THE ROLE OF LOCAL GOVERNMENT IN EVICTIONS*

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1 Introduction

The role of local government in evictions has been described as follows:

> Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy.[1]

This is an understatement. In the context of how the courts interpret eviction provisions, local government is in an unenviable and precarious position. This is not static, but constantly changing and adapting. The law relating to evictions is not what it was 10 years ago,[2] or even 5 years ago.[3] It has now become, to borrow a phrase from either Stuart Wilson, "the new normality"[4] or Sandra Liebenberg, "a new paradigm".[5]

Local government law has also undergone dramatic change since the first of a suite of local government laws was passed to kick-start a new local government structure in 1998.[6] In the context of the *Constitution* municipalities must *inter alia* provide

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1 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) (hereafter *Modderklip*) para 49.

2 Pienaar and Muller 1999 *Stell L Rev*; De Vos 2001 *SAJHR*; Liebenberg 2001 *SAJHR*; Van der Walt 2002 *TSAR* 254-289; Van der Walt 2002 *SAJHR* 372-420; Liebenberg 2002 *Law, Democracy and Development*.

3 Van der Walt 2005 *SAJHR* 144-161.

4 Wilson 2009 *SALJ* 270-290.

5 Liebenberg *Socio-economic Rights* 268-316.

6 The local government legislation is the *Local Government: Municipal Demarcation Act* 27 of 1998; the *Local Government: Municipal Structures Act* 117 of 1998; the *Local Government: Municipal Systems* Act 32 of 2000; the *Local Government: Municipal Electoral Act* 27 of 2000; the *Local Government: Municipal Finance Management Act* 56 of 2003 and the *Local Government: Municipal Property Rates Act* 6 of 2004. See further Van Wyk "Local Government" para 1.

democratic and accountable government for local communities, promote social and economic development[7] and undertake developmentally-oriented planning.[8]

The interpretation by the courts, especially the Constitutional Court,[9] of legislative provisions relating to both evictions and local government has created a framework within which municipalities must react to and deal with evictions. In terms of that framework numerous duties and responsibilities are placed on municipalities. In interrogating the role played by municipalities in evictions this paper will identify and flesh out the content of those duties and responsibilities. This will be done within the context of section 26(3) of the *Constitution*, the relevant legislative provisions for evictions, and against the background of local government's role in land-use planning and development.

2 Section 26(3)

The starting point on the law relating to evictions is section 26(3) of the *Constitution:*

> 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 and that no legislation may permit arbitrary evictions.[10]

Two categories of legislative measures dealing with eviction have resulted from this provision, namely measures which respond to unlawful occupation of land and buildings[11] and measures dealing with redistribution of land and land tenure issues.[12] Other eviction procedures pre-date the *Constitution.*[13]

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7 S 152 *Constitution of the Republic of South Africa* 1996. See 4.12.3 below.

8 S 153 *Constitution of the Republic of South Africa* 1996. See 4.12.4 below.

9 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); (hereafter *Various Occupiers*); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (hereafter *Occupiers of 51 Olivia Road*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) (hereafter *Residents of Joe Slovo Community*).

10 See in general *Grootboom* para 19.

11 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter *PIE*).

12 *Extension of Security of Tenure Act* 62 of 1997 (hereafter *ESTA*) and the *Land Reform (Labour Tenants) Act* 3 of 1996.

13 *National Building Regulations and Building Standards Act* 103 of 1977 (hereafter *NBRBSA*) and the *rei vindicatio.*

3 Evictions

3.1 Procedures for eviction

Eviction in South Africa can take place in terms of the following legislation:

(a) *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 *(PIE)*;[14]
(b) *Extension of Security of Tenure Act* 62 of 1997 *(ESTA)*;[15]
(c) *Land Reform (Labour Tenants) Act* 3 of 1996;[16]
(d) *National Building Regulations and Building Standards Act* 103 of 1977 *(NBRBSA);* and the
(e) *Interim Protection of Informal Rights Land Ac*t 31 of 1996.[17]

In addition there is the *rei vindicatio.* Although eviction legislation has significantly affected the applicability of the *rei vindicatio* it does still apply, albeit in very limited circumstances. These would be where there is eviction from land or property only when it is being used for business, trade or industrial purposes.[18] The only incident of residential eviction not to be regulated by PIE, it seems, is a holiday home, which the SCA has held does not fall within the definition of "building or structure" as it does not function as a "habitual dwelling" or "home".[19]

14 Ss 4, 5 and 6 *PIE*. For more detail, see eg Van der Walt 2002 *TSAR* 284-287; Carey Miller and Pope *Land Title* 519-525. See further 3.2 below.
15 Ss 8-11 *ESTA*. For more detail see eg Van der Walt 2002 *TSAR* 275-282; Carey Miller and Pope *Land Title* 499-507. See also 3 2 below.
16 Ss 5-15 *Land Reform (Labour Tenants) Act* 3 of 1996; Van der Walt 2002 *TSAR* 271-274; Carey Miller and Pope *Land Title* 533-537. See also 3.2 below.
17 S 3 *Interim Protection of Informal Rights Land Act* 31 of 1996. The Act does not deal explicitly with eviction but it protects people who qualify from being evicted unless existing rights have been lawfully terminated. See Van der Walt 2002 *TSAR* 282-283; Carey Miller and Pope *Land Title* 462-467.
18 *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA); Mostert and Pope (eds) *Law of Property* 217.
19 *Barnett v Minister of Land Affairs* 2007 6 SA 313 (SCA) 328B-C.

3.2 PIE *and* NBRBSA *context*

Against the background of the law relating to planning and development, this discussion will focus only on the procedures in terms of *PIE* and the *NBRBSA*, for a number of reasons:

(a) *PIE* applies where none of the other statutes do. Where the others apply to certain types of land and occupiers, *PIE* applies to all land and to occupiers who have no rights.[20]

(b) *PIE* regulates eviction in response to unlawful occupation of land and buildings while *ESTA* and the *Labour Tenants Act* comprise legislative measures that deal with redistribution of land and tenure issues as well as evictions from land not falling in proclaimed townships and in respect of which a consent to reside exists or existed. In addition *ESTA* applies only if the occupier earns less than R 5 000,00 per month, failing which *PIE* will apply.

(c) *PIE* and the *NBRBSA* often involve large scale evictions. For example, in the *Chieftan Real Estate* case[21] 20 000 occupiers had to be evicted, in *Modderklip*[22] it was 40 000 occupiers, in the *Residents of Joe Slovo Community* case[23] the High Court order affected 4 386 households - approximately 20 000 individuals, in the *Blue Moonlight Properties* case[24] 62 adults and 9 children were affected, in the *Various Occupiers* case[25] 68 people were required to move and in the *Occupiers of 51 Olivia Road* case[26] 400 people were affected.

(d) In a local government context evictions in terms of *PIE* occur most often and are often problematic.

(e) *PIE* and the *NBRBSA* deal with the situation where people must be moved in order to make way for housing and other building developments or where the buildings they occupy are unsafe or unhealthy and must be renovated.

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20 Wilson 2009 *SALJ* 271.

21 *Chieftan Real Estate Incorporated in Ireland v Tshwane Metropolitan Municipality* 2008 5 SA 387 (T) (hereafter *Chieftan Real Estate*).

22 *Modderklip* para 8; *Chieftan Real Estate* para 28.

23 *Residents of Joe Slovo Community* para 8.

24 *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) (hereafter *Blue Moonlight Properties*) para 7.

25 *Various Occupiers* para 1.

26 *Occupiers of 51 Olivia Road* para 1.

(f) *ESTA* is about to be repealed and replaced by a *Land Tenure Security Act*.[27]

(g) The *Labour Tenants Act* applies only in restricted circumstances, namely where the relationship between the owner or person in charge and the labour tenant is problematic.[28] It is also about to be repealed by the *Land Tenure Security Act*.

4 Role of local government

4.1 Introduction

Municipalities play a central, increasingly complex role in facilitating the determination of whether or not the courts will grant an eviction order. In the face of a developing jurisprudence comprising numerous decisions, many of them looking through different lenses, it becomes important to try to catalogue the different duties and responsibilities municipalities must shoulder.

4 2 Requirements for eviction orders

The legislative provisions in terms of which evictions are examined are the procedures contained in *PIE* and the *NBRBSA.*

In terms of *PIE*, either an owner of land or the state may apply for eviction. Section 4 regulates the position of the owner of land[29] although this could also be the state in its role as an owner of land. Where an unlawful occupier occupies land for more than six months (being the period of unlawful occupation as opposed to the mere

27 Nkwinti 2010 www.info.gov.za.

28 S 7 *Land Reform (Labour Tenants) Act* 3 of 1996.

29 See eg the following cases: *Sailing Queen Investments v The Occupants of LA Colleen Court* 2008 6 BCLR 666 (W) (hereafter *Sailing Queen Investments*)*; Lingwood v Unlawful Occupiers of Erf 9, Highlands* 2008 3 BCLR 325 (W) (hereafter *Lingwood*); *Blue Moonlight Properties; Cashbuild (South Africa) (Pty) Ltd v Scott* 2007 1 SA 332 (T) (hereafter *Cashbuild*); *Transnet Ltd v Nyawuza* 2006 5 SA 100 (D&CLD) (hereafter *Transnet*); *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments and Others* 2010 4 BCLR 354 (SCA) (hereafter *Shorts Retreat*); *Ritama Investments v The Unlawful Occupiers of Erf 62, Wynberg* 2007 JOL 18960 (T) (hereafter *Ritama Investments*).

occupation) the bottom line is that an order for eviction must be "just and equitable" and a court must have regard to all relevant circumstances.[30] These include:

(a) the rights and needs of the elderly, children, disabled persons and households headed by women;[31]
(b) 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.[32]

Section 6 is relevant where the state applies for an eviction order.[33] In deciding if the eviction is just and equitable a court must have regard to the following:

(a) the circumstances under which the land was occupied and the buildings or structures erected;[34]
(b) the length of the period for which the occupiers resided on the land;[35] and
(c) the availability of suitable, alternative accommodation or land.[36]

The particular vulnerability of occupiers such as the elderly, children, disabled persons and households headed by women[37] could also constitute a relevant circumstance under section 6.[38]

30 *Lingwood* paras 9; 30.
31 S 4(6) *PIE.* See eg *Sailing Queen Investments* para 3; *Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Mark Lewis Steele* 2010 9 BCLR 911 (SCA) (hereafter *Occupiers Shulana Court*); *Lingwood* para 31; *Transnet* 107G.
32 S 4(7) *PIE*. See eg *Lingwood* paras 10, 18; *Sailing Queen Investments* para 3; *Blue Moonlight Properties* para 65; *Occupiers Shulana Court* para 10, *Cashbuild* para 38; *Transnet* 107E-G; *Shorts Retreat* para 6.
33 See eg the following cases: *Port Elizabeth Municipality v People's Dialogue on Land and Shelter* 2001 4 SA 759 (ECD) (hereafter *People's Dialogue*); *Drakenstein Municipality v Hendricks* 2010 3 SA 248 (WCC) (hereafter *Drakenstein Municipality)*; *Various Occupiers*; *Occupiers of 51 Olivia Road; Chieftan Real Estate; Residents of Joe Slovo Community.*
34 See especially *Various Occupiers* para 26; *Residents of Joe Slovo Community* paras 104-114, 161-175, 312-326.
35 See especially *Various Occupiers* para 27; *Residents of Joe Slovo Community* paras 104-114, 161-175, 312-326.
36 *People's Dialogue* 768D-F; *Various Occupiers* paras 26-38; *Residents of Joe Slovo Community* paras 104-114, 161-175, 312-326.
37 Referred to in s 4 *PIE.*
38 *Various Occupiers* paras 30-31; *Residents of Joe Slovo Community* para 104.

These circumstances are peremptory but not exhaustive.[39] The court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant then it is obligatory for the court to have regard to it.[40]

Section 12 of the *NBRBSA* enables a local authority to do the following by written notice:

(a) order the removal of persons occupying buildings or structures that are unsafe or unhealthy;
(b) order the vacation of buildings of persons who work in or otherwise occupy such buildings; and
(c) order that no such building or structure may be used unless written permission to that effect had been granted by the local authority.

The Constitutional Court held in the *Occupiers of 51 Olivia Road* case that section 12(6) of the *NBRBSA* is inconsistent with the *Constitution* and ordered that the provision must be read as if the following words had been added:

> This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned.[41]

Although the Court held that it was not necessary to decide the applicability of *PIE* or the subsections of section 26 of the *Constitution* because the question would not arise if there were meaningful engagement with occupiers by the City, it seems very likely that if the enforcing of the *NBRBSA* is to be preceded by a court order for eviction, it would have to be an order in terms of *PIE* and that achieving eviction in terms of the *NBRBSA* absent *PIE* proceedings is no longer possible.[42]

The way in which the courts have interpreted and applied these provisions, especially over the past decade, has resulted in a continually increasing number of

39 *Various Occupiers* para 30; *Occupiers Shulana Court* para 13; *Residents of Joe Slovo Community* para 104; *Transnet* 104E.
40 *Occupiers Shulana Court* para 13.
41 *Occupiers Shulana Court* para 51; Liebenberg *Socio-economic Rights* 293-303.
42 Section 6 of *PIE* applies to all evictions by organs of the state.

duties and responsibilities having to be shouldered by municipalities. These duties and responsibilities - now viewed as the "new normality"[43] - as well as other duties and responsibilities are set out within the context that eviction cases are each adjudicated on their own specific merits and circumstances.

4.3 Case-by-case approach

At the outset it is important to note that each eviction has its own history, its own dynamics, its own intractable elements that must be lived with and its own creative possibilities that must be explored as far as is reasonably possible.[44] The circumstances of unlawful occupiers either as individuals or as a group are also unique.

Since each eviction case is different each must be treated differently. Courts have a duty to seek concrete case-specific solutions in cases of unlawful occupation, keeping all of the relevant factors in mind.[45] A one-size-fits-all solution in eviction cases is, therefore, not only unworkable but also unacceptable.[46] As Sachs J said in the *Various Occupiers* case the "...managerial role of the courts may need to find expression in innovative ways".[47]

4.4 Provision of information / duty to report

In deciding whether or not to grant an eviction order a court has an obligation to "have regard to all relevant circumstances". Before it can fully comply with such an obligation it has to be apprised of such circumstances and it therefore needs all of the relevant information.[48] Both the Constitutional Court and the Supreme Court of Appeal[49] are of the view that a municipality's obligations extend, at the very least, to

43 Wilson 2009 *SALJ*.
44 *Various Occupiers* para 31; Du Plessis, Pienaar and Olivier 2009b *SAPL* 602.
45 *Various Occupiers* paras 22, 39; Wilson 2009 *SALJ* 279.
46 *Blue Moonlight Properties* para 64.
47 *Various Occupiers* para 23; *Occupiers Shulana Court* para 11.
48 *ABSA Bank v Murray* 2004 2 SA 15 (C) (hereafter *ABSA Bank*) para 41; *Blue Moonlight Properties* para 52; *Various Occupiers* para 32; *Sailing Queen Investments* para 19; *Ritama Investments* para 13; Liebenberg *Socio-economic Rights* 288-290.
49 However, according to *Drakenstein Municipality* para 29 there does not seem to be a general duty on municipalities to report in all cases.

providing a court with all of the information necessary to establish when an eviction would be just and equitable.[50] Consequently that input must not only be comprehensive but must also be meaningful and specific, to assist the court to come to a just decision in a particular case. This would include information on the interests of female-headed families, children, the elderly and disabled,[51] if land may be made available, if there had been any mediation (especially in relation to state-owned land) [52] and if alternative accommodation is in fact available.[53]

The only entity that can provide the necessary information is the municipality.[54] Such a provision of information by a municipality presupposes an awareness of the exact situation in the area of jurisdiction of that municipality. Meaningful information regarding the existence of housing available for the homeless is critical because it forces a municipality to determine what its priorities are with regard to its overall planning and housing programme and the situation of the specific occupiers. Courts are reluctant to order evictions without any information on plans that the municipality has for emergency housing.[55]

Placing relevant circumstances before the court may be difficult to realise in practice. In certain instances unlawful occupiers, as respondents, are destitute and have difficulty in accessing legal representation. In other instances it is difficult to get the relevant information that is in the possession of local authorities or organs of state.[56]

The failure of municipalities to submit meaningful reports can have serious consequences:

> ...the failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to report to the court in respect of any of the factors affecting land and accommodation availability and the basic health and

50 *Sailing Queen Investments* para 11 referring to *Various Occupiers* and *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA); *Occupiers Shulana Court* para 10; Wilson 2009 *SALJ* 285-286.

51 *Occupiers Shulana Court* para 11.

52 *Various Occupiers* paras 39-45.

53 *Ritama Investments* para 13; *Sailing Queen Investments* para 6; *ABSA Bank* paras 41-42.

54 *Sailing Queen Investments* para 19; *Various Occupiers* para 56.

55 *Sailing Queen Investments* para 8; *Occupiers Shulana Court* para 14.

56 See *Cashbuild* in relation to children's rights in eviction proceedings and providing sufficient information to the court in this regard.

> amenities consequences of an eviction, especially on the most vulnerable such as children, the disabled and the elderly, not only renders the service of the notice a superfluous and unnecessarily costly exercise for the applicants, but more importantly, it frustrates an important objective of the legislation. It will often hamper the court's ability to make decisions which are truly just and equitable.[57]

Similarly, in the *Blue Moonlight Properties* case the report which the municipality had filed was a general one, not designed to assist a court faced with a peculiar set of circumstances to come to a decision.[58] The court could not accept the report and ordered the municipality to report within four weeks what steps it would take to provide emergency shelter or other housing for the respondents.[59]

4.5 Policies, actions, programmes and plans

In terms of section 26(2) of the *Constitution* municipalities must develop policies, plans and programmes for their areas of jurisdiction, which set out development and housing goals.[60] In the *Grootboom* case the court rapped the municipality over the knuckles because the programme it had adopted fell short of constitutional requirements requiring government to have a housing policy that responds reasonably to the needs of the most desperate.[61]

Similarly, in the *Modderklip* case[62] the court found that government's existing policy, actions and programmes had failed with regard to its constitutional obligations, in the sense that reasonable legislative and other measures must be in place to realise the evictees' right of access to adequate housing.[63]

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57 *ABSA Bank* para 41; *Blue Moonlight Properties* paras 53, 68.

58 *Blue Moonlight Properties* paras 63-64; *Various Occupiers* para 29.

59 *Blue Moonlight Properties* para 78. See *Transnet t/a Spoornet v Informal Settlers of Cape of Good Hope* 2001 4 All SA 516 (W) where an order postponing the matter *sine die* was made ordering a survey to be made to assess the needs of the occupiers. See also *Lingwood* para 36.

60 See below 4.11.2 for a discussion of the s 26 housing right. See also *Occupiers of 51 Olivia Road* paras 32-36.

61 *Grootboom* para 69; Wilson 2009 *SALJ* 272.

62 *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T).

63 *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) 693A-F.

A municipality cannot merely show that it has a programme in place which is designed to provide housing for a maximum number of people in the shortest period of time in the most cost-effective manner. Although the existence of such a programme can go a long way towards establishing a context to ensure that the eviction is just and equitable, it may well fall short of determining whether and under what conditions an actual eviction order should be made in a specific case.[64]

A state housing programme is essential. It should be "comprehensive, coherent and effective" and:

> have a sufficient regard for the social economic and historical context of widespread deprivation; have sufficient regard for the availability of the State's resources; make short, medium and long term provision for housing needs; give special attention to the needs of the poorest and most vulnerable; be aimed at lowering administrative, operational and financial barriers over time; allocate responsibilities and tasks clearly to all three spheres of government; be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations; respond with care and concern to the needs of the most desperate; achieve more than a mere statistical advance in the number of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for; and a program that excludes a significant segment of society cannot be said to be reasonable.[65]

4.6 Joinder

Recent developments in case law show an increasing tendency to join municipalities,[66] other organs of state[67] and even departments of state in eviction proceedings.[68]

However, there is no unanimity on joinder. In some cases municipalities are joined and ordered to participate in the eviction process.[69] Other cases indicate that it is now a procedural requirement in many courts for a municipality to be joined in

64 *Various Occupiers* para 29; *Blue Moonlight Properties* para 68.

65 Masipa J summarises, in *Blue Moonlight Properties* para 28, referring to *Grootboom* paras 40-46, the contents of such a state housing programme.

66 See eg *Occupiers of 51 Olivia Road*; *Sailing Queen Investments*; *Shorts Retreat; Blue Moonlight Properties, Cashbuild*. See also Du Plessis, Pienaar and Olivier 2009b *SAPL* 599.

67 *Chieftain Real Estate* para 32; Du Plessis, Pienaar and Olivier 2008 *SAPL* 124-125.

68 Eg *Blue Moonlight Properties; Chieftain Real Estate* para 32.

69 Eg *Shorts Retreat; Sailing Queen Investments; Cashbuild.*

eviction proceedings which may lead to homelessness.[70] Sometimes it is felt that municipalities should, in fact, intervene and insist that they are joined.[71] Some courts are reluctant to order evictions without joinder of the municipality.[72] In *Sailing Queen Investments* Jajbhay J ordered joinder of the municipality and stayed the eviction application pending a report on the availability of alternative accommodation being delivered by the municipality.[73] Yet in some instances a municipality need not be joined, and reporting to the court or mediation is not required in all cases.[74]

The rationale behind joinder is one of convenience - time, effort and costs are saved by joining parties or causes in one action instead of bringing separate actions.[75] Of particular importance in eviction proceedings is that an eviction application may be approached effectively only when all relevant parties involved in the process as well as those having the necessary information that will enable the court to come to a just and equitable result participate in the procedure,[76] especially because the local authority is responsible for assisting in the alleviation of the housing need.[77] Joinder gives the state the opportunity to engage with potential homelessness at an early stage and to be in a better position to provide meaningful information to a court hearing an eviction application, especially on whether or not alternative accommodation is available.[78]

The principles underlying joinder and the participation of municipalities emanating from the various decisions seem to be as follows:

* Joinder is not a precursor in determining if an eviction order is just and equitable and *PIE* does not require joinder as a prerequisite in every eviction application.[79]

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70 Wilson 2009 *SALJ* 284.
71 *Cashbuild* para 27.
72 *Sailing Queen Investments* para 8; *Lingwood* para 17.
73 *Sailing Queen Investments* para 20; Wilson 2009 *SALJ* 283; Liebenberg *Socio-economic Rights* 287-288.
74 *Drakenstein Municipality* para 25.
75 *Sailing Queen Investments* para 6.
76 *Sailing Queen Investmets* para 8.
77 *Lingwood* paras 19-29 and the cases referred to there.
78 Wilson 2009 *SALJ* 284-285.
79 *Daries v Kannemeyer* 2009 JOL 23623 (C) (hereafter *Daries*); *Shorts Retreat*; *Drakenstein Municipality*.

* The question of joinder in eviction proceedings is governed by the principles underlying joinder as dictated by the law of civil procedure, namely the requirement that the party to be joined has a substantial interest in the outcome of the proceedings, i.e. whether it is an interested party. As such, when the eviction of large numbers of occupiers will lead to homelessness or will have a socio-economic impact on society, the municipality has an interest and should be joined. Joinder in such cases is therefore in the public interest. In the latter situations a report of the municipality and its participation through mediation may also be required and the court may also consider the availability of alternative land and may even prescribe an orderly relocation process, depending on the scale of the occupation and the circumstances.[80]

* Joinder in applications to which section 4(6) applies, where the duration of the unlawful occupation is less than six months, will be less prevalent than where section 4(7) applies (unlawful occupation longer than six months). However, the principles underlying joinder as alluded to above, must be considered in all situations.

* The *de facto* handling of eviction applications in various cases indicates that if the eviction proceeding involves a normal tenancy dispute, affluent occupiers or occupiers that will obviously not be left homeless if evicted, joinder of the municipality is not a prerequisite nor is a report by it or mediation required, although service on the municipality is still obligatory in terms of section 4(2).[81]

4.7 Engagement

In order to achieve a sustainable reconciliation of the varying interests involved in an eviction situation it was held in *Various Occupiers* that:

80 *Residents of Joe Slovo Community*; *Shorts Retreat*.
81 *Davids v Van Straaten* 2005 4 SA 468 (CPD); *Daries; Seiti v Berlein* (AR 151/2009) 2009 ZAKZPHC 24.

> [w]herever possible, respectful face to face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.[82]

A dignified and effective method of achieving the goal of reconciling the differing interests in a proactive and honest endeavour to find mutually acceptable solutions is for the parties to engage with one another.[83]

Engagement or "meaningful engagement"[84] is face-to-face interaction[85] between all stakeholders.[86] There are no hard and fast rules of engagement and once again, these are dealt with on a case-by-case basis. Engagement differs from situation to situation, from municipality to municipality. As is stated in *Occupiers of 51 Olivia Road*:[87]

> …the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. *Ad hoc* engagement may be appropriate in a small municipality where an eviction or two might occur each year, but it is entirely inappropriate in the circumstances prevalent in (Johannesburg).

The process of engagement must be open and transparent - secrecy is counter-productive.[88] A complete and accurate account of the process is essential. In *Occupiers of 51 Olivia Road*[89] the court devotes a long discussion to the issue of "meaningful engagement". It states that engagement is a two-way process in which the local authority and those about to become homeless talk to each other meaningfully in order to achieve certain objectives. In this case the municipality agreed to take steps to render the buildings safer and more habitable. This was to be achieved by the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags and the installation of fire extinguishers. A time

82 *Various Occupiers* para 39.
83 *Various Occupiers* para 39; *Occupiers of 51 Olivia Road* para 12; *Residents of Joe Slovo Community* paras 238-247, 297.
84 *Occupiers of 51 Olivia Road* paras 9-31; Du Plessis, Pienaar and Olivier 2008 *SAPL* 128-130; Liebenberg *Socio-economic Rights* 293-303.
85 *Various Occupiers* para 39.
86 *Occupiers of 51 Olivia Road* para 14; *Residents of Joe Slovo Community* para 239.
87 *Occupiers of 51 Olivia Road* para 19.
88 *Occupiers of 51 Olivia Road* para 21; *Residents of Joe Slovo Community* para 166.
89 *Occupiers of 51 Olivia Road* para 14.

frame of 21 days was agreed to. The court found the agreement to be a reasonable response to the engagement process and commended the city for being humane.[90] There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine-

(a) what the consequences of the eviction might be;
(b) whether the city could help in alleviating those dire consequences;
(c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
(e) when and how the city could or would fulfil these obligations.[91]

Added to these could be the points in the order in the *Residents of Joe Slovo Community*[92]decision that engagement must include (but not be limited to) the following issues:

(f) ascertainment of the names, details and relevant personal circumstances of those affected by each relocation;*
(g) the exact time, manner and conditions under which the relocation of each affected household be conducted;
(h) the precise temporary residential accommodation units to be allocated to those persons to be relocated;
(i) the need for transport to be provided to those to be relocated;
(j) the provision of transport facilities to the affected residents from the temporary residential accommodation units to amenities, including schools, health facilities and places of work;
(k) the prospect of the allocation of permanent housing to those relocated to temporary residential accommodation units, including information regarding their current position on the housing waiting list, and the provision of assistance to those relocated with the completion of application forms for housing subsidies;
(l) the date of commencement of the relocation
(m) a timetable for the relocation process; and
(n) any other relevant matter upon which they agree to engage.

The engagement process should result in an agreement containing explicit and meticulous provisions which are reasonable and which will facilitate the court

90 *Occupiers of 51 Olivia Road* para 28; Mbazira 2008 *SAJHR* 18.
91 *Occupiers of 51 Olivia Road* para 14.
92 *Residents of Joe Slovo Community* Order. See also paras 115, 237, 239, 242.

process. If necessary a court can approve the agreement.[93] The absence of engagement or the unreasonable response of the municipality to the process would weigh heavily against granting an eviction order.[94]

4.8 Mediation

Different from and more formal than meaningful engagement is mediation, where a third party is appointed to mediate and settle a dispute.

A form of mediation that applies in an eviction context is that set out in *PIE*. The Act provides that:

> …the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested persons to attempt to mediate and settle any dispute in terms of the Act.[95]

Mediation can achieve the underlying philosophy of the Act which is to promote the constitutional vision of a caring society.[96] A number of cases have dealt with the need for and value of mediation.[97] In *Various Occupiers* Sachs J indicates that the value of mediation is that parties can relate to one another in a pragmatic and sensible way, building up prospects of good neighbourliness for the future[98] - mediation can facilitate a mutual give and take.[99]

A lack of mediation and the fact that municipalities have an option whether or not to resolve a dispute existing in their area of jurisdiction have been severely criticised[100] and can have serious consequences. In *Various Occupiers* an application for eviction was turned down because it was not "just and equitable" since not all reasonable steps had been taken by the municipality to get an agreed mediated

93 *Occupiers of 51 Olivia Road* paras 24-30; Liebenberg *Socio-economic Rights* 293-303.
94 *Occupiers of 51 Olivia Road* para 21.
95 S 7(1) *PIE*.
96 *Lingwood* para 37.
97 Eg *Various Occupiers* paras 39-43; 61; *Shorts Retreat* para 10; *Lingwood* paras 33-36.
98 *Various Occupiers* para 43.
99 *Various Occupiers* para 42.
100 Eg *Grootboom* para 87; *Cashbuild* para 52; Wilson 2009 *SALJ* 287.

solution.[101] In the *Lingwood* case Mogagabe J postponed the matter *sine die*, ordering the municipality to engage in mediation in an endeavour to achieve solutions acceptable to the parties.[102] In the *Shorts Retreat* case an eviction order granted by the Natal court was set aside by the SCA because it was premature in that mediation had not been explored.[103]

4.9 Availability of suitable alternative accommodation/land

A court may grant an eviction order if it is just and equitable to do so, after considering circumstances such as whether, in *PIE* section 4(7) applications, land has been made available or can reasonably be made available by a municipality or other organ of state or other landowner for the relocation of the unlawful occupier[104] or in *PIE* section 6(3)(c) applications, the availability to the unlawful occupier of suitable alternative accommodation or land.

This is possibly the most problematic of all the considerations.[105] It is the central provision to which many other duties of municipalities point, eg information is required to determine whether alternative accommodation is available[106] and joinder of municipalities is necessary to determine the availability of alternative accommodation.[107]

The issue has been examined from a variety of different angles and consequently some nuanced views have resulted. It appears, however, that there is no overriding requirement that alternative land must be made available as a prerequisite before a court may grant an eviction order - the constitutional duty on a municipality is not an absolute right or duty.[108] The availability of suitable alternative accommodation is but one of the factors to be considered by a court when proceedings are instituted by a

101 *Various Occupiers* paras 45, 61.
102 *Lingwood* para 38; Wilson 2009 *SALJ* 287-88; Du Plessis, Pienaar and Olivier 2008 *SAPL* 130-131.
103 *Shorts Retreat* para 10; Du Plessis, Pienaar and Olivier 2009b *SAPL* 599.
104 S 4(7) *PIE*; *Occupiers Shulana Court* paras 10, 13; *Transnet*; *Lingwood* para 18; Liebenberg *Socio-economic Rights* 315-316.
105 *People's Dialogue* 768D-F; *Various Occupiers* paras 26-38.
106 *Ritama Investments* para 13; *Sailing Queen Investments* para 6.
107 *Sailing Queen Investments* para 8.
108 *Transnet* 112C.

municipality. In *Baartman v Port Elizabeth Municipality*[109] Mpati DP stated that while section 6(3)(c) of *PIE* is not a precondition for the granting of an eviction order but rather one of the factors to be considered, the availability of suitable alternative accommodation becomes the important factor in that specific case, the reasons being the length of time the appellants had resided on the property and, more importantly, because the eviction was sought by an organ of state and not by the owners of the land.[110] A municipality is not obliged to go beyond available resources to ensure access to housing or land for the homeless[111] and the eviction of people may take place even if it results in the loss of a home.[112]

These views are encapsulated in the following statement by Sachs J:

> [t]here is no unqualified constitutional duty on municipalities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms however a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme. The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case.[113]

In 2007 the SCA, in *City of Johannesburg v Rand Properties (Pty) Ltd*[114]*,* upheld an appeal against the decision in *City of Johannesburg v Rand Properties (Pty) Ltd*[115] and confirmed that section 12(4)(b) of the *NBRBSA* was neither unconstitutional nor unlawful. It may be employed to relocate or remove persons or communities once certain conditions have been met. The constitutionality of this section was examined in the *Occupiers of 51 Olivia Road* case where it was argued that all relevant circumstances had not been considered, eg, the availability of suitable alternative accommodation, to determine if it was "just and equitable" to grant an eviction

109 *Baartman v Port Elizabeth Municipality* 2004 1 SA 560 (SCA).
110 *Baartman v Port Elizabeth Municipality* 2004 1 SA 560 (SCA) para 18.
111 *Lingwood* paras 22-24; *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T) para 23; *Modderklip* para 49; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 BCLR 643 (SCA) para 47.
112 *Various Occupiers* para 21.
113 *Various Occupiers* para 28; *Occupiers Shulana Court* para 16; Wilson 2009 *SALJ* 280.
114 *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 BCLR 643 (SCA).
115 *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W).

order.[116] The finding of the CC was that the SCA was incorrect to conclude that the failure of the city to consider the availability of suitable alternative accommodation or land for the occupiers in the process of making a decision was unobjectionable. The city must take into account the possibility of the homelessness of any resident consequent upon an eviction in the process of making a decision as to whether or not to proceed with the eviction.[117]

Where more clarity has recently become evident is in the provision of temporary accommodation.

4.10 Temporary accommodation

The decision in *Grootboom* paved the way for government to provide at least temporary shelter to those with no access to land.[118] That precedent was recently followed by the CC where it granted an eviction order on condition that temporary alternative accommodation be provided. This was in the *Joe Slovo Community* case where the court ordered the provision of alternative accommodation in the form of "temporary residential accommodation units" to each of the households moved from the Joe Slovo informal settlement. The court went so far as to describe the content, namely:

> The temporary residential accommodation unit must be at least 24m^2 in extent; be serviced with tarred roads; be individually numbered for purposes of identification; have walls constructed with a substance called Nutec; have a galvanised iron roof; be supplied with electricity through a pre-paid electricity meter; be situated within reasonable proximity of a communal ablution facility; make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage and make reasonable provision (which may be communal) for fresh water.[119]

116 *Occupiers of 51 Olivia Road* paras 39-46.
117 *Occupiers of 51 Olivia Road* para 46; Du Plessis, Pienaar and Olivier 2007 *SAPL* 568; Du Plessis, Pienaar and Olivier 2008 *SAPL* 128-130.
118 Wilson 2009 *SALJ* 272.
119 *Residents of Joe Slovo Community* para 7.

4.11 Other rights in the Bill of Rights

A number of rights in the Bill of Rights also circumscribe the duties and responsibilities of municipalities, especially towards vulnerable people who occupy their land. Only the most relevant will be referred to here[120] and those referred to are not exhaustively treated. In a general sense the *Constitution* requires the state, and therefore the municipality, to respect, protect, promote and fulfill all fundamental rights.[121]

4.11.1 Human dignity

Arguably one of the most significant rights is the right to have the inherent dignity of everyone respected and protected.[122] Human beings must be treated as human beings,[123] with the appropriate respect and care for their dignity, to which they have a right as members of humanity.[124]

4.11.2 Housing right

Section 26(3) is tied to section 26(1), which provides that "everyone has the right to have access to adequate housing"[125] and to section 26(2), which provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".[126] This connection, as well as the resultant legislative framework, is significant.[127]

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120 Eg also ss 24 and 25 *Constitution of the Republic of South Africa* 1996.

121 S 7(2) *Constitution of the Republic of South Africa* 1996; *Occupiers of 51 Olivia Road* para 16; *Blue Moonlight Properties* para 24; *Residents of Joe Slovo Community* paras 83, 352; *Ritama Investments* para 7, Van der Walt 2005 *TSAR* 679-680.

122 S 10 *Constitution of the Republic of South Africa* 1996.

123 *Grootboom* paras 82-83, *Various Occupiers* para 29; *Residents of Joe Slovo Community* para 353; *Occupiers of 51 Olivia Road* para 10.

124 *Occupiers of 51 Olivia Road* para 10 refers to *Grootboom* para 16; *Various Occupiers* para 29.

125 S 26(1) *Constitution of the Republic of South Africa* 1996; *MEC for KwaZulu-Natal Province for Housing v Msunduzi Municipality* 2003 1 All SA 580 (N); *Msunduzi Municipality v MEC for Housing, KwaZulu-Natal* 2004 6 SA 1 (SCA); McLean “Housing”; Currie and De Waal *Bill of Rights Handbook* 566-598.

126 S 26(2) *Constitution of the Republic of South Africa* 1996.

127 It is dealt with elsewhere. See especially *Grootboom* paras 34-46; *Blue Moonlight Properties* paras 26-27, *Residents of Joe Slovo Community* paras 225-229, 349-350.

The *Housing Act*,[128] the *National Housing Code*[129] with its *Emergency Housing Programme*[130] and the *Breaking New Ground* strategy[131] take the responsibilities of municipalities several steps forward.[132] Significant information is provided on the approach the state must adopt when dealing with the claims of the homeless, such as that all spheres of government must "give priority to the needs of the poor in respect of housing development".[133] In addition, municipalities are given the following specific functions:

> Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to-
> (a) ensure that-
> (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
> (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
> (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
> (b) set housing delivery goals in respect of its area of jurisdiction;
> (c) identify and designate land for housing development;
> (d) create and maintain a public environment conducive to housing development which is financially and socially viable;
> (e) promote the resolution of conflicts arising in the housing development process;
> (f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.[134]

Central to the right of access to adequate housing is the reasonableness criterion.[135] Possibly the most appropriate description of reasonableness is that of Yacoob, J in *Grootboom*:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether

128 *Housing Act* 107 of 1997; *Grootboom* paras 47-52; *Blue Moonlight Properties* paras 30-32; *Sailing Queen Investments* para 10; *Ritama Investments* para 13.
129 Department of Housing *National Housing Code*; *Sailing Queen Investments* para 10.
130 *Blue Moonlight Properties* paras 33-35; Van Wyk 2007 *TSAR*.
131 Department of Housing *Breaking New Ground.*
132 *Residents of Joe Slovo Community* paras 199-205.
133 Strategy 2(1). See also *Ritama Investments* para 13.
134 See also *Various Occupiers; Lingwood* para 9; *Residents of Joe Slovo Community* para 350.
135 Currie and De Waal *Bill of Rights Handbook* 577-584.

> public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[136]

In the context of municipalities, all their duties and responsibilities in evictions must be reasonable. In addition, all of the factors discussed in relation to the question of whether it is just and equitable to grant an eviction order must justify a conclusion that the eviction is, in the circumstances, reasonable.[137]

Put more concretely, the following are pertinent in the context of "reasonableness" - as long as the response of the municipality in the engagement process is reasonable, that response complies with s 26(2);[138] eviction is a reasonable measure to facilitate the housing development programme;[139] every step taken in relation to a homeless person must be reasonable[140] and a housing programme can be reasonable only if it provides emergency shelter for those in desperate need.[141] In addition, Yacoob J states that "reasonableness involves realism and practicality".[142]

4.12 Other provisions in the Constitution

4.12.1 Introduction

All of these duties and responsibilities of municipalities in the context of evictions are further contextualised by the attitude with which the municipality performs them. Although Wilson questions Van der Walt's view that "patience and empathy"[143] must be employed in eviction proceedings, the courts emphasise that compassion and a

136 *Grootboom* para 37; *Residents of Joe Slovo Community* para 115.
137 *Residents of Joe Slovo Community* para 114.
138 *Residents of Joe Slovo Community* para 353; *Occupiers of 51 Olivia Road* para 18; Du Plessis, Pienaar and Olivier 2008 *SAPL* 129.
139 *Residents of Joe Slovo Community* paras 104, 115, 369.
140 *Residents of Joe Slovo Community* para 35; *Occupiers of 51 Olivia Road* para 17.
141 *Grootboom* paras 52, 63, 69.
142 *Residents of Joe Slovo Community* para 117. See also the decision of O'Regan on reasonableness paras 294-296.
143 Wilson 2009 *SALJ* 282 referring to Van der Walt 2005 *SAJHR*.

humane approach are required.[144] This finds application in the way in which the values set out in the *Constitution* are recognised and applied.[145]

Moreover, specific provisions in the *Constitution* relate first to the objects of local government[146] and secondly to the developmental duties of local government.[147] The advent of the *Constitution* has enhanced rather than diminished the autonomy and status of local government[148] and the CC, in the *Grootboom*, *Occupiers of 51 Olivia Road* and the *Residents of Joe Slovo* decisions, has made specific reference to the role of municipalities in the broader constitutional context.[149]

4.12.2 Values

Evictions must take place in a humane manner consistent with the values of the *Constitution*.[150] Not only must municipalities attend to their duties with insight and a sense of humanity. They must also treat those within their jurisdiction with respect.[151] Vulnerable people, particularly, must be treated with care and concern and human beings must be treated as human beings.[152]

In *Blue Moonlight Properties* the court states that there is no indication that the circumstances of the respondents were given consideration. These were unlawful occupiers who were desperately poor, some of whom had been rendered homeless before. Such cases require extra vigilance and compassion on the part of the courts. Hence the need of special judicial control of a process that is both socially stressful and potentially conflictual.[153]

144 Eg *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 v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 6 SA 40 (SCA) para 26; *Blue Moonlight Properties* para 51.

145 See further 4.12.3 below.

146 S 152 *Constitution of the Republic of South Africa* 1996.

147 S 153 *Constitution of the Republic of South Africa* 1996.

148 *City of Cape Town v Robertson* 2005 2 SA 323 (CC).

149 See further 4.12.3 below.

150 *Occupiers Shulana Court* para 14; *Various Occupiers* para 11; *Residents of Joe Slovo Community* para 231.

151 *Various Occupiers* para 56; Wilson 2009 *SALJ* 279.

152 *Residents of Joe Slovo Community* paras 83, 352; *Modderklip* para 55.

153 *Blue Moonlight Properties* para 18.

4.12.3 Objects of local government

Local government issues can be examined only in the context of chapter 7 of the *Constitution*. One of the most relevant provisions is that local government is enjoined to provide democratic and accountable government for local communities.[154] This is an important transformative goal as the nation is emerging from an era where democracy was denied to the majority of the population.

Other relevant provisions are stressed in the *Residents of Joe Slovo Community* case:

> The Constitution deals expressly with the duties of councils towards the disadvantaged sections of our society. It states that the objects of local government include ensuring "the provision of services to communities in a sustainable manner" and "promoting social and economic development", and that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".[155]

By ensuring the provision of services to communities in a sustainable manner,[156] the Constitution gives assurance that government should be efficient and effective in rendering services and promoting social and economic development.[157] The *Local*

154 S152(1)(a) *Constitution of the Republic of South Africa* 1996. See *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) (hereafter *Cape Metropolitan Council*) para 22; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* 2000 1 SA 661 (CC) (hereafter *Executive Council, Western Cape*); *Uthukela District Municipality v President of the Republic of South Africa* 2002 5 BCLR 479 (N); *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) (hereafter *Masondo*) paras 16-17, 53-54; *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C) para 24; *CDA Boerdery v Nelson Mandela Metropolitaanse Munisipaliteit* 2006 4 All SA 56 (SE) (hereafter *CDA Boerdery*).

155 *Residents of Joe Slovo Community* para 348.

156 S 152(1)(b) *Constitution of the Republic of South Africa* 1996. See *Residents of Joe Slovo Community* para 348; *Occupiers of 51 Olivia Road* para 16. In *Grootboom* para 39 it was stated that local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. See also *Executive Council, Western Cape*; *Masondo*; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality' Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng* 2005 1 SA 530 (CC); *CDA Boerdery.*

157 S 152(1)(c) *Constitution of the Republic of South Africa* 1996; *Occupiers of 51 Olivia Road* para 16; *Executive Council, Western Cape*;. *Democratic Alliance v ANC* 2003 1 BCLR 25 (CC) para 17.

Government: Municipal Systems Act[158] echoes these sentiments and obliges a municipality to provide all members of communities with "the minimum level of basic municipal services".[159]

Local government must also promote a safe and healthy environment.[160] This provision must be read together with the housing provision,[161] the reason being that a city is a single entity which must take holistic decisions. Furthermore a municipality must encourage the involvement of communities and community organisations in matters of local government.[162] This would find concrete expression in the requirement of meaningful engagement.[163]

A municipality must strive, within its financial and administrative capacity, to achieve these objects.[164]

4.12.4 Developmental local government

Municipalities have all-important developmental duties, which include that they must structure and manage their administration and budgeting and planning processes to give priority to the basic needs of the community and promote the social and economic development of the community.[165] They must also participate in national and provincial development programmes.[166]

158 *Local Government: Municipal Systems Act* 32 of 2000.
159 *Residents of Joe Slovo Community* para 348.
160 S 152(1)(d) *Constitution of the Republic of South Africa* 1996; *Residents of Joe Slovo Community* para 348.
161 *Occupiers of 51 Olivia Road* para 44.
162 S 152(1)(e) *Constitution of the Republic of South Africa* 1996; *Nelson Mandela Metropolitan Municipality v Greyvenouw* 2004 2 SA 81 (SE); *Occupiers of 51 Olivia Road* para 16.
163 See para 4.7 above.
164 S 152(2) *Constitution of the Republic of South Africa* 1996; *Grootboom* para 39; *Residents of Joe Slovo Community* para 74.
165 S 153(a) *Constitution of the Republic of South Africa* 1996. In *Grootboom* para 39 it was stated that local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. *Cape Metropolitan Council* para 22; *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C); *CDA Boerdery* para 15; *Residents of Joe Slovo Community* para 348.
166 S 153(b) *Constitution of the Republic of South Africa* 1996.

This provision is strengthened by the provision in the *Local Government: Municipal Systems Act*[167] that a municipality must undertake developmentally-oriented planning so as to ensure that it gives effect to its developmental duties as required by the *Constitution*[168] and together with other organs of state contribute to the progressive realisation of certain of the fundamental rights contained in the *Constitution*.[169]

A municipality must tread a careful path to comply with all of its constitutional obligations. Should that path become impassable and should it fail to protect a person it must be remembered that municipalities are part of the hierarchy of the national organs of state and that the same duties of protection that are vested in provincial and national governments should be invoked.[170]

5 Conclusions

In *Emfuleni Local Municipality v Builders Advancement Services CC*[171] Willis J concludes by stating that he is bewildered and confused as to a how a court is expected to deal appropriately with evictions, and that clarity is required. In his opinion the only legal remedy for the unlawful occupation of property is an eviction order, the making of which must be exercised with compassion, grace and an awareness of the right of every human being to be treated with dignity.[172] He adds that besides much wisdom practical but nevertheless fair and just answers to some highly vexing questions are required.[173] In the present context of the invidious and somewhat unclear position of municipalities regarding their duties and responsibilities in respect of evictions, his view cannot be summarily dismissed.

167 *Local Government: Municipal Systems Act* 32 of 2000.
168 S 23(1)(b) *Local Government: Municipal Systems Act* 32 of 2000.
169 Ss 24, 25, 26, 27, 29 *Constitution of the Republic of South Africa* 1996; s 23(1)(c) *Local Government: Municipal Systems A*ct 32 of 2000.
170 *Chieftan Real Estate* paras 30-32.
171 *Emfuleni Local Municipality v Builders Advancement Services CC* (2009/51258) 2010 ZAGPJHC 27.
172 *Emfuleni Local Municipality v Builders Advancement Services CC* (2009/51258) 2010 ZAGPJHC 27 para 28.
173 *Emfuleni Local Municipality v Builders Advancement Services CC* (2009/51258) 2010 ZAGPJHC 27 para 31.

Section 26(3) of the *Constitution* imposes on courts the duty to take into account all of the relevant circumstances when the granting of an eviction order is considered. Essentially, an eviction order may be granted only if it is just and equitable within the relevant circumstances. In this regard the duties and responsibilities of municipalities in all evictions must not be underestimated. Not only the provisions in the eviction legislation, but other constitutional directives, especially those specifically applicable to local government must all be applied in a holistic manner.

The content and substance of the framework within which municipalities find themselves is simultaneously complex and uncertain. It is only now that some clarity on the role of municipalities is emerging. Yet the existence of different procedures with different requirements is not helpful, and the case-by-case approach makes each new application a new challenge. For a court to succeed in granting an eviction order only if certain that it is fair and equitable within the relevant circumstances, the prior existence of a land-use planning and development system that functions properly is a presupposition. The potential for a clash of duties and obligations must be acknowledged. In this regard the following tensions exist: housing development is required in order to clear the housing backlog, yet emergency housing and shelter must also be provided, eviction must be "just and equitable" taking account a number of factors, yet the role of local government must be that of developmental local government.

In this context clear guidelines are called for, not an *ad hoc* approach.

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List of abbreviations

CC	Constitutional Court
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SCA	Supreme Court of Appeal
Stell L Rev	Stellenbosch Law Review
TSAR	Journal of South African Law

THE ROLE OF LOCAL GOVERNMENT IN EVICTIONS

J van Wyk*

SUMMARY

Local government occupies a unique place in the South African system of government. This is circumscribed by the Constitution which contains directives. enjoining municipalities inter alia to provide democratic and accountable government for local communities and to promote social and economic development (section 152) as well as to undertake developmentally-oriented planning (section 153). In addition local government has a specific role to play regarding access to adequate housing and, in that context, evictions.

In terms of sections 25 and 26 of the Constitution as well as legislation enacted in terms of these provisions new and different procedures have been put in place to demarcate the role of municipalities in evictions. The interpretation, by the courts, of these legislative provisions, has created a framework within which municipalities must react to and deal with evictions. In terms of that framework a number of duties and responsibilities are placed on municipalities, which include that they do the following: have policies, actions and programmes in place, draw up proper housing plans, be notified of evictions, mediate and engage with all stakeholders and provide temporary - and suitable alternative - accommodation of a specific standard, all of which must be consistent with principles of human dignity and be reasonable.

Against this background this paper will interrogate the role of local government in evictions, concentrating on the constitutional directives for municipalities, the different eviction procedures and the duties and responsibilities of municipalities.

KEYWORDS

Local government; evictions; local communities; municipalities; social and economic development; good governance; housing policies

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