parameters of the justiciability of social and economic rights, and explicitly endorsed a passage from General Comment 3 regarding the meaning of the term 'progressive realisation' in the context of the South African Constitution.

30 UNA/CONF 165/14(part) 7 August 1996. 
31 Adopted at the 18th plenary meeting, on 14 June 1996 of the UN Conference on Human Settlements. 
32 Grootboom (n 1 above) para 26. 
33 Grootboom (n 1 above) para 28. 
34 GA Res 2200A (XXI); 993 UNTS 3 (1967); 6 International Legal Materials 360 (1967). 
35 Grootboom (n 1 above) para 45. 
36 UN Committee on ESCR General Comment No 3 The nature of state parties’ obligations (art 2 para 1 of the Covenant) (5th session, 1990) [UN Doc E/1991/23]. 
37 Grootboom (n 1 above) para 45.
3 International and South African law

3.1 Introduction

The right of access to adequate housing protected in section 26 of the Constitution engenders both negative and positive obligations on the state and other relevant role-players. These obligations are spelt out in section 7(2) of the Bill of Rights, which states that the state must ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.38 In the next section I shall summarise the duties engendered by this right, focusing on both the negative39 and positive40 obligations for the state and other relevant role-players in respect of the right to housing.41 I shall also proceed to illustrate these general principles with reference to South African case law and the relevant international law provisions.

3.2 Negative obligations on the state and other role-players to respect the right to housing

3.2.1 General principles

Section 26 places a negative obligation on the state and other relevant role-players to desist from preventing or impairing the right of access to adequate housing.42 Any action by the state that would take away existing access to adequate housing or would make it more difficult for an individual to gain access to existing housing would thus potentially result in an infringement of this right. This means that the state is required to respect the autonomy of the individual in his or her exercise of the right of access to adequate housing. This duty to respect human rights is easiest to grasp because it corresponds to the traditional view of the nature of the Bill of Rights as a shield against

38 Sec 7(2). See also De Vos (n 7 above) for an exposition on what this section entails.
39 Grootboom (n 1 above) paras 20 & 34.
40 n 39 above, para 38.
41 According to sec 8(2), the Bill of Rights may, in certain circumstances, also bind natural and juristic persons. Stephen Ellmann has argued that in the context of the HIV/AIDS crisis in South Africa, pharmaceutical companies might be bound by sec 27(1) of the Constitution. This is because most South Africans are being denied access (in the negative sense) to anti-retroviral drugs. Unless this denial can be justified by the pharmaceutical companies’ legitimate interest, their actions that continue to deny individuals access to anti-retroviral drugs could be found to be unconstitutional. Ellmann argues that where it is feasible for companies to lower their prices without compromising their financial stability, then refusing to make such reductions could be unconstitutional. The same will hold for companies and private individuals when it comes to the right of access to adequate housing. Although access to housing is arguably a less pressing right than the right of access to health care in the context of the HIV/AIDS pandemic, it might still be true that in certain circumstances not only the state but also companies and private individuals will be under a constitutional duty not to infringe on the existing right of access to health care or not to act in a way that will make it more difficult for individuals to gain access to adequate housing. See P Andrews & S Ellmann The post-apartheid constitutions: Perspectives on South Africa’s basic law (2001) 444 460-462. See also De Vos (n 7 above) 67 80.
42 First Certification case (n 6 above) para 20; Grootboom (n 1 above) para 34.
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It is a duty whose flipside is a right: Every individual has a constitutional right to enjoy unhindered access to housing and not to be disturbed in existing access to housing. Like all rights, this right is not absolute and might be limited in specific circumstances.

This negative duty on the state to respect the right of access to housing is further elaborated upon in section 26(3), which addresses the question of unlawful evictions. This section explicitly outlaws people being evicted or having their homes demolished without an order of court after due consideration has been accorded to all relevant circumstances. While certain criteria as to what constitutes 'all relevant circumstances' are required, it is clear that this subsection is significant in the sense that it is subject to immediate implementation and not qualified by the availability of resources. In addition, it unequivocally prohibits legislation that permits arbitrary evictions.

3.2.2 Evictions and South African law

To give effect to the positive constitutional obligation in section 26(1) to respect the right of access to housing, the South African Parliament has adopted a number of laws aimed at protecting the rights of those who occupied land or had access to housing. For example, the Rental Housing Act protects the occupation rights of (lawful) occupiers of (rural and urban) residential property; the Land Reform (Labour Tenants) Act protects (lawful) occupiers of agricultural (rural) land; the Extension of Security of Tenure Act (ESTA) protects the occupation rights of persons who (lawfully) occupy (rural) land with consent of the landowner; the Interim Protection of Informal Land Rights Act protects (lawful) occupiers of (rural and urban) land in terms of informal land rights; the Restitution

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43 This section must be read with sec 25 (6) of the Constitution which deals with property, and which explicitly provides that 'a person or community whose tenure of land is legally insecure as a result 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'.


45 50 of 1999.

46 3 of 1996.


48 31 of 1996.
of Land Rights Act \(^{49}\) protects (lawful and unlawful) occupiers of (urban and rural) land who have instituted a restitution claim; and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) \(^{50}\) regulates eviction of unlawful occupiers (from urban and rural land) in order to give effect to the provisions of section 26(3). These Acts form a web of protection that has considerably improved the position of previously vulnerable groups whose legal rights to access to land and housing were weak or non-existent. \(^{51}\)

From the perspective of the right of access to housing, one of the most important strands of this web is PIE. This Act becomes relevant in two distinct situations, namely, first, where evictions are aimed at the unlawful invaders and occupiers of land, and second, where evictions are aimed at occupiers whose lawful occupation turned unlawful through lapse of time or cancellation. I shall deal with these two situations separately.

This Act prohibits the eviction of the ‘unlawful occupier’ of land, unless the eviction is ordered by a court of law and unless certain procedures are followed. \(^{52}\) It distinguishes between unlawful occupiers who have occupied the land for less than six months and those unlawful occupiers who have occupied the land for more than six months. In the first case, 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. \(^{53}\) In latter cases, courts are given the same power to issue an eviction order and are also required to take into account relevant circumstances, including those set out in section 6(4). However, in the second set of circumstances, relevant circumstances are said also to include the question 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. \(^{54}\)

These provisions radically changed the South African common law. \(^{55}\) Previously the common law held that an owner could claim his or her property wherever he or she found it, from whomever was holding it. The owner therefore only needed to allege and prove that he or she was the owner of that property and that the defendant was holding the property before the onus would shift to the defendant to establish any common law right to continue holding the property. \(^{56}\) Under PIE, the owner no longer has the right to evict the unwanted

\(^{49}\) 22 of 1994.
\(^{50}\) 19 of 1998.
\(^{51}\) See Van der Walt Journal of South African Law (n 44 above) 265.
\(^{52}\) n 50 above, sec 4.
\(^{53}\) Sec 4(6).
\(^{54}\) Sec 4(7).
\(^{55}\) See Van der Walt South African Journal on Human Rights (n 44 above) 377. Sec 4(1) states: ‘Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.’
\(^{56}\) Chetty v Naidoo 1974 3 SA 13 (A) 20A.
and unlawful occupier. This right is given to the court that has a wide discretion in terms of wide-ranging criteria to decide whether an eviction order would be just and equitable.\(^{57}\)

In cases where the occupiers are seen as unlawful invaders who have settled on land without permission, the courts have generally had no problem with interpreting the Act to give effect to its provisions which override the common law protection of property.\(^{58}\) It is therefore clear that PIE applies to and protects all people who have unlawfully occupied land or property and now resist eviction from that property.

However, there has been some considerable confusion about whether PIE also applies to individuals who occupied property lawfully but became unlawful occupiers through defaulting on rent or bond payments, or refusing to vacate premises after the expiry of a lease. The Act does not provide explicitly for the situation where lawful occupation becomes unlawful.\(^{59}\)

Until 2002, the Transvaal High Court case of *ABSA Bank Ltd v Amod*\(^{60}\) was generally considered to be the authoritative decision on this matter. In this case, the High Court decided that the prohibition against summary eviction contained in PIE applied only to persons who invaded vacant land and who occupied structures in informal settlements. It was thus held that the Act did not apply to the occupation of formal structures such as houses and flats occupied in terms of rent agreements as these were still governed by the common law.\(^{61}\) Early in 2002, the Supreme Court of Appeal in the case of *Brisley v Drotsky*\(^{62}\) seemed to endorse this view when it assumed that PIE did not apply to a situation where a lease agreement was validly terminated and the occupation thus became unlawful. The appellant had argued that section 26(3) of the Constitution precluded the granting of an ejectment order without taking into account all relevant circumstances, including the personal circumstances of the appellant.\(^{63}\) The Court rejected an argument that they had to take into account the relevant circumstances set out in sec 4(6) and (7) of PIE when deciding whether to grant an ejectment order, as they assumed this Act did not apply to the present case.\(^{64}\)

However, in August 2002, the Supreme Court of Appeal in the case of *Ndlovu v Ngcobo*\(^{65}\) found that PIE indeed applied not only to cases where land or housing was unlawfully occupied, but also where

\(^{57}\) See the minority decision in *Ndlovu v Ngcobo*; *Bekker & Another v Jika* 2003 1 SA 113 (SCA).


\(^{59}\) Van der Walt (n 58 above, 385-86) elaborates on the various situations in which lawful occupation can become unlawful.

\(^{60}\) (1999) 2 All SA 423 (W).

\(^{61}\) n 60 above, 429c-30h.

\(^{62}\) 2002 12 BCLR 1229 1229 (SCA).

\(^{63}\) n 62 above, para 43.

\(^{64}\) n 62 above, para 37.

\(^{65}\) n 57 above.
occupation of land and housing became unlawful after a previous period of lawful occupation. Harms J argued that:

[H]aving regard to the history of the enactment with, as already pointed out, its roots in s 26(3) of the Constitution which is concerned with rights to one's home, the preamble to PIE which emphasises the right to one's home and the interests of vulnerable persons, the buildings listed and the fact that one is ultimately concerned with 'any other form of temporary or permanent dwelling or shelter', the ineluctable conclusion is that, subject to the *eiusdem generis* rule, the term was used exhaustively. It follows that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE.

However, as Van der Walt points out, the situation remains somewhat murky as the *Ndlovu* decision is based on an interpretation of the relevant provisions of PIE and not on a jurisprudential analysis of the relationship between section 26(3) of the Constitution, land reform legislation and the common law.

### 3.2.3 Evictions and international law

The various pieces of legislation adopted by the South African Parliament over the past five years seem to have come close to ensuring respect for the right of access to housing as envisaged by the Constitution. The strong emphasis on the protection of existing occupiers of land and housing, and the Supreme Court of Appeal’s extension of PIE to those whose unlawful occupation stems from causes other than the initial unlawful occupation of land or housing suggests that it would mostly be possible for individuals to enjoy their access to housing without undue interference. This is also in line with the various resolutions, opinions and treaty provisions addressing the issue of access to land and housing.

For example, the UN Sub-Commission on Human Rights has adopted a Resolution on Forced Evictions, parts of which are worth referring to in the present section. It has urged governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions. It has further urged governments to confer legal security of tenure to all persons currently threatened with forced evictions and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups. It has

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66 n 57 above, para 20.
67 Van der Walt *South African Journal on Human Rights* (n 44 above) 404.
68 This mostly positive assessment of legal trends towards the protection of access to housing and land may seem optimistic in the light of criticism of judicial responses to land issues. Van der Walt argues that attempts to rectify the apartheid legacy regarding land are often frustrated by courts which instinctively adhere to the common law position which favours existing property rights unless clearly instructed otherwise. See Van der Walt *South African Journal on Human Rights* (n 44 above) 411. Although I am generally in agreement with this assessment, I believe the influence of the Constitution – especially sec 26(3) – is gradually turning the tide even in the more traditional courts such as the Supreme Court of Appeal.
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recommended that all governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities who have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups.

Furthermore, the UN Commission on Human Rights has adopted a further Resolution on Forced Evictions,\(^\text{70}\) parts of which are applicable to the issue at hand, and will accordingly be referred to in the present section. It has recognised forced evictions to mean ‘[t]he involuntary removal of persons, families and groups from their homes and communities, resulting in increased levels of homelessness and in inadequate housing and living conditions’.\(^\text{71}\) It has noted its concern with the fact that forced evictions and homelessness intensify social conflict and inequality and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society. In addressing the prevalent issue of forced evictions, the UN Commission on Human Rights has emphasised that governments bear the ultimate legal responsibility for preventing forced evictions.\(^\text{72}\)

The Committee on ESCR has placed considerable emphasis on forced evictions and has asserted that ‘instances of forced evictions are prima facie incompatible with the requirements of the [CESCR] and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law’.\(^\text{73}\)

Although the South African Constitution differs in the sense that it prohibits evictions without an order of court after all the relevant circumstances have been considered (as opposed to ‘in the most exceptional circumstances’), the relevant factors considered by the Committee on ESCR when deciding whether evictions should be allowed might be of help to South African courts when interpreting section 26(3) as well as the provisions of section 4 of PIE.\(^\text{74}\)

\(^\text{70}\) Resolution 1993/77.
\(^\text{71}\) As above preamble para 5.
\(^\text{72}\) n 70 above, preamble para 8.
\(^\text{73}\) General Comment No 4 The right to adequate housing (art 11(1) of the Covenant) (6th session, 1991) [UN Doc E/1992/23] para 18.
\(^\text{74}\) Some examples of what have been considered to be ‘the most exceptional circumstances’ in the international realm include racist or other discriminatory statements, attacks or treatment by one tenant or resident against a neighbouring tenant; unjustifiable destruction of rented property; the persistent non-payment of rent despite a proven ability to pay and in the absence of unfulfilled duties of the landlord to ensure dwelling habitability; persistent anti-social behaviour which threatens, harasses or intimidates neighbours; persistent behaviour which threatens public health or safety; manifestly criminal behaviour, as defined by law, which threatens the rights of others; the illegal occupation of property which is inhabited at the time of occupation; and the occupation of land or homes of occupied populations by nationals of an occupying power. See eg Committee on ESCR General Comment No 7 The right to adequate housing (art 11.1): Forced evictions (16th session, 1997) para 11.
3.3 Positive obligations

Section 26 of the Constitution also places a positive obligation on the state and other relevant actors to ‘protect, promote and fulfil’ the right of access to housing. This means, at the very least, that the state must take steps - including the enactment of legislation - to ensure that individuals can acquire access to housing without interference from private actors and institutions. It furthermore means that the state has a duty to devise and implement - progressively and within its available resources - a comprehensive plan to ensure the full realisation of the right of access to housing. This plan cannot merely be aimed at providing individuals with shelter or basic housing, but must be aimed at providing adequate housing. What is required is a holistic approach aimed at providing all South Africans with access to adequate, comprehensive housing that will enable an individual to live a dignified and productive life. This means that the state has a duty to foster conditions to enable citizens to gain access to health care services on an equitable basis. The state is required ‘to devise a comprehensive and workable plan to meet its obligations’ in terms of section 26.

Implicit in this approach is the understanding that the right of access to housing does not entitle any applicant to individual relief, because the state’s duty is not immediately to provide each and every South African with the best possible housing that money can buy, but to devise and implement a comprehensive plan that will achieve this goal over time. When devising and implementing this plan, the state must take cognisance of the conditions and capabilities of people at all economic levels of our society. Those who can afford to pay for housing should do so themselves, but where people have no money to pay, the state has a duty to take steps to unlock the system through legislation and other measures. The state must address the needs of those who can afford housing and those who cannot. More importantly, the 'poor are particularly vulnerable and their needs require special attention'.

The crux of any inquiry about whether the state has met its obligations in terms of sections 26(1) and (2) will depend on what constitutes 'appropriate steps'. Steps will be appropriate if they meet three key elements set out in section 26(2), namely (a) whether they are reasonable legislative or other steps; (b) to achieve the progressive realisation of the right; and (c) within available resources.
3.3.1 Reasonable legislative and other measures

The obligation on the state is firstly to act reasonably in pursuit of realising the goal of providing accessible and adequate housing for people from all economic spheres. To judge the reasonability of the steps taken, it must be determined whether there is a comprehensive policy, encompassing all three tiers of government, to realise the right of access to housing progressively. Legislation in itself will not be sufficient. What is required is for the state to act in order to achieve the intended result according to comprehensive policies and programmes that are reasonable both in their conception and implementation. To determine whether such measures are reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be ‘balanced and flexible’ and a programme ‘that excludes a significant segment of society cannot be said to be reasonable’. More pertinently, those whose needs are the most urgent and whose ability to enjoy all rights are most in peril, must not be ignored by the measures aimed at achieving the realisation of the goal. Where measures, though statistically successful, fail to respond to those most desperate, they may not pass the test of reasonability.

This signals the interrelated and mutually supporting nature of the right of access to housing and the right to equality and the overarching goal of striving for ‘real’ equality and a respect for dignity. State action or inaction that fails to take into account the structural inequalities in society and action that fails to take into account the impact of that action or inaction on the relevant groups who are most vulnerable and in greater need of state assistance will inevitably become difficult to be justified as reasonable.

3.3.2 Progressive realisation of the right

The second requirement of progressive realisation signals that the right cannot be realised immediately. Nevertheless, it establishes a clear obligation on the state to move towards realisation of the right. What is required is that the state immediately takes steps to facilitate access to adequate housing progressively.

82 Grootboom (n 1 above) para 41.
83 n 82 above, para 42.
84 n 82 above, para 43. See also Treatment Action Campaign (n 9 above) para 68.
85 Grootboom (n 1 above) para 44.
The state has a duty to move expeditiously and effectively towards that goal. Any deliberate retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided in the Bill of Rights. It is imperative to understand that the requirement of progressive realisation of rights does not mean the state can sit back and do nothing. It must take steps immediately, even if those steps will not provide every South African with immediate access to adequate, humane and effective housing. The Constitutional Court in Grootboom thus endorsed the understanding of 'progressive realisation' set out by the Committee on ESCR in General Comment 3.

3.3.3 Resource constraints

To determine whether the state’s action or inaction is reasonable, one has to take into account the resources available to realise the right in question. There has to be a balance between goal and means. The measures have to be calculated to attain a goal expeditiously and effectively, but the availability of resources would always be an important factor in determining what was reasonable in a particular case.

While it would be inappropriate for the court to make orders directed at rearranging budgets, a determination of the unreasonableness of government action or inaction might well have budgetary implications.

Where resources are clearly insufficient to provide any meaningful access to adequate housing, a lack of action on the part of the state may be found to be more reasonable than in cases where the resource constraints are less severe.

When considering resource constraints, it may be kept in mind that resources here refer to both the resources within the state and those

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86 n 85 above, para 45, relying on para 9 of General Comment No 3 (n 36 above). See also The Limburg Principles (a set of interpretative principles concerning the implementation of CESCR developed by human rights scholars and representatives of several UN bodies), which has also accorded significant attention to the term 'progressive realisation', which warrants attention. Principle 16 notes that 'all state parties have an obligation to begin immediately to take steps towards full realisation of the rights contained in the Covenant'. Principle 21 notes as follows: 'The obligation to achieve progressively the full realisation of the rights' requires state parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary, all state parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant' (Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights [UN Doc E/CN 4/1987/17]).

87 Grootboom (n 1 above) para 46.

88 Treatment Action Campaign (n 9 above) para 38. See also the Limburg Principles (n 86 above). Eg, Principle 23 provides as follows: 'The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.' Limburg Principle 24 provides as follows: 'Progressive implementation can be affected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the Covenant.'
available from the international community through international cooperation and assistance.89

3.4 Minimum core obligations

It is clear from the above that the right of access to housing does not provide individual claimants with an individual right to claim relief from the government in the form, say, of ordering the government to provide him or her with access to housing. The question arose in both Grootboom and the Treatment Action Campaign cases whether the rights set out in sections 26 and 27 nevertheless required the state to provide at least a 'minimum core' of these rights regardless of resource and other constraints. The concept of 'minimum core' was developed by the Committee on ESCR and constitutes an attempt to define more clearly a minimum floor of social and economic entitlements that each state must ensure for its inhabitants as a matter of priority: 'A state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.'90

In Grootboom, the Court indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable.91 But this does not mean that the socio-economic rights of the Constitution should be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core is therefore relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).92 Section 26(1) can therefore not be read to establish a positive obligation on the state to provide a 'minimum core' regardless of the qualification set out in section 26(2).93 Courts ‘are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards’ should be,94 and the Constitution thus contemplates a rather restrained role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.95 But despite the fact that individuals cannot invoke the concept of a 'minimum core' to demand specific performance from the government, the concept remains relevant when evaluating the reasonableness of government action or inaction.

89 De Vos (n 7 above) 98.
90 General Comment No 3 (n 36 above) para 10.
91 Grootboom (n 1 above) para 33.
92 As above. See also Treatment Action Campaign & Others (n 9 above) para 34.
93 Treatment Action Campaign (n 9 above) para 34.
94 n 93 above, para 37.
95 n 93 above, para 38.
3.5 International law and the concept of 'adequate' housing

Section 26(1) of the Constitution provides for a right of access to adequate housing as opposed to a right to housing per se or a right to shelter. In Grootboom, the Constitutional Court did endorse the idea that adequate housing ‘entails more than bricks and mortar ... For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.’

But the Constitutional Court has not focused specifically on the concept of adequate housing and has not provided a detailed indication of what might constitute ‘adequate’ housing for the purposes of section 26. It is therefore relevant and appropriate to provide an overview of the very specific understanding provided by the Committee on ESCR in General Comment 4 regarding what constitutes adequate housing. In General Comment No 4, the Committee commented that, while cultural, climatic and contextual factors are important in making a determination on the adequacy of the housing, there are certain core factors that are central to making this determination. These entitles form the core guarantees that, under international law, are legally vested in all persons. They include the following:

3.5.1 Legal security of tenure

Legal security of tenure refers to the fact that all persons should possess a degree of security of tenure that guarantees legal protection against forced evictions, harassment and other threats. The Committee on ESCR has noted that, in ensuring legal security of tenure, governments are obliged to take measures aimed at conferring legal security of tenure upon those households currently lacking such protection. It has further noted that this should be undertaken in consultation with the affected groups or individuals.

3.5.2 Availability of services, materials and infrastructure

The Committee on ESCR has noted that the availability of services, materials and infrastructure refers to the right of all beneficiaries of the right of access to adequate housing to have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

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96 Grootboom (n 1 above) para 35.
97 General Comment No 4 (n 73 above) para 8.
98 n 97 above, para 8(a).
99 n 97 above, para 8(b).
3.5.3 Affordable housing

The Committee has noted that costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised by efforts to acquire or maintain access to housing. It has further referred to the need for housing subsidies and protection from unreasonable rentals or sporadic rent increases.\(^\text{100}\)

3.5.4 Habitable housing

Adequate housing should, according to the Committee, be habitable. It should provide the inhabitants with adequate space and protection from the cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of the occupants must be guaranteed.\(^\text{101}\)

3.5.5 Accessible housing

Adequate housing must further be accessible to those entitled to it. The Committee has noted that disadvantaged groups must be accorded full and sustainable access to adequate housing resources. These would include groups such as the elderly, children, the physically disabled, the terminally ill, HIV positive individuals, the mentally ill, victims of natural disasters, people living in disease-prone areas and other vulnerable groups. Such groups should be ensured some degree of priority consideration in the housing sphere and their housing needs should be adequately reflected in laws and policies.\(^\text{102}\)

3.5.6 Location

Adequate housing must, according to the Committee, be in a location that allows access to employment options, health care services, schools, child care centres and other social and recreational facilities. Furthermore, housing should not be built on polluted sites, nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.\(^\text{103}\)

3.5.7 Culturally adequate housing

Finally, the Committee has commented that the way in which housing is constructed, the building materials used and the policies underlying

\(^{100}\) n 97 above, para 8(c).
\(^{101}\) n 97 above, para 8(d).
\(^{102}\) n 97 above, para 8(e).
\(^{103}\) n 97 above, para 8(f).
these must appropriately enable the expression of cultural identity and diversity.¹⁰⁴

4 Housing-related protection of vulnerable groups

The Constitutional Court has set out general principles that allow us to understand - to some degree at least - the extent of the obligations engendered by the right of access to housing in general. However, as indicated above, the Constitution also contains housing-related protection for certain vulnerable groups, such as children and prisoners. Given the general principles set out by the Constitutional Court, I shall now turn to these issues.

4.1 Children’s right to shelter

As has been noted, section 28(1)(c) of the Constitution accords every child the right to basic nutrition, shelter, basic health services and social services. This section can be distinguished textually from section 26. Firstly, it provides for a right to shelter as opposed to adequate housing. A definition of what constitutes shelter for the purposes of the section is accordingly required. Secondly, it provides for a right to shelter as opposed to a right of ‘access’ to shelter. Finally, children’s rights to shelter are subject to neither the internal qualifier of ‘progressive realisation’ nor that of ‘within its available resources’. Judging from these differences, it has been argued that children’s right to shelter is subject to immediate implementation and resource limitations may not be used to justify a failure to implement the right.¹⁰⁵

However, the Constitutional Court in Grootboom in essence held that parents bore the primary obligation to provide shelter for their children. Because section 28(1)(c) should be read with sections 28(1)(b) and 26, the ‘carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand’.¹⁰⁶

The Constitutional Court decided that the right to provide shelter was primarily imposed on the parents or family and only alternatively on the state. It further stated that the state’s obligation was to provide shelter to those children who were for example removed from their families.¹⁰⁷ Thus, the Court argued, section 28(1)(c) ‘does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their

¹⁰⁴ n 97 above, para 8(g).
¹⁰⁵ See the High Court judgment in Grootboom v Oostenberg Municipality & Others 2000 3 BCLR 277 (C).
¹⁰⁶ Grootboom (n 1 above) para 71.
¹⁰⁷ For a general discussion of children’s rights to shelter, see Grootboom (n 1 above) paras 70-79 of the judgment.
parents or families’. The Court held that this did not mean that the state was absolved from all responsibility. The state would have to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. In addition, the state would be required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to the rights enumerated in section 27. As was reiterated in the Treatment Action Campaign case, the needs of children will often be ‘most urgent’ and their rights ‘most in peril’ and this might require the state to take special cognisance of their needs when devising and implementing the progressive realisation of the right of access to housing.

### 4.2 Prisoners’ rights to adequate accommodation

Section 35(2)(e) of the Constitution provides for prisoners’ rights to adequate accommodation at state expense. Prisoners’ rights to adequate accommodation are not qualified by the term ‘access’. Unlike the right of children to shelter, which the Constitutional Court linked to the duty of parents to provide shelter, this right is clearly directly enforceable against the state. Prisoners are, by their very circumstances, charges of the state and are thus entitled to accommodation at state expense. The only qualification that is contained in the text of section 35(2)(e) itself is that such accommodation must be adequate. In determining adequacy in the South African context, cognisance should be taken of international standards as set out in documents such as the Standard Minimum Rules for the Treatment of Prisoners. The emphasis both at international level as well as in the South African Constitution is that the conditions in which people are detained and accommodated need to be consistent with human dignity.

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108 n 107 above, para 77.
109 n 107 above, para 78.
110 Treatment Action Campaign (n 9 above) para 78.
In *Strydom v Minister of Correctional Services & Others*, the Witwatersrand Division of the High Court relied on section 35(2)(e), read with section 7(2) of the Constitution, and found that prisoners have a right to be housed in circumstances where they would be able to enjoy all the privileges recognised by the Department of Correctional Services and that some of these privileges require access to electricity. Where, as in the present case, prisoners were housed in cells with no access to electric sockets, the Department was under a constitutional duty to work towards the provision of this facility. Given the fact that the Department had already allocated funds to provide the prisoners in this instant case with access to electricity, the court therefore directed the Department to report to it to set out a timetable for upgrading the electricity at Johannesburg Maximum Security Prison where the applicants had been held. This case suggests that adequate facilities must at least encompass those facilities envisioned by the rules of the Department of Correctional Services itself.

5 Conclusion

The right of access to housing does not provide the individual with a right to demand that the government provides him or her with access to a house. However, it does begin to spell out the duties of the state in progressively realising the right of access to housing. It is clear that the exact duties of the state will depend on the specific context and that cases will have to be judged on the individual merits. This is a difficult task, but in attempts to elaborate on the actual constitutional duties placed on the state the provisions of international treaties and the opinions of the Committee on Economic, Social and Cultural Rights will be of specific importance.

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112 1999 3 BCLR 342 (W).
113 n 112 above, para 15.
114 n 112 above, para 23.