

# **MOTSWAGAE AND OTHERS V RUSTENBURG LOCAL MUNICIPALITY AND ANOTHER – EVICTIONS IN THE CONSTITUTIONAL ERA: THE EXPANSIVE INTERPRETATION OF SECTION 26(3) OF THE CONSTITUTION**

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## I INTRODUCTION

Prior to the introduction of the current Constitution<sup>1</sup> evictions were regulated by common law. Under common law, ownership was described as a real right that confers complete or rather absolute control over a thing, to the owner thereof.<sup>2</sup> In cases of immovable property, in particular, a *rei vindicatio*<sup>3</sup> was used by owners as a real action to evict the occupier(s) of the property. To succeed with this action, the owner had to allege and prove that he/she was the owner of the property in dispute, and that the defendant was in possession of it.<sup>4</sup> Once these requirements were proved, the defendant bore the burden to adduce a valid and enforceable defence, based on either a personal or real right to occupy the property, acquired in terms of legislation, or by right of permission given by the owner.<sup>5</sup> Failure to establish such a defence amounted to granting of the *rei vindicatio*, without any consideration of social and economic circumstances of the unlawful occupier or any other prevailing general policy.<sup>6</sup>

Recognising that evictions of this nature not only impair the right to property and other rights, but also halt the constitutional systems commitment to protecting socio-economic rights and dignity, section 26(3) of the Constitution states that:

[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances...'

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<sup>1</sup>Constitution of the Republic of South Africa, 1996.

<sup>2</sup>Muller, G *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (Unpublished Doctoral Dissertation, Stellenbosch University 2011)6:12.

<sup>3</sup>This is a legal action by which the plaintiff demands that the defendant return a thing that belongs to the plaintiff. It may only be used when the plaintiff owns the thing, and the defendant is somehow impeding the plaintiff's possession of the thing.

<sup>4</sup>*Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A. Confirmed in *Worcester Court (Pty) Ltd v Benatar* 1982 (4) SA 714 at 721G-722D.

<sup>5</sup>Muller G op cit note 2 at 6:12.

<sup>6</sup>*Ibid* at 7:12. Van de Walt, *AJ Property in the Margin* (2009) at 54.

Until recently, the term 'eviction' under the provision of section 26(3) had been interpreted and confined to instances where the occupier has been physically expelled from property or where the state or private owner has failed to desist from impairing the right to access to adequate housing.<sup>7</sup> On 7 February 2013, the South African Constitutional Court handed down an important decision in *Motswagae and others v Rustenburg Local Municipality and another* ('*Motswagae*').<sup>8</sup> It clarified and extended the interpretation of Section 26 (3). This section was held by the Constitutional Court, not only to protect the occupier in instances where he/she is being physically expelled from his/her property (home), but also when the occupier is being disturbed in his/her peaceful occupation of property.

This paper explores the development of law brought about by the Constitutional Court decision and the implication of this expansion of the meaning of evictions. The decisions of the High Court<sup>9</sup> and the Constitutional Court are considered and contrasted. The discussion will show that the Constitutional Court's decision, which now unequivocally protects against interference in a person's peaceful and undisturbed occupation of his/her home without compliance with the requisite formalities – is to be preferred.

## II THE SCOPE OF SECTION 26(3) PRIOR TO THE DECISION

In terms of section 26(3) of the Constitution, no one may be evicted from their home by another in the absence of a court order or their consent. The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (the 'PIE Act') expands on this right by providing a procedure for legal eviction by either a private individual or a state organ.<sup>10</sup> The failure to comply with the requirements of the PIE Act renders the eviction illegal. In terms of section 6 of the PIE Act, an organ of state may conduct legal evictions (with a court order) on the land situated within its jurisdiction, where the occupier occupies the land without the organ of state's consent (if needed)<sup>11</sup> or when it is in the public interest.<sup>12</sup> An order for eviction will be granted if the court deems it to

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<sup>7</sup>See Section II for a full discussion of this part.

<sup>8</sup>2013 (2) SA 613 (CC).

<sup>9</sup>*Motswagae and Others v Rustenburg Local Municipality and Another*(1413/2009) [2011] ZANWHC 61 (15 September 2011).

<sup>10</sup>19 of 1998. See below for discussion of this Act.

<sup>11</sup>Section 6 (1)(a) of the PIE Act.

<sup>12</sup>Section 6(1)(b) of the PIE Act.

be just and equitable after considering all relevant circumstances – including the availability of alternative accommodation.<sup>13</sup>

Before the *Motswagae* decision, the interpretation and the scope of section 26(3) of the Constitution (together with the PIE Act) regarding unlawful evictions was primarily limited and confined to instances where the occupier was physically expelled from his/her home without following the procedure required by law. This position was manifested through decided cases<sup>14</sup> and legislation regulating evictions. The latter was manifested through the PIE Act's requirement that the court, when deciding an application for eviction, must consider '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...'<sup>15</sup> This was confirmed in *Port Elizabeth Municipality v Various Occupiers*, when the court stated that 'court[s] 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...'<sup>16</sup> In *Government of the Republic of South Africa and Others v Grootboom and Others*, the scope of section 26(3) was also held to impose a 'negative obligation ... upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing'.<sup>17</sup> The significance of this was that a mere failure to desist from such action would fall within the meaning of the term 'eviction', and thus be protected in terms of section 26(3) of the Constitution. This limited interpretation was given despite the fact that the right to peaceful and undisturbed occupation is recognised and protected in other areas of law.<sup>18</sup>

The new issue raised in the *Motswagae* case was whether the ambit of section 26(3) could be interpreted so as to protect the occupier's right to peaceful

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<sup>13</sup>Section 6(3)(c) of the PIE Act. When the occupier has occupied the property for more than six months, the court must consider the availability of alternative accommodation as part of relevant circumstances, in terms of section 6(6). See, for example, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

<sup>14</sup>Including, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) BCLR 150 (CC).

<sup>15</sup>Section 4(7).

<sup>16</sup>2005 (1) SA 217 (CC) para 28.

<sup>17</sup>2001 (1) SA 46 (CC) para 34.

<sup>18</sup>Amongst the essential elements of a valid lease agreement is that the lessor must undertake that the lessee will have the undisturbed use and enjoyment of the property. See, also, *Southern Port Developments v Transnet* 2004 SCA para 6; see, also, *Ntshiq v Anders Supermarket* 1997 (1) SA 184 (TK).

and undisturbed occupation of property, in instances where he/she had not yet been physically expelled from the property.

### III FACTS

In June 2009, the Rustenburg Local Municipality (hereafter referred to as 'the Respondent') authorised construction work on the Tlhabane Hostel, in accordance with a redevelopment project. The hostel comprised free-standing units, fenced off from each other, and which were occupied by Motswagae and 14 others (hereafter referred to as 'the Applicants'). The Respondent argued that it had ownership through subrogation. The Respondent offered the Applicants alternative accommodation, which was rejected by the Applicants. The Respondent then proceeded with the redevelopment despite the fact that no consensus had been reached with the Applicants regarding where they would live during (and even after) the redevelopment.

After a period of correspondence between the Applicants' attorneys and the Respondent – which proved unsuccessful in resolving the impasse – the service provider (Promptique TR 9 CC) employed by the Respondent for the redevelopment brought a bulldozer onto the property and excavated land immediately adjacent to the hostel of one of the Applicants – to such an extent that its foundations were left exposed, despite efforts to refill some of the excavated soil.<sup>19</sup> Notwithstanding continued protest by the Applicants, the service provider continued with the excavation work, compelling the Applicants to turn to the court for relief.

The issue was whether the Respondent had acted lawfully in engaging in the construction work without the Applicant's consent, and without obtaining an order for the eviction of the Applicants.

### IV CONSIDERATION OF THE HIGH COURT DECISION

The Applicants sought an urgent interdict against the Respondent based on the aforementioned redevelopment project being conducted in the absence of their consent and without a court order. They sought an order 'prohibiting [the Respondent] from unlawfully disturbing and/or interfering with [their] peaceful

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<sup>19</sup>Para 2 -3 of the Constitutional Court judgment.

possession of their properties...<sup>20</sup> The Respondent counter-applied, beseeching an order restraining the Applicants from obstructing the service provider in the execution of the redevelopment work.<sup>21</sup> At the High Court, it was not disputed that the property in question belonged to the Respondent and not to the Applicants<sup>22</sup>

Hendricks J delivered the judgement in the North West High Court. First, he considered the general requirements that must be met for an urgent interdict to be granted. He identified three requisites that had to be met for a successful application: '[a] a clear right; [b] an injury actually committed or reasonably apprehended; [c] the absence of any other remedy available to the Applicant'.<sup>23</sup> With regard to [a], the court held that the Applicants had no clear right to occupy the property since the Respondent had ownership of the property by means of subrogation. *Inter alia*, the court held that there was no form of spoliation that occurred or that had been proved.<sup>24</sup> It accepted the contention that the rights of the Applicants, including that of privacy and to remain within structures, were not yet infringed, as they still remained within their homes. This finding alone, according to the court, justified the refusal to grant the order.<sup>25</sup>

Based on the above, the court went further to hold that with regard to [b] there was not yet an injury committed or reasonably apprehended, and rejected the contention of the Applicants that actual injury had occurred due to the excavation, and that there was a reasonable apprehension that the same fate could befall them and their properties.<sup>26</sup> Furthermore, with regard to [c], the court found that an alternative remedy existed for the Applicants. It reasoned that the Applicants had been given a sufficient period of notice about the redevelopments; that they were guaranteed that they would not be left homeless; and that none of them had contested the project when the meetings were held which could have been the source of their remedy.<sup>27</sup> As a result, the application was dismissed, and the Applicants were ordered not to interfere with the redevelopments and to allow the

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<sup>20</sup> *Motswagae and Others v Rustenburg Local Municipality and Another*(1413/2009) [2011] ZANWHC 61 (15 September 2011) para 1.

<sup>21</sup> High Court decision para 2.

<sup>22</sup> *Ibid* para 24.

<sup>23</sup> High Court decision, para 27. See below for full discussion on these requirements.

<sup>24</sup> *Ibid* para 10.

<sup>25</sup> *Ibid* para 634 E-G; High Court decision, para 29. This was based in consideration of the test enunciated in *Plascon - Evans Paints Ltd to Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), that the interdict sought could only be granted if the facts as submitted by both the Applicant and Respondent through affidavits, justify the granting of such an interdict.

<sup>26</sup> *Ibid* paras 31-32.

<sup>27</sup> *Ibid* para 34.

service provider to enter 'upon the land to lay any foundation or infrastructure which may be required',<sup>28</sup> due to a counter-application sought by the Respondent for an order restraining the Applicants from obstructing the contractor in the execution of a service-level agreement.<sup>29</sup>

(i) *The Court's approach to the interdict application: A cause of concern?*

The approach taken by the court *a quo* towards the elements of an interdictory order which must be met for a successful application is a cause of concern. While the court correctly identified the requirements to be met before granting an urgent interdict, it failed to apply the principles correctly to the facts. On the question of the existence of a *clear right*, the court seems to have misconstrued what right the interdict sought to protect. The matter was decided as if the Applicants had put ownership of the hostels into dispute, rather than their right to occupy them peacefully and without any disturbance.<sup>30</sup> The court held that since the Respondent had ownership of the Hostels by means of subrogation and there was no proof of spoliation, the Applicants had no clear right to the property.<sup>31</sup> It is, however, well established that when it can be shown that there has been an infringement of a legal right by another, a clear right to have that right protected is automatically established for the party seeking protection.<sup>32</sup> In this case, although the right to peaceful and undisturbed occupation was not protected by any domestic law before the Constitutional Court's judgment, to excavate property occupied by another in the absence of his/her consent or court order, even if the occupier is not the owner thereof, establishes, in my view, a clear right not to be disturbed – a right which is worthy of protection. Furthermore, it cannot be disputed that the right not to be disturbed in occupation of property is

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<sup>28</sup>*Ibid* para 35.

<sup>29</sup>*Ibid* para 38-F.

<sup>30</sup>Such a right was not protected by domestic law prior to the Constitutional Court judgment, but was protected by international instruments adopted by South Africa. Article 17.1 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his ...home'. The ICCPR was adopted on 19 December 1966 and entered into force on 23 March 1976. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998. Accordingly, this is binding on South Africa in terms of section 231 (b), and was worthy of protection.

<sup>31</sup>High Court decision, para 30. See, also, *Motswagae and others v Rustenburg Local Municipality and another* 2013 (2) SA 613 (CC) para 12; note 6.

<sup>32</sup>See *Chapman's Peak Hotel (Pty) Ltd v Jab and Annalene's Restaurants t/a O'Hagans* 2001 (2) SA 415 (C).

inherent to ownership,<sup>33</sup> but ownership is not the only incidence where one can enjoy such a right. For example, in law, a person may seek a spoliation order for restoration of property that does not belong to him/her, as long as he/she can show that he/she had undisturbed occupation thereof.<sup>34</sup> In other words, the heart of the matter should have been whether the Applicants had a right not to be disturbed in the absence of their consent not whether such right can be infringed in the absence of ownership of property.

It is also settled law that ‘the granting of an interdict is appropriate when there is actual injury or where the same is feared of’,<sup>35</sup> that is, when an unlawful act giving rise to an *injury has occurred* or when there is a *reasonable apprehension or threat that harm will occur*.<sup>36</sup> The court *a quo*, again, seems to have erred in finding that:

[a]pplying the Plascon-Evans principle, the version of the Respondent[w]as to be accepted that the Applicants’ right to privacy and to remain in the structures pending the implementation of the housing project, have not been affected by the construction activities.<sup>37</sup>

The court’s readily acceptance of the Respondent’s arguments is disappointing. It cannot be disputed that an injury had already occurred to one of the Applicants and that the effect of the construction on the property occupied by one of the Applicants could have caused a reasonable apprehension that the properties of other Applicants would also be affected. One is reminded of the old adage that ‘*a man’s (or woman’s) home is his/her castle*’ – where one feels safe and this is a source of comfort. Given such meaning of a home to a person, no injury can go beyond having to endure the exposure of one’s home to excavation. It is trite that an injury had already occurred, as the Applicants had been unlawfully disturbed in their peaceful occupation. Even if it could be accepted that an injury had not yet occurred as the Respondent claimed, there clearly existed a reasonable apprehension ‘that the same fate [was to] befall on them’<sup>38</sup> and such reasonable apprehension, according to William J, ‘[was the] one which a reasonable man might entertain on being faced

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<sup>33</sup>This is manifested by the fact that an owner can claim back ownership through *rei vindicatio* (see *Chetty v Naidoo* 1974 (3) SA 13 (A) para 20A-E and the PIE Act).

<sup>34</sup>For example, see *Telkom SA Ltd v Xsinet (Pty) Ltd* (92/2002) [2003] ZASCA 35 (31 March 2003).

<sup>35</sup>*Johannesburg City v Mansir* 2003 (6) SA 724 (W) at 725 -726.

<sup>36</sup>*Ibid.* Erasmus: Superior Court Practice E8.

<sup>37</sup>High Court decision, para 32.

<sup>38</sup>*Ibid.*

with certain facts'.<sup>39</sup> If the bulldozer, at the commencement of its services, had excavated so close to one of the Applicants' hostels – leaving the foundation exposed– how could there not be fear in the other Applicants that the same might happen to their properties in the continuation of the process? What reasonable person would be at ease knowing that, what he/she calls a *home*, faces a threat of such a nature. The court clearly erred in holding that there had been no injury and no reasonable apprehension upon the Applicants.

Based on the above, it is submitted that Hendricks J did not consider the Constitutional provisions, whereby section 38 of the Constitution safeguards constitutional rights to such a great extent that even the mere threat of an infringement of constitutional rights warrants an appropriate remedy, which includes an interdict. This provision states that '[a]ny persons listed in [it] has the right to approach the court, alleging that the right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief... .' The word *threatened* is included to make it clear that an applicant may also approach a court to obtain an interdict to prevent a future violation of a fundamental right. This indicates how important it is for our courts to emphasise constitutional rights when deciding on matters dealing with possible future infringements.<sup>40</sup> Therefore, the Applicants should not have been refused protection based on the fact that their rights were not yet infringed.

The question of availability of *alternative remedies* in interdict applications is meant to ensure that the Applicant has other remedies in law even if the interdict is granted. An alternative remedy must: (a) be adequate in the circumstances; (b) grant similar protection to that of an interdict; (c) be ordinary and reasonable; and (d) be a legal remedy.<sup>41</sup> Whether the availability of an alternative remedy was to be considered requires a mention on the balance of probabilities,<sup>42</sup> or as a factor that a court should consider in the exercise of its discretion, the answer should have yielded the same result. The assurance of alternative accommodation by the Respondent, upon which the decision of the court was based, did not come close to what is legally considered to be an alternative remedy in interdict applications. It was

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<sup>39</sup>In *Free State Gold Areas Ltd V Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA at 518A.

<sup>40</sup>See *Ferreira v Levin and Others* 1996(1) BCLR 1 (CC).

<sup>41</sup>As per Friedman AJP in *Minister of Law and Order v Committee of the Church Summit* 1994 (3) SA 89 (B) at 99; see, also, *Chapman's Peak Hotel (Pty) Ltd v Jab and Annalene's Restaurants t/a O'Hagans* 2001 (2) SA 415 (C) at 420.

<sup>42</sup>Jones & Buckle Vol. 1 The Act at 94 and 100.

not a legal remedy as it was supposed to be, since the Respondent could only offer alternative accommodation based on a court order for eviction or based on the consent of the Applicants. In addition, the court based its reasoning on the fact that the Applicants had failed to contest the implementation of the redevelopments, which is a remedy that should have been followed.<sup>43</sup> This did not address the question of whether the Applicants had an alternative remedy in law. The reason why the Applicants had resorted to the court was because the Respondent had, *without a court order or their consent*, interfered with their peaceful occupation of their homes (the hostels). The question should have been centred on whether there was any other way in which the Applicants could be protected from this unlawful act. This was not a matter of an eviction order, where an offer of alternative accommodation justifies the order. Law dictates that the only time when alternative accommodation can be offered is through a court order of legal eviction.<sup>44</sup> Therefore, the court erred and authorised an illegitimate self-help remedy.

## V THE DECISION OF THE CONSTITUTIONAL COURT

After both the High Court and the Supreme Court of Appeal refused the Applicants' leave to appeal, they applied to the Constitutional Court for leave to appeal – challenging the decision of the court *a quo*. The Chief Justice issued the following directions as the basis of arguments:

'[W]hether:

- (a) section 26(3) of the Constitution or any other law confers on the applicants any right not to be disturbed in the peaceful occupation and possession of their home without a court order;
- (b) the premises they occupy can properly be regarded as their homes within the meaning of section 26(3) of the Constitution;
- (c) the conduct authorised and caused by the first respondent has resulted and is likely to result in unlawful interference with the right of the applicants who occupy or possess their homes peacefully; and

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<sup>43</sup>High Court judgment para 34.

<sup>44</sup>Section 6 of the PIE Act.

- (d) the conduct authorised and caused by the first respondent can be regarded as reasonable in the absence of any order of court ejecting the applicants from the property concerned.<sup>45</sup>

Yacoob J, in delivering a unanimous judgement, confirmed that the case presented a constitutional matter in granting leave to appeal as ‘the constitutional question [remained] whether section 26(3) protects the undisturbed occupation of everyone’s homes [in the absence of] a court order... [and] whether the municipality [had] acted constitutionally, lawfully and reasonably.’<sup>46</sup>

A predictable affirmative response to the first three questions was tendered by the Applicants, with the Respondent denying that it had acted improperly and instead asserting that it was performing its duties under section 26(1) and (2), and that section 26(3) was irrelevant with regard to the disturbance of peaceful occupation.<sup>47</sup> On the one hand, in addition to the affirmative answers, the Applicants raised an argument that their homes were referred to as hostels ‘precisely because they, as single women, did not qualify to own any houses under the apartheid Black housing regime; that had they been men, they would probably have owned the houses.’<sup>48</sup> Therefore the hostels had to be treated as their homes. The Respondent denied that it had conducted itself improperly<sup>49</sup> and rather that ‘it [had] a servitudinal right to enter property to perform work related to the provision of public services.’<sup>50</sup> Yacoob J stated clearly on the first question – and against the contention of the Respondent – that section 26(3) is wide enough to afford protection to the Applicants, since it does, by implication, offer a guarantee of peaceful and undisturbed occupation of one’s home unless a court order rules otherwise.<sup>51</sup> He reasoned that the ‘provisions (of section 26(3)) would be pointless and afford no protection at all if the municipalities and other owners were permitted to disturb occupiers in their peaceful and undisturbed occupation of their homes’<sup>52</sup> – with neither a court order nor a justified circumstance.<sup>53</sup> Moreover, he held that the contention that an individual can disturb the peaceful occupation of another without infringing the right emanating from

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<sup>45</sup>Para 7 of the Constitutional Court judgment.

<sup>46</sup>*Ibid* para 10.

<sup>47</sup>*Ibid*.

<sup>48</sup>*Ibid* para 6.

<sup>49</sup>*Ibid* para 8.

<sup>50</sup>*Ibid* para 14.

<sup>51</sup>*Ibid* para 12.

<sup>52</sup>*Ibid*.

<sup>53</sup>*Ibid*.

section 26(3) was invalid.<sup>54</sup> *Inter alia*, 'eviction' under section 26(3) 'does not have to consist solely on the expulsion of someone from their home. It can also consist in the attenuation or obliteration of incidences of occupation.'<sup>55</sup> Flowing from this line of reasoning, the court found that the Respondent had interfered with the Applicants' right to peaceful and undisturbed occupation, and this was an interference which was 'by no means slight'<sup>56</sup> and 'constituted a form of eviction.'<sup>57</sup> Such interference was serious and unacceptable in our constitutional era.<sup>58</sup>

The court then turned to the question of whether the conduct of the Respondent could be regarded as reasonable and lawful in the absence of a court order evicting the Applicants or without consent of the Applicants. As a point of departure, it rejected the contention of the Respondent that it was exercising a servitudinal right over the property – holding that non-consensual bulldozing nonetheless breached the common law requirement that servitudes be exercised respectfully and with caution.<sup>59</sup> As a result, the Respondent was held to have gone beyond the entering of property for purposes of fulfilling its obligations as an organ of state, rather it had 'invaded the properties of the Applicants'.<sup>60</sup> The court went further to hold that the conduct of the Respondent could not be said to have been reasonable since the Respondent clearly 'knew that it was interfering with the rights of the [Applicants] to occupy their homes peacefully.'<sup>61</sup> It reasoned that this was evidenced by the fact that the Respondent had consistently offered alternative accommodation to the Applicants, an offer which could only be made based on the realisation that it was reasonably necessary. Accordingly, 'the offer would be reasonable if, and only if, the particular development would have affected the applicants' peaceful and undisturbed occupation of their homes.'<sup>62</sup> Therefore, the court held, inference could be drawn (from the deliberate interference of peaceful occupation and offer of alternative accommodation) that the Respondent was trying to attain eviction of the Applicants 'through the back door.'<sup>63</sup> It found that '[t]he [A]pplicants had a clear right not to be disturbed in the peaceful occupation of their

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<sup>54</sup> *Ibid.*

<sup>55</sup> Para 12 of the Constitutional Court judgment.

<sup>56</sup> *Ibid* para 13.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* para 14.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid* para 15.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid* para 16.

homes; they were suffering irreparable harm; and no alternative remedy was available to them.<sup>64</sup> The appeal was upheld. The court ordered that the Respondent be interdicted and restrained from performing or causing the performance of any construction work on the properties on which the Applicants' homes are situated, without the written consent of the Applicants or a court order.

*(i) Significance of the Constitutional Court decision*

This decision has significantly developed the law regarding evictions, by extending the interpretation and meaning of 'eviction' under section 26(3) to include instances where there has been disturbance of an occupier's peaceful occupation of property in the absence of consent of the occupier, or a court order authorising the disturbance. Prior to this judgment, the lack of specific legislation or common law protection against interference of peaceful and undisturbed occupation (in instances where no possession has yet been taken away) had left room for what may be termed a 'sweet-escape' for evictors to disturb such occupation in attempts to attain illegal eviction,<sup>65</sup> and shelter behind the contention that the occupier still has access to the property. In other words, the organs of state or private owners could interfere with this right without affecting the protection against eviction as per the provisions of section 26(3). Yacoob J correctly held that the provisions of section 26(3) are wide enough to protect peaceful and undisturbed occupation, and if this was not the case the provision would be 'pointless and afford no protection [at all]...'<sup>66</sup> As a result, the position is now that where interference is serious and unacceptable in the constitutional era, it will constitute a form of eviction, even when there has not been physical expulsion of the occupier.<sup>67</sup> The judgment is to be applauded for finally putting an end to the 'sweet-escape' and for the provision of protection of peaceful and undisturbed occupation which had neither legislative nor common law protection where no actual possession had been lost. It is potentially relevant to a range of public housing occupiers in living situations notable for their absence of security, peace and dignity. Logically, what would be the essence of being guaranteed a right to remain in your premises, if full use and enjoyment of such property is forbidden?

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<sup>64</sup> *Ibid* para 18.

<sup>65</sup> Refer to Section II above for discussion on the position prior the Constitutional Court decision.

<sup>66</sup> Para 12 of the Constitutional Court judgment.

<sup>67</sup> *Ibid* paras 12 -13.

(ii) *Is the interpretation and meaning of 'evictions' now too broad?*

As stated above,<sup>68</sup> due to previous interpretations of the PIE Act and section 26(3) of the Constitution, the interpretation of *evictions* (under section 26(3) in particular) had been restricted to instances where an occupier was physically expelled from the property.<sup>69</sup> This is no longer the position. As Yacoob J held: '[t]he underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home... [but now] also consists in the *attenuation or obliteration of the incidents of occupation*.'<sup>70</sup> This progressively developed the law in line with the well-established jurisprudence of the Constitutional Court, which manifests commitment to protection of property, privacy, dignity, and so forth. However, this also left some questions unanswered. For example, is there a threshold regarding what exactly is the degree and nature of disturbance that will be considered to be a form of eviction in instances where there is no actual physical expulsion? Is the absence of consent of the occupier the sole consideration in determining whether the disturbance amounts to an eviction? If not, can a court consider other relevant circumstances, and/or would reasonableness justify the conduct interfering with the right to peaceful occupation?

It is submitted that a court faced with an issue of this nature will have to be cautious. Regarding the question of what nature and degree of disturbance will amount to eviction, the reasoning of the Constitutional Court suggests that the court would have to consider the *seriousness* and *nature* of the interference that has occurred. In other words, as the court reasoned,<sup>71</sup> if the disturbance is 'by no means slight'<sup>72</sup>, and so serious that it is unacceptable in the constitutional era, such disturbance will constitute a form of eviction. What is unacceptable in the constitutional era will generally be guided by the principles and values that shape our constitutional society, including the concept of Ubuntu, fairness and justice, and public policy. This submission is compatible with section 39 of the Constitution which places a duty on the court to 'promote the values that underlie an open and

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<sup>68</sup>Section II, above.

<sup>69</sup>See, for example, *City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association* (025/2011) [2011] ZASCA 227(30 November 2011).

<sup>70</sup>Para 12 of the Constitutional Court judgement.

<sup>71</sup>See para 13 of the Constitutional Court judgement.

<sup>72</sup>*Ibid.*

democratic society based on human dignity, equality and freedom' in interpreting the provisions in the Bill of Right, including section 26(3).

In a society that is committed to protection of human dignity<sup>73</sup> and other fundamental rights,<sup>74</sup> the underlying idea behind the concept of Ubuntu, according to Makgoro J, is that:

'Generally, [U]buntu translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa,[U]buntu has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings.'<sup>75</sup>

In essence, this concept indirectly places an obligation not only on every individual in a society, but also on our courts to consider what is just and fair, based (but not solely) on the concept of Ubuntu – a concept 'which holds that we are all demeaned if some among us are treated without grace and compassion.'<sup>76</sup> That is, when an individual interferes with another's right to undisturbed and peaceful occupation of property, not only without the consent of another, but to a degree that dignity, respect and humanity is infringed – such disturbance shall be considered serious and unacceptable in the constitutional era, and amount to eviction. In addition, *boni mores* (public policy) generally plays the same role as the concept of Ubuntu, dictating the sense of justice within the society; what the society considers wrongful (legally rather than morally), just and fair.<sup>77</sup> In essence, the disturbance that

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<sup>73</sup>Section 10 of the Constitution.

<sup>74</sup>Section 7 of the Constitution provides:

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>75</sup>*S v Makwanyane and another* 1995 (3) SA 391 (C) para 308.

<sup>76</sup>de Vos op cit note 41, accessed on 19 September 2013.

<sup>77</sup>For the application of public policy, see *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

halts the enjoyment of another's constitutional rights emanating from peaceful and undisturbed occupation of property – without a legal justification – will be considered as being against public policy and also a form of eviction. All these concepts will certainly guide the court in determining what may be considered the degree and seriousness of disturbance that would constitute a form of eviction– case by case.

Another question left open was whether the absence of consent of the occupier will be the sole consideration in determining whether disturbance amounts to eviction (in addition to the seriousness of the interference). It is submitted that this would not be practicable; rather the court will have to engage in consideration of all relevant circumstances, including the motive of the disturber. For example, the Constitutional Court in *Motswagae* took into account that alternative accommodation had been consistently offered by the Respondent and therefore the Respondent knew that it was interfering with the peaceful occupation of the Applicants.<sup>78</sup> The court drew an inference that the motive of the Respondent was to attain 'back-door' eviction and self-help.<sup>79</sup>

It is submitted further that where the disturbance is reasonable,<sup>80</sup> although serious and unacceptable, it may not be held to amount to eviction. This position was implied by the Constitutional Court in *Motswagae*, that '[t]he argument that a municipality can lawfully enter upon property on which a home is situated to carry out its duty, absent urgency or other exceptional circumstances, in the face of the objection of the home occupier without a court order is just wrong.'<sup>81</sup> This seems to suggest that in cases of 'urgency and other exceptional circumstances'<sup>82</sup> which may vary from case to case, disturbance that is tantamount to eviction may be deemed reasonable and therefore justified.

In the absent of any other decision having dealt with the Constitutional Court judgment in *Motswagae*, the meaning of evictions may be considered broad. However, it nevertheless encompasses the fundamental protection of the rights to peaceful and undisturbed occupation of property, a right that was not protected prior to this judgment. It remains to be seen how courts will interpret and apply this decision.

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<sup>78</sup>Para 15 of the Constitutional Court judgment.

<sup>79</sup>*Ibid* para 16.

<sup>80</sup>Such as in instances where there is urgency or circumstances compelling the infringement of the right not to be disturbed.

<sup>81</sup>Para 14 of the Constitutional Court judgment.

<sup>82</sup>Exceptional circumstances or urgency may exist in cases, for example, where there is an imminent threat of harm, threat of a hurricane, or threat of floods.

## VI CONCLUSION

An injunction is placed on our courts to heed constitutional rights whenever deciding any matter before them. This is the case even when courts are asked to grant interdicts, within which the interference of constitutional rights is not an issue before the court. This understanding is premised on the protection of all rights contained in the Constitution. These rights include the right to enjoy ones property and housing, based on the rule of law that does not permit self-help.<sup>83</sup> Failure to observe these rights at all times may amount to the court blind-folding itself in a manner that is difficult to reconcile with South Africa's commitment to the protection and promotion of constitutional rights that have been clearly infringed.

It is also clear that the significance of the Constitutional Court judgment is that it presented protection of the right to peaceful and undisturbed occupation of property, in instances where there has not yet been actual physical expulsion; an area of law that had neither legislative nor common law regulation prior to this decision. Hence, the court extended the interpretation of 'evictions' under section 26(3) of the Constitution (along with the PIE Act), holding that evictions may also consist of obliteration or attenuation of incidents of occupation. This seems to be the confirmation of Pierre de Vos's assertion that our Constitution 'acknowledges that a home is more than just a shelter...[but] a zone of personal intimacy and family security', and the forced removal from a home 'is a shock for any family...[irrespective of] whether that home is lawfully or unlawfully occupied.'<sup>84</sup> Inherently, this presents us with a very broad and open-ended interpretation of evictions, which will inevitably vary case by case.

Overall, although the term 'evictions' now seems broad, disputes regarding disturbance of peaceful occupation that amounts to eviction shall be preceded by a thorough consideration of what is considered as being serious and unacceptable in the constitutional era. This consideration shall be guided by principles such as Ubuntu, *boni mores*, and justice, as the concepts that shape our constitutional sense of justice and fairness – an obligation entrenched in section 39 of the Constitution.

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<sup>83</sup>Sections 1(c), 25 and 26 of the Constitution of the Republic of South Africa, 1996.

<sup>84</sup>de Vos, P 'Where is the grace? Where is the compassion?' *Constitutionally Speaking* 20 November 20, available at <http://constitutionallyspeaking.co.za/where-is-the-grace-where-is-the-compassion/>, accessed on 17 September 2013.

Most importantly, however, it must always be borne in mind that the judicial system and the government have a significant role in the protection and preservation of constitutional rights, and as the guardians of society and the constitutional order. As a result, they must never be both shepherds and butchers of the same constitutional rights.