A QUEST FOR A UNIFORM SET OF RULES REGULATING EVICTION PROCEEDINGS IN SOUTH AFRICA

by

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SUMMARY

The hypothetical premise around which this study revolves is that, from a procedural angle, there are no comprehensive court rules regulating evictions in South Africa, notwithstanding the existence of various substantive laws pertaining to evictions. The study is also informed by the perceived inconsistent elements in the existing eviction-related laws, which have a propensity to confuse litigants both in the High Court and the Magistrates' Courts. The current general procedures that regulate processes in civil courts, including the commencement of evictions up to the execution of ejectment orders, are comprehensively analysed and demonstrate a necessity for stand-alone uniform eviction procedures. Provisions of various substantive eviction laws seem to be incorporated or infused in some civil procedural laws and practice directives regulating eviction proceedings in South African courts but to a very limited and unsatisfactory extent, leaving room for the creation of a uniform regulatory framework. Both pre-democratic and post-constitutional eviction regulatory frameworks are evaluated in the thesis, and shortcomings identified. Certain inadequacies in this regard are validated by the research findings. The secondary objective of the study is to concentrate on developing mechanisms towards improving the shortcomings ascertained. This is done mainly through reference to and comparative analysis of laws and procedures on evictions in selected foreign jurisdictions namely, the United Kingdom and the two states of Arizona and Texas in the United States of America. The study confirms that there is a lacuna for procedural rules of court dedicated to evictions in South Africa. Should such rules be developed, as is suggested, then at least two alternative formats are recommended and discussed.

Key terms and concepts

Civil court rules in South Africa; Civil court rules in the UK; Civil court rules in Arizona, USA; Civil court rules in Texas, USA; Civil procedure; Constitution of the Republic of South Africa, 1996; Evictions; Law of property; Ownership of land; Right of access to adequate housing; Security of tenure.

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Amen!

TABLE OF CONTENTS

LIST OF DIAGRAMS

LIST OF ABBREVIATIONS

AST	Assured shorthold tenancy
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	*Constitutional Court Review*
CESCR	UN Committee on Economic, Social and Cultural Rights
Chi.-Kent J. Int' l & Comp. Law	*Chicago-Kent Journal of International Comparative Law*
CPRs	Civil Procedure Rules (United Kingdom)
DALRRD	Department of Agriculture, Land Reform and Rural Development
DTLA	Development Trust and Land Act 18 of 1936
ECHR	European Convention on Human Rights
ESR	Economic and Social Rights in South Africa
ESTA	Extension of Security of Tenure Act 62 of 1997
EU	European Union
FEANTSA	The European Federation of National Organisations Working with the Homeless
FHR	Foundation for Human Rights
Fla. St. U. L. Rev.	*Florida State University Law Review*
HRA	Human Rights Act 1998 (United Kingdom)
ICESCR	UN's International Covenant on Economic, Social and Cultural Rights
LTA	Land Reform (Labour Tenants) Act 3 of 1996
Louisiana LR	*Louisiana Law Review*
MEC	Member of the Provincial Executive Council
NBRBSA	National Building Regulations and Building Standards Act 103 of 1977
NCA	National Credit Act 34 of 2005
Nebraska LR	*Nebraska Law Review*
PAJA	Promotion of Administrative Justice Act 3 of 2000
PER/PELJ	*Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal*
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PISA	Prevention of Illegal Squatting Act 52 of 1951
RCA	Rent Control Act 80 of 1976
REHA	Rental Housing Act 50 of 1999
RLRA	Restitution of Land Rights Act 22 of 1994

RPAPL	Real Property Actions and Procedural Law (New York)
RPEA	Rules of Procedure for Eviction Actions (Arizona).
SAJHR	*South African Journal on Human Rights*
SALJ	*South African Law Journal*
SCA	Supreme Court of Appeal
THRHR	*Tydskrif vir die Hedendaagse Romeins-Hollandse Reg*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*
UK	United Kingdom
UN	United Nations
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
US/USA	United States of America

Chapter 1: Introduction

1.1 Introduction

The Constitution of the Republic of South Africa[1] contains two provisions that are central in the quest for a uniform set of rules that regulate eviction proceedings in South Africa. These are section 25(1) and section 26(3) respectively.

In terms of section 25(1):

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Section 26(3) states that:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Elaborating on this provision, Sachs J remarks:[2]

> Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.

It is clear from the above that a house – or home – is so much more than a mere building or structure and, in Sachs J's opinion, there is a need for special judicial control of evictions. Removal from one's home is a process that is both socially stressful and potentially conflictual.[3] In an endeavour to adhere to and promote the values of human dignity and the advancement of human rights and freedoms enshrined in the South African Constitution, certain laws were enacted aimed at ensuring that in instances where evictions occur they are nevertheless conducted in a manner sensitive to constitutional values.[4] One of those laws, the Prevention

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[1] Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

[2] In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [17] (hereinafter *Port Elizabeth Municipality*).

[3] *Port Elizabeth Municipality* [18].

[4] The most noticeable amongst these laws are: Land Reform (Labour Tenants) Act 3 of 1996; Extension of Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and Rental Housing Act 50 of 1999. Others that are related to housing are the Housing Act 107 of 1997 and the Social Housing Act 16 of 2008.

of Illegal Eviction from and Unlawful Occupation of Land Act,[5] defines 'evict' as "the deprivation of a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning".[6] Unlike in the pre-democratic society where landowners had the exclusive right to use their land and evict any unlawful occupiers therefrom, the Constitution now remarkably limits the ability of a landowner to secure an eviction order.[7] To ensure that all relevant circumstances are placed before the court and that the order is just and equitable, the Constitutional Court has endorsed a flexible, responsive, inquisitorial and managerial process in disputes concerning housing evictions.[8] However, Dafel maintains that this relaxation of general civil procedure rules, while fitting comfortably with the court's prior housing eviction jurisprudence, should also, as a general matter, be viewed as limited to eviction cases.[9]

Evictions continue to be a common feature in post-*apartheid* South Africa, documented in numerous judicial pronouncements, journals, news media, publications and so forth. These evictions occur in various spheres of the law such as: civil procedure; landlord and tenant law; property law and land tenure. These will be explored more fully below. In a similar vein, the procedural aspects regulating eviction processes in civil courts are contained in various pieces of legislation and are not streamlined. As such, regulation of evictions, from commencement of proceedings up to and including the enforcement of ejectment orders, tends to be inharmonious and complex. In eviction proceedings procedural and substantive controls that strive to provide occupiers with better tenure security feature prominently.[10] This study therefore seeks to analyse the various substantive and procedural laws and processes pertaining to evictions in the South African constitutional democracy and the complexities associated therewith. The objective is to recommend the introduction of a uniform set of rules regulating

[5] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as PIE).
[6] Section 1 of PIE.
[7] Dafel M "On the flexible procedure of housing eviction applications" 2013 *Constitutional Court Review (CCR)* Volume 5, 331–345 333.
[8] Dafel 2013 *CCR* 345.
[9] Dafel 2013 *CCR* 345.
[10] Maass S *Tenure security in urban rental housing* (Unpublished LLD thesis, Stellenbosch University 2010) 141.

eviction proceedings in South African courts, where deemed necessary and appropriate. The overarching goal with a set of eviction rules would be to streamline legislative processes essential for the efficient adjudication of eviction matters. Moreover, access to courts as enshrined in the Constitution[11] can also benefit from a procedural context with the making and implementation of the envisaged rules.

In the process, a comparative analysis of eviction laws, procedures and case law in selected foreign jurisdictions of the United Kingdom (UK) and the United States of America (US/USA) states of Arizona and Texas will be made. These external legal systems are selected as they have separate stand-alone eviction rules and jurisprudence, particularly within their civil procedural systems, from which South Africa can hopefully benefit. There are currently no uniform rules of court specifically or exclusively dedicated to evictions in South Africa. The foreign jurisdictions are selected purely from an illustrative point of view, to show that it is possible to have stand-alone eviction rules. Evictions in the selected jurisdictions are limited to the spheres of landlord and tenant law and foreclosures. They do not extend to other spheres of eviction covered in the South African spheres such as those pertaining to rural and peri-urban land. Further, concerning the US, the states of Arizona and Texas are chosen so as to reflect how evictions in the US are generally regulated, not because these two states are unique or different from other American states. The comparative research method followed is explained comprehensively in the description of research methods.

The focus of this study is on residential evictions as opposed to commercial evictions. Commercial evictions are still governed by the common law, as PIE is not applicable to them. This was confirmed by the Supreme Court of Appeal in *Ndlovu v Ngcobo,*[12] wherein Harms JA had the occasion to evaluate whether the lease of commercial properties falls within the purview of PIE. Amongst others,[13] he considered the following: the fact that PIE has roots in section 26(3) of the

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[11] Section 34 of the Constitution provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[12] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) (hereinafter *Ndlovu*).
[13] *Ndlovu* [20].

Constitution, which is concerned with rights to a person's home; that its Preamble emphasises the right to one's home and the interests of vulnerable persons; and the Act's definition of 'building or structure' that "includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter".[14] In the circumstances, the court held that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE.[15]

1.2 Background: Eviction procedures in the South African legal context

Currently, evictions mainly occur in the following areas of South African law, namely:[16]

- Civil procedure – following sale in execution proceedings;
- Landlord and tenant law – where former tenants hold over;
- Property law – where people settle on property without any right, permission or licence to do so, commonly referred to as 'squatters'; and
- In the sphere of rural land tenure.

1.2.1 The different procedures for eviction in the specified areas of law

1.2.1.1 Introduction

As will be demonstrated below, laws pertaining to evictions in the above-mentioned areas prescribe different procedures to be followed by those entitled to evict. These include private owners of the land, municipalities, landlords, and other categories of persons having limited real rights in the specific land such as home-loan mortgage institutions. Some of the procedural requirements tend to be onerous on parties intending to evict. This may result in protracted litigation and increased legal expenses. Although these procedures seem to be catered for in the rubric of civil procedural laws regulating court proceedings, some are unique to the norm and remain fixated in substantive laws. For instance, whilst provisions of

[14] The definition of 'building or structure' is contained in section 1 of PIE.
[15] *Ndlovu* [20].
[16] Muller G *The Impact of section 26 of the Constitution on the eviction of squatters in South African law* (Unpublished LLD thesis Stellenbosch University 2011) 31. The fourth area in which evictions occur is my addition.

the Extension of Security of Tenure Act[17] give jurisdiction to Magistrates' Courts in respect of proceedings for evictions or reinstatement, section 19(2) thereof stipulates that civil appeals from Magistrates' Courts in terms of ESTA must lie to the Land Claims Court as opposed to the usually applicable High Court having jurisdiction. This essentially means a deviation from the norm of appealing decisions of a Magistrate's Court in the High Court. Normally, rule 51 of the Magistrates' Courts Rules[18] would be applicable. The rule prescribes that those civil appeals in matters emanating from Magistrates' Courts lie with the High Court Division having jurisdiction.[19] This position finds confirmation in the High Court Rules.[20] Instead, ESTA now compels an aggrieved party to lodge an appeal in the Land Claims Court as opposed to the High Court Division ordinarily having jurisdiction. The Land Claims Court is likely to be substituted by the Land Court envisaged in section 3 of the Land Court Bill, 2021 which has not yet been promulgated.[21] But for now, and a foreseeable future, the *status quo* prevails. Further, the Land Reform (Labour Tenants) Act[22] provides for payment of compensation by the landowner to the labour tenant to the extent that it is just and

[17] Extension of Security of Tenure Act 62 of 1997 (hereinafter referred to as ESTA).

[18] Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa, first published under GN R. 740 in *Government Gazette* 33487 dated 23 August 2010 (with effect from 15 October 2010), as amended (hereinafter referred to as the Magistrates' Courts Rules).

[19] Rule 51(10) of the Magistrates' Courts Rules stipulates that: "Subject to rule 50 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, the registrar or clerk of the court shall, within 15 days after he or she receives notice that an appeal has been set down for hearing, transmit to the registrar of the court of appeal the record in the action duly certified".

[20] Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, first published under GN R. 48 in *Government Gazette* 999 dated 12 January 1965, as amended (hereinafter referred to as the High Court Rules). The heading of rule 50 of the High Court Rules is titled "Civil Appeals from Magistrates' Courts". Rule 50(1) provides that: "An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed".

[21] The Land Court Bill [B 11–2021] as introduced in the National Assembly (hereinafter referred to as the Land Court Bill, 2021). The explanatory summary of this Bill and prior notice of its introduction were published in *Government Gazette* 44480 dated 23 April 2021. Paragraph 1.3 of the Memorandum on the Objects of the Land Court Bill, 2021 states that the Bill "seeks to establish a specialist Land Court, with its judgments, orders and decisions appealable at a specialist Land Court of Appeal. It seems appropriate that a properly constituted and capacitated ''Land Court'', and not a ''Land Claims Court'' under the Restitution Act, should be the forum to deal with all land-related matters as regulated by various Acts of Parliament. This will also facilitate the expeditious disposal of cases and contribute towards the development of appropriate jurisprudence in relation to land matters. This is coupled with the cheaper and speedier alternative dispute resolution mechanism in the form of mediation and arbitration". This aspect is also discussed in Chapter 2 in the segment dealing with the Land Claims Court.

[22] Land Reform (Labour Tenants) Act 3 of 1996 (hereinafter referred to as LTA), section 10.

equitable. It uniquely prohibits the carrying out of the eviction order prior to payment of such compensation. Furthermore, unlike the service provisions of the High Court Rules and Magistrates' Courts Rules respectively,[23] PIE states:[24]

> A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.

As such, in order to appropriately commence and finalise an eviction a person must be familiar with the specific area of the law and the applicable regulatory framework within which to operate. There is no straightforward, easy reference point. The *status quo* seems undesirable and has the potential of leading to confusion and unintended consequences or frustrations for litigants in the eviction sphere. This is particularly so as different sets of laws and rules have to be accessed and comprehensively implemented in both the protection and enforcement of constitutional rights in land.

As will be noted below, PIE permeates the first three categories of the spheres in which evictions occur. However, it seems prudent to retain the categorisation as each eviction area tends to be imbued with unique characteristics and an additional regulatory framework. This also allows for a flowing, uncomplicated discussion.

1.2.1.2 Evictions following civil execution proceedings

Evictions in this category emanate from legal processes ordinarily instituted for the recovery of debts, culminating in the repossession of a debtor's immovable property, ultimately followed by an eviction. If a judgment for debt remains unsatisfied the judgment creditor is entitled to issue out a writ of execution in court, to execute or enforce judgment. The execution process is levied first against the debtor's movable assets. If such assets are insufficient to satisfy judgment, then execution will be effected against the debtor's immovable property. However, in certain instances, such as where a debt is secured through a mortgage bond over an immovable property, the creditor (bondholder) is allowed to ask for an order

[23] These service provisions are contained in High Court rule 4 and Magistrates' Courts rule 9 respectively.
[24] Section 4(11).

declaring the immovable property specially executable. This then circumvents the requirement of executing first against the debtor's movables.[25]

However, the High Court can also develop practice directives regulating this process, complementing the court rules that would otherwise be ordinarily applicable. As an illustration, in the Gauteng Local Division of the High Court in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, when amounts of money owed are low, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of a certain number of months.[26] In *Absa Bank Limited v Lekuku*[27] the court confirmed this position, directing that in matters of low arrears the case must be postponed for at least six months, in order for the mortgagor to report back on the steps it has taken to avoid foreclosure. This was subsequently given effect to by the court in *Firstrand Bank Limited t/a First National Bank and Other v Zwane and Others*[28] where Van der Linde J stated that in view of the provisions of the court rules and of section 26(3) of the Constitution, a court is unlikely to grant executability for a mere three months' arrears in a 240 months' home-loan repayment scheme.[29]

PIE is applicable to eviction proceedings against unlawful occupiers of immovable properties[30] pursuant to the successful execution of court judgments for the recovery of debts.[31] Provisions of PIE are used in conjunction with the rules of the particular court in which eviction proceedings are instituted, being either the

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[25] The background of the ordinary legal process for recovering debts is comprehensively outlined by Cameron and Nugent JJA in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) [3].

[26] Chapter 10.17 of the *Practice Manual of the Gauteng Local Division of the High Court*. See Van der Walt AJ and Brits, R "Judicial oversight over the sale in execution of mortgaged property: *Gundwana v Steko Development* 2011 (3) SA 608 (CC); *Nedbank Ltd v Fraser and Four Other Cases* 2011 (4) SA 363 (GSJ)" 2012 *Journal of Contemporary Roman-Dutch Law,* Vol. 75, 322–329; *Nxazonke and Another v ABSA Bank Ltd and Others* (18100/2012) [2012] ZAWCHC 184 (4 October 2012); and Brits R "Protection for homes during mortgage enforcement: human-rights approaches in South African and English law" 2015 *SALJ*, Vol. 132, 566–595.

[27] *Absa Bank Limited v Lekuku* [2014] ZAGPJHC 244 (14 October 2014) (hereinafter *Lekuku*).

[28] *Firstrand Bank Limited t/a First National Bank and Other v Zwane and Others* 2016 (6) SA 400 (GJ) (hereinafter *Zwane*).

[29] *Zwane* [12].

[30] The definition of 'unlawful occupier' in section 1 of PIE excludes a person who is an occupier in terms of ESTA. It will be discussed fully in the thesis, particularly in chapter 5.

[31] In the High Court, rule 46 regulates the manner of execution against immovable property including sale thereof via public auction. The corresponding rule in the Magistrates' Courts is rule 43.

applicable High Court or Magistrate's Court.[32] However, of particular significance to this study are the different approaches and procedures followed in the High Court and the Magistrates' Courts respectively in the application of some of the provisions of section 4 of PIE.[33]

In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*[34] Brand AJA explained the combined effect of PIE's statutory provisions (section 4) and the High Court Rules. He stated, amongst others, that section 4(2) requires notice of the eviction proceedings to be effected on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing of those proceedings, and that it must be served by the court.[35] The judge held that although section 4(2) could have been more clearly worded, it is obvious that the legislature did not intend physical service of the notice by the court in the person of a judge or magistrate. Instead, he believed that what is intended is that the contents and the manner of service of the notice contemplated in subsection (2) must be authorised and directed by an order of the court concerned.[36] Brand AJA explained the import of section 4(3) when it provides that notice of the proceedings must be served in accordance with the rules of the court in question. He held that

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[32] Section 1 of PIE defines 'court' as "any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated".

[33] The pertinent provisions of section 4 of PIE are the following:

"**4 Eviction of unlawful occupiers**

(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must–

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid".

[34] *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*[34] 2001 (4) SA 1222 (SCA) (hereinafter *Cape Killarney*).

[35] *Cape Killarney* [11].

[36] *Cape Killarney* [11].

for purposes of an application in the High Court, this section requires that a notice of motion[37] be served on the alleged unlawful occupier in the manner prescribed by the applicable rule.[38] In his view, it was clear that this notice in terms of the court rules is required in addition to the section 4(2) notice, otherwise any other construction will render the requirement of PIE's section 4(3) meaningless.[39] Lastly, he remarked that section 4 does not indicate how the court's directions regarding the section 4 notice are to be obtained.[40] As such, Brand AJA reckoned that the common-sense approach to the section appears to dictate that the applicant can approach the court for such directions by way of an *ex parte* application.[41]

Regarding the procedural approach in the Magistrates' Courts, the decision in *Theart and Another v Minnaar NO*[42] is instructive. In that matter Bosielo JA explained that the procedure in the Magistrates' Courts is different from the High Court because of the difference in the provisions of Magistrates' Courts rule 55 on the one hand, and High Court rule 6 on the other (both of which regulate the applications procedure).[43] As such, in the Magistrates' Courts two notices contained in two separate documents are not required.[44] Instead, one document will suffice as long as: (1) the content of the document and the manner of service are approved by the Magistrate's Court having jurisdiction, as envisaged by section 4(2) of PIE, pursuant to a preceding *ex parte* application; (2) the contents of the document comply with the provisions of section 4(5) of PIE and rule 55 of the Magistrates' Courts Rules, amongst others; and (3) the document is served on the respondent and the municipality concerned[45] in accordance with Magistrates'

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[37] A notice of motion as prescribed by High Court rule 6 (which deals with the applications procedure).

[38] *Cape Killarney* [12]. The applicable rule is High Court rule 4 (which regulates various methods of service of documents).

[39] *Cape Killarney* [12].

[40] *Cape Killarney* [15].

[41] *Cape Killarney* [15].

[42] *Theart and Another v Minnaar NO, Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) (hereinafter *Theart*).

[43] *Theart* [15]. In this regard, see also Klos T "Step-by-step guide to residential housing eviction proceedings in the magistrate's court" 2016 (July) *De Rebus* 26–27, also available at http://www.derebus.org.za/step-step-guide-residential-housing-eviction-proceedings-magistrates-court/ (Date of use: 1 June 2021).

[44] *Theart* [15].

[45] In accordance with section 4(2) of PIE.

Courts service rule 9.[46] The judge stated that the fact that the notice served on the respondent is in some respect deficient of section 4(2) or rule 55 will not necessarily be fatal if the notice achieved the purpose contemplated by these statutory provisions.[47] Whether such purpose has been achieved cannot be considered in the abstract, but will depend on the facts of each case.[48] This difference in the respective procedures of the High Court and the Magistrates' Courts in relation to the implementation of the provisions of the same Act (PIE) in eviction proceedings is undesirable. The situation could probably have been avoided if uniform eviction rules existed.

In 2010 rule 5(10) of the Magistrates' Court Rules was amended to give effect to the Supreme Court of Appeal[49] judgment in *Standard Bank of South Africa Ltd v Saunderson and Others*.[50] In the court's view it was desirable to lay down a rule of practice requiring summons in which an order for execution against immovable property is sought to inform the defendant that his or her right of access to adequate housing might be implicated by such an order.[51] The court effectively did this by issuing a practice direction in its ultimate order, as it considered that it is possible that an order of execution against immovable property may infringe on the provisions of section 26(1) of the Constitution.[52] Thus, rule 5(10) now provides that summons in which an order is sought to declare immovable property executable, which is the home of the defendant, must contain a notice in the following form:[53]

> The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.

However, this sub-rule is easy to miss amidst a multitude of Magistrates' Courts rules dealing with a variety of matters. Rule 5 alone has eleven sub-rules,

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[46] *Theart* [15].
[47] *Theart* [15].
[48] *Theart* [15].
[49] Supreme Court of Appeal (hereinafter the SCA).
[50] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (hereinafter *Saunderson)*.
[51] *Saunderson* [25].
[52] *Saunderson* [25]. The full court order is contained in [27] and will be referenced.
[53] Rule 5(10) of the Magistrates' Courts Rules.

including (10), that deal with summonses. Thus, it is easy for users of court rules to overlook sub-rule (10), due to its location within the set of Magistrates' Courts Rules. This factor could be obviated if sub-rule (10) were instead included in a set of court rules specifically dedicated to evictions.

In another related development, High Court rule 31(5), which deals with applications for default judgments, was recently amended to give effect to the Constitutional Court judgment in *Gundwana v Steko Development CC and Others*.[54] Simply put, the rule now requires that in instances where an order is sought declaring residential property specially executable, the court registrar must refer such application to a judge for adjudication.[55] In other words, registrars of court are now precluded from granting such orders. This is to ensure judicial oversight in default judgment applications to declare immovable property specially executable, which declaration effectively permits the sale in execution of a person's home. Because such applications may result in a person losing his or her home through a sale in execution and subsequent eviction, judicial oversight has now been deemed peremptory.

The *Gundwana* judgment, to a certain extent, echoes the remedial approach set out in the *Jaftha*[56] matter, wherein Mokgoro J was of the view that judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution:[57]

> Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the (Magistrates' Courts) Act.

High Court rule 46(1)(a)(ii) was amended subsequent to the *Jaftha* judgment to effectively provide that where the property sought to be attached is the primary

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[54] *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) (hereinafter *Gundwana*). The court [65] declared that it is unconstitutional for a registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the High Court Rules to the extent that this permits the sale in execution of the home of a person.

[55] Rule 31(5) of the High Court Rules, Amendments to this effect were published under GN R. 471 in *Government Gazette* 36638 dated 12 July 2013 (with effect from 16 August 2013).

[56] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005* (2) SA 140 (CC) (hereinafter *Jaftha*).

[57] *Jaftha* [55].

residence of the judgment debtor, no writ shall be issued by the registrar unless the court, having considered all the relevant circumstances, orders execution against such property.[58]

1.2.1.3 Landlord and tenant law

The catalyst for eventual evictions in this regard is triggered when former tenants hold over. A tenant is deemed to be holding over if he or she remains in a property after the expiration of the lease, and may be evicted. Muller *et al* explain that a tenant who fails in his or her obligations to restore the leased property to the landlord in a required condition is 'holding over'.[59] In *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another*[60] the court stated:[61]

> A claim for holding over is founded on a breach of the contractual obligation to give vacant possession on termination as required by the relevant clause in the lease agreement or as an incidence of the common law ...

The Rental Housing Act,[62] in its Preamble, recognises rental housing as a key component of the housing sector and the need to promote the provision of rental housing. The Act aims at balancing the rights of landlords and tenants through mechanisms that protect both parties against unfair practices and exploitation.[63] Section 13 introduces a complaints mechanism whereby the landlord or tenant may lodge a complaint concerning unfair practice for adjudication by the Rental Housing Tribunal.[64] Section 13(7) prevents the landlord from evicting the tenant as from the date of any complaint having been lodged with the Tribunal until the determination of the complaint or a period of three months has lapsed, whichever is the earlier. Section 13(9) stipulates that any dispute in respect of an unfair practice must be determined by the Tribunal. However, no one is precluded from "approaching a competent court for urgent relief…or to institute proceedings for

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[58] Rule 46(1)(a)(ii) of the High Court Rules, as amended under GN R. 981 in *Government Gazette* 33689 dated 19 November 2010 with effect from 24 December 2010.

[59] Muller G, Brits R, Pienaar JM and Boggenpoel Z *Silberberg & Schoeman's The law of property* 6th ed (LexisNexis Durban 2019) 512.

[60] *Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another* 2013 (4) SA 607 (GSJ) (hereinafter *Hyprop*).

[61] *Hyprop* [42]. See also *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W).

[62] Rental Housing Act 50 of 1999 (hereinafter referred to as REHA).

[63] These objectives are also reiterated in section 1A of the Act.

[64] The Rental Housing Tribunal (hereinafter Tribunal) is established through the provisions in Chapter 4 of REHA.

the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice".[65]

The eviction in this context is regulated by the provisions of PIE and will be fully elaborated upon in other chapters.

1.2.1.4 Property law

This segment deals with evictions in instances where people settle on property without any right, permission or licence to do so, and such people are commonly referred to as 'squatters'. An analysis of case law indicates a variety of situations in which squatting prevails. In *Government of the Republic of South Africa and Others v Grootboom*[66] Mrs Irene Grootboom and other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing.[67] The Constitutional Court declared, amongst others, that section 26(2) of the Constitution requires the state to devise and implement, within its available resources, a comprehensive and coordinated programme progressively to realise the right of access to adequate housing. Such programme must provide relief for people without access to land, and who are living in intolerable conditions.[68]

The *Port Elizabeth Municipality* case concerned an eviction application by the state – the Port Elizabeth Municipality – against 68 people, including 23 children, who had illegally occupied private undeveloped land within the municipality's jurisdiction.[69] The occupiers had been living on the land for periods ranging from two to eight years. Most of them had moved there after being evicted from previously occupied land.[70] The application was based on section 6 of the PIE, which states that an organ of state may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction.[71]

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[65] Section 13(10) of REHA.
[66] *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) (hereinafter *Grootboom*).
[67] *Grootboom* [4].
[68] *Grootboom* [99].
[69] *Port Elizabeth Municipality* [1]-[2].
[70] *Port Elizabeth Municipality* [2].
[71] *Port Elizabeth Municipality* [25].

The Constitutional Court declined to grant the eviction order on, among other grounds, the basis of the length of occupation of the land, the fact that the land was not put to some other productive use, and the lack of suitable alternative land.[72] In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*,[73] the City of Johannesburg sought to evict occupiers of inner-city buildings considered unsafe and described as residential 'sinkholes'. Amongst others, the court found a section of the National Building Regulations and Building Standards Act[74] to be unconstitutional in that it violated the provisions of section 26(3) of the Constitution.[75] The NBRBSA made it a crime to remain in buildings after an eviction notice by the city, but prior to any court order for eviction. Other relevant cases will be discussed in-depth in the study.[76]

As this category mainly and directly impacts on ownership rights, the South African common law will be explored in the study, together with the impact of legislation thereon. However, such discussion will be done mindful of the subsidiarity principles which basically affirm a single system of law in our constitutional dispensation, founded in the Constitution.[77] In the process, the study will touch on the manner in which the pre-democratic era *apartheid* government invoked common-law principles plus some draconian laws to ensure that Black people only settled in those group areas or townships demarcated for them. As Mmusinyane

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[72] Chenwi L *Evictions in South Africa* (Community Law Centre, University of the Western Cape 2008) 78.

[73] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (hereinafter *Occupiers of 51 Olivia Road).*

[74] National Building Regulations and Building Standards Act 103 of 1977 (hereinafter referred to as the NBRBSA).

[75] *Occupiers of 51 Olivia Road*, [49].

[76] These include: *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC); *Abahlali baseMjondolo Movement of South Africa and Another v Premier of KwaZulu-Natal and Others* 2010 (2) BCLR 99 (CC); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC); *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC); *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

[77] Brits R and Van der Walt AJ "Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act" (part 2) 2014 *TSAR* 508-519 510.

reflects, the historical background of the South African society constitutes an integral part of the Constitutional Court's jurisprudential assessment:[78]

> For example, in every eviction case the court deals with the illegal occupants' circumstances and government's housing policies aimed at improving the situation of these people are considered.

PIE was enacted to give effect to section 26(3) of the Constitution. With its enactment there was a shift in the focus of evictions – away from preventing squatting to preventing illegal eviction. This shift in focus coincided with the provision of procedural protections and substantive safeguards against illegal evictions.[79] The PIE provisions and applicable procedures are discussed in-depth in the study,[80] together with related legislation and case law.

1.2.1.5 Rural land tenure evictions

Sections 25(6) and (9) of the Constitution provide:

> (6) A person or ... community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
>
> (9) Parliament must enact the legislation referred to in subsection (6).

Simply defined, land tenure is the manner whereby a party holds or occupies an area of land. It is a way of identifying who has the right to use and occupy land.[81] For farm owners, dwellers and workers land is a vital component of a particular way of life as it can be linked to the right to housing and livelihood.[82] In South Africa the historical link between housing and employment on farms continues to render farm dwellers and labourers vulnerable to eviction, leaving them with short–term security of tenure.[83] Various cases bear testimony to this prevailing position.[84]

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[78] Mmusinyane BO *Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India* (Unpublished LLD thesis University of South Africa 2015) 402.

[79] Muller *The impact of section 26 of the Constitution* 318.

[80] PIE provisions are discussed in-depth in chapter 5.

[81] *http://www.austrade.gov.au › Home › Land tenure* (Date of use: 1 February 2017).

[82] Dhliwayo P *Tenure security in relation to farmland* (Unpublished LLM dissertation, Stellenbosch University 2012) 33.

[83] Dhliwayo *Tenure security* 46.

[84] These include *Snyders and Others v De Jager and Others* (Appeal) 2017 (3) SA 545 (CC); *Klaase and Another v van der Merwe N.O. and Others* 2016 (9) BCLR 1187 (CC); *Magodi*

Pursuant to sections 25(6) and (9) of the Constitution various laws were enacted towards enhancing land rights and tenure security for previously disadvantaged groups, particularly those occupying rural land and peri-urban land.[85] The LTA and ESTA are the ones significant to this study.

ESTA introduces unique concepts, procedures and/or processes to be complied with towards eviction. For instance, ESTA provides that proceedings may be instituted in a Magistrate's Court or Land Claims Court, but only by consent of the parties in the High Court where the land in question is situated.[86] In terms of sections 17(3) and (4) of ESTA, the Rules Board[87] can make rules governing the procedure in the High Court and the Magistrates' Courts. Otherwise, the prevailing court rules apply in ESTA matters. The President of the Land Claims Court may also make rules to govern the procedure in that court in terms of ESTA, plus the procedure for the automatic review of eviction orders in terms of section 19(3).[88] In *Snyders v De Jager and Others* (Appeal)[89] the court determined that once an eviction order of a Magistrate's Court has been confirmed by the Land Claims Court under section 19(3) of ESTA, an appeal lies to the SCA.[90]

On the other hand, the LTA is pertinent in the eviction process of labour tenants.[91] It also gives the authority to evict to the Land Claims Court. Section 9 introduces certain limitations on evictions. For instance, a labour tenant who has attained the age of sixty years or who is disabled and unable to provide labour to the

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and Others v Van Rensburg 2002 (2) SA 738 (LCC); *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA); and so forth.

[85] Such as the Communal Property Associations Act 28 of 1996, which provides a legal mechanism to accommodate the needs of those who wish to hold land collectively; the Interim Protection of Informal Land Rights Act 31 of 1996, which is a holding measure that protects the interests of people who have informal rights to land pending long-term reform measures; the LTA, which provides security of tenure for labour tenants; and the ESTA , which provides security of tenure for occupiers residing on rural or peri-urban land. See also Dhliwayo *Tenure security* 37–38.

[86] Sections 17(1) and (2) of ESTA.

[87] The Rules Board for Courts of Law established in terms of the Rules Board for Courts of Law Act 107 of 1985 (hereinafter the Rules Board). The Act itself is hereinafter referred to as the Rules Board Act.

[88] Section 20(4) of ESTA.

[89] *Snyders and Others v De Jager and Others* (Appeal) 2017 (3) SA 545 (CC) (hereinafter *Snyders*).

[90] *Snyders* [47]. Up until this pronouncement, the contrary view was that an appeal in such instances rested in the Land Claims Court.

[91] A 'labour tenant' is defined in the Act, and will be adequately elaborated on in the thesis, particularly in chapter 5.

landowner or lessee shall not be evicted.[92] As concerns procedural aspects, an owner intending to evict must give the labour tenant and the Director-General of the Department of Agriculture, Land Reform and Rural Development (DALRRD) [93] not less than two months' written notice.[94] This triggers a compulsory mediation mechanism, whereby the Director-General is obliged to convene a meeting during this period aimed at attaining settlement. [95]

1.2.1.6 Summary

The plethora of laws and regulations intended to regulate the conduct of eviction proceedings in the democratic dispensation, albeit in the various spheres in which evictions occur, is undesirable, creating practical complexities in application. In addition, seemingly compounding matters are the existence of different practice directives in various divisions of the High Court and Regional Magistrates' Courts aimed at supplementing procedural aspects pertaining to evictions in the respective courts. In the circumstances, the situation seems worthy of in-depth scientific consideration.

1.3 Foreign jurisdictions: Brief analysis

1.3.1 United Kingdom

In the United Kingdom evictions are regulated by, amongst others, Part 55 of the Civil Procedure Rules – 'Possession Claims'.[96] Rule 55.1 provides:

> **55.1** In this Part –
>
> (a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings);
>
> (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to

[92] Section 9(1) of the LTA.
[93] Previously known as the Department of Rural Development and Land Reform, which is the name still cited in both the LTA and ESTA. The name change follows upon the Presidential announcement of the reconfiguration of government departments on 14 June 2019: https://www.gov.za/about-government/government-system/national-departments (Date of use: 7 February 2021).
[94] Section 11(1) of the LTA.
[95] Section 11(3) of the LTA.
[96] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55 (Date of use: 20 April 2020).

possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not.

Laying out the scope of these rules, Rule 55.2 states:

55.2

(1) The procedure set out in this Section of this Part must be used where the claim includes –
(a) a possession claim brought by a –
  (i) landlord (or former landlord);
  (ii) mortgagee; or
  (iii) licensor (or former licensor);
(b) a possession claim against trespassers; or
(c) a claim by a tenant seeking relief from forfeiture.

As will become clearer from in-depth discussion in chapter 6, the United Kingdom rules are more embracive on the areas of law in which evictions occur. However, in the United States their Arizona and Texas counterparts seem to be more concerned with evictions under landlord and tenant laws.

1.3.2 United States of America

1.3.2.1 Arizona

In the state of Arizona there are the Rules of Procedure for Eviction Actions (RPEA), effective 1 January 2009.[97] Rule 1 thereof provides as follows:

Rule 1. Title and Scope of Rules

These rules shall be known and cited as the Rules of Procedure for Eviction Actions ("RPEA"). These rules shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions, which are jointly referred to in these rules as "eviction actions". For purposes of these rules, there shall be only one form of action known as an "eviction action." The Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules, except that Rule 80(i) shall apply in all courts and Rule 42(f) shall apply in the superior courts.

Rule 5(b)(1) directs that the complaint shall be brought in the name of the party claiming entitlement to possession of the property. Legislation involved comprises,

[97] https://www.azcourts.gov/rules/Recent-Amendments/More-Rules/Rules-of-Procedure (Date of use: 20 April 2016).

amongst others, the Arizona Residential Landlord Tenant Act,[98] and the Arizona Mobile Home Parks Residential Landlord and Tenant Act.[99]

1.3.2.2 Texas

In an almost similar vein, in Texas eviction rules are governed by rules 500 to 510 of the Texas Rules of Civil Procedures for Justice Courts, more specifically by Rule 510 titled 'Eviction Cases', effective from 31 August 2013.[100]

Sub-rules 510.1–510.3 provide:

> **RULE 510. EVICTION CASES**
>
> RULE 510.1. APPLICATION
>
> Rule 510 applies to a lawsuit to recover possession of real property under Chapter 24 of the Texas Property Code.
>
> RULE 510.2. COMPUTATION OF TIME FOR EVICTION CASES
>
> Rule 500.5 applies to the computation of time in an eviction case…
>
> RULE 510.3. PETITION
>
> (a) *Contents*. In addition to the requirements of Rule 502.2, a petition in an eviction case must be sworn to by the plaintiff and must contain:
>
> (1) a description, including the address, if any, of the premises that the plaintiff seeks possession of;
> (2) a description of the facts and the grounds for eviction;
> (3) a description of when and how notice to vacate was delivered;
> (4) the total amount of rent due and unpaid at the time of filing, if any; and
> (5) a statement that attorney fees are being sought, if applicable.
>
> (c) *Defendants named*. If the eviction is based on a written residential lease, the plaintiff must name as defendants all tenants obligated under the lease residing at the premises whom plaintiff seeks to evict …

Rule 500.3 (d) states that an eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code,[101] often by a landlord against a tenant. Sub-rule 510.3(e) significantly stipulates that the

[98] https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).
[99] https://www.azag.gov/sites.../ArizonaMobileHomeParksResidential (Date of use: 5 December 2020).
[100] https://www.texasrealestate.com.uploads/files/presentations/EvictionsMadeEasy.ppt (Date of use: 30 November 2020).
[101] http://statutes.legis.state.tx.us/Docs/SDocs.PROPERTYCODE.pdf (Date of use: 5 December 2020).

court must preside over the right to actual possession and not title.[102] This confirms that the initiation of eviction proceedings is not only limited to holders of title deeds in land.

1.3.3 Conclusion

From all three jurisdictions described above formats can be extracted for gainful and flexible adoption in the South African legal context, towards formulation of unique eviction court rules. Only the stated jurisdictions are selected at this stage, as it seems beyond the scope of this study to conduct research of all foreign jurisdictions with uniform eviction rules.

1.4 Research problem

An evaluation of the provisions of eviction-related legislation (LTA, ESTA, PIE and REHA), other relevant laws, the common law, case law and the South African civil procedural system resulted in the undertaking of this study, for in-depth research. The research will seek to address the questions described below, around which the study revolves.

(a) Do the procedural laws, inclusive of court rules, adequately and comprehensively regulate eviction litigation uniformly in both the high courts and lower courts? This question is asked in view of the fact that in South Africa currently there are no clear-cut, straightforward court rules for commencing and finalising evictions in both the High Court and the Magistrates' Courts. Instead, eviction proceedings are conducted using the general court rules of procedure. Moreover, both the action (trial) and motion (application) procedures are used interchangeably when launching eviction proceedings as the current court rules are silent in this regard. Such a state of affairs is confusing and undesirable, particularly when viewed from the angle of an ordinary, non-sophisticated litigant. The findings throughout this study mean that this question has to be answered in the negative, as fully explained below.

[102] http://tools.cira.state.tx.us/users (Date of use: 20 April 20).

In answering this question, under chapter 2 the current laws and rules underpinning court procedures for evictions are evaluated, together with applicable case law. In chapter 4 a historical analysis is made of the common law and legislative principles informing procedures through which eviction proceedings used to be conducted in the pre-democratic era. Relevant case law is also considered in the process. Furthermore, some foreign jurisdictions are examined on a comparative basis under chapter 6.

(b) To what extent are the provisions of statutes dealing with evictions accommodated in the existing civil court rules?[103] The extent to which certain court rules and legislation, such as High Court rules 31, 45 and 46, Magistrate's Courts rules 5 and 43 and the Magistrates' Courts Act section 66, have been amended subsequent to judicial pronouncements in matters such as those of *Jaftha*, *Saunderson*, *Gundwana* and so forth is examined in-depth in chapter 2. The same applies to the extent to which some High Court Divisions' practice directives have also been altered to accommodate certain court judgments. However, procedural elements remain in legislation such as PIE, LTA and ESTA that would seemingly operate better if accommodated in a set of court rules dedicated specifically to evictions. This study contends, therefore, that primary legislation should in the main address substantive aspects pertinent to evictions, whilst procedural segments are better catered for in the rules.

Furthermore, in answering this question, the historical context informing the enactment of the present eviction legislation is discussed in both chapters 3 and 4, and touched upon in chapter 5. In the process, the study intends analysing eviction laws preceding PIE and related statutes, relevant constitutional provisions and case law.[104] Then a systematic evaluation of the provisions of PIE and those of incidental laws will be conducted, simultaneously juxtaposing pertinent provisions and concomitant judicial pronouncements against provisions of the prevailing court rules and practice

[103] Statutes such as LTA; ESTA; PIE; and REHA.

[104] Pre-democratic era laws that will be analysed in this regard include Prevention of Illegal Squatting Act 52 of 1951, the Group Areas Act 36 of 1966, the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977.

directives. The aim is to weigh-up the proportions to which the court rules and practice reflect synergy with the provisions of PIE, LTA, ESTA, REHA and other applicable statutes respectively, as developed or interpreted by case law.

(c) Is there room for improvement of procedural laws in the institution, execution and conclusion of eviction proceedings? This is particularly relevant for an increased infusion of eviction-law prescripts in civil court rules and for practical, efficient usage by prospective litigants in the advancement of rights. Throughout the study this aspect is evaluated.

In the process of addressing this question an examination of judicial pronouncements or recommendations in our courts is conducted, and similarly extended to developments in selected jurisdictions. This is done with the aim of extrapolating lessons that can be learnt, from a South African legal context.

(d) If room for improvement is indeed found to exist, the question that follows is what recommendations can be made towards the effective litigation of eviction matters? Further, if the development of a uniform set of eviction rules is amongst those recommendations, what should be included in such rules? Conclusions and recommendations would respectively be drawn and made at the end of the study. However, it is beyond the scope of this study to design an appropriate model in this regard, due to the vast nature of areas likely to be covered in any such suggested eviction rules judging by the magnitude and content of the four main eviction-related Acts, which are ESTA. LTA, PIE and REHA. Instead, recommendations would be made about the fundamental features that can constitute the suggested eviction rules.

1.5 Hypothesis

The hypothetical premise around which the study revolves is that, from a procedural angle, there are no comprehensive court rules regulating evictions in South Africa, notwithstanding the existence of various substantive laws pertaining to evictions. The study is also informed by the perceived inconsistent elements in

the existing substantive eviction laws, which have a propensity to confuse litigants. Should any inadequacies in this regard be validated by the research findings, then the secondary objective of the study will be to concentrate on developing mechanisms towards improving shortcomings. This will be done mainly through reference to and analysis of laws as well as procedures on evictions in selected foreign jurisdictions. The current procedures which regulate processes in civil courts, including the commencement of evictions up to the execution of ejectment orders, demonstrate a necessity for stand-alone uniform eviction procedures. This is premised on the notion that provisions of various substantive eviction laws seem incorporated or infused in some civil procedural laws and practice directives which regulate eviction proceedings in South African courts but to a very limited, unsatisfactory extent, thus leaving room for the creation of a uniform regulatory framework. There are lessons to be extricated from comparative analysis of eviction laws and procedures in selected foreign jurisdictions.

1.6 Key concepts

'Civil procedural laws' refers to the Superior Courts Act 10 of 2013; High Court Rules; Magistrates' Courts Act 32 of 1944; Magistrates' Courts Rules; and Practice Directives of different High Court Divisions and Regional Magistrates' Courts, and related legislation.

'Eviction(s)' covers the eviction of human beings, as opposed to corporate entities or juristic persons, from their homes or places of abode.

'Eviction laws' is loosely used to refer to legislation such as the Prevention of Illegal Squatting Act;[105] LTA; ESTA; PIE; and REHA, as developed by case law.

'Home' includes, but is not limited to, urban residential dwelling (owned or rented), squatter camp and farm dwelling.

'High Court Rules' refers to the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, first published under GN R. 48 in *Government Gazette* 999 dated 12 January 1965, as

[105] Prevention of Illegal Squatting Act 52 of 1951 (hereinafter referred to as PISA).

amended. An alternative name used to describe these rules is 'Uniform Rules of Court'.

'Magistrates' Courts Rules' refers to the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, first published under GN R. 740 in *Government Gazette* 33487 dated 23 August 2010 (with effect from 15 October 2010), as amended.

'Unlawful occupiers' denotes persons occupying property without the owner's consent or another right in law to occupy same.[106]

1.7 Point of departure

In this study I seek to scientifically evaluate the extent of assimilation of eviction prescripts contained in substantive laws such as PIE, REHA, ESTA and LTA, into the civil procedural laws, rules and practice directives governing court proceedings, and identify inadequacies therein. The study is being undertaken with a view to an enhancement of the regulation of all spheres in which evictions occur – civil procedure, landlord and tenant law, property law and rural land tenure – in a uniform, systematic manner. Such envisaged regulation of necessity entails the development of unique, all-embracing eviction court rules. Recommendations towards the basic contents of uniform eviction rules are also projected if validated by the findings of the study, in a manner that will balance the interests of holders of real rights in land and unlawful occupiers. As stated above, the comprehensive design of such model uniform eviction rules seems beyond the scope of this study at this stage. However, it is envisaged that at the most this study will be able to make additional recommendations concerning the format and skeletal contents of such uniform eviction rules.

Although literature on evictions in South Africa is vast, there is limited focus on the substantive law and civil procedural law aspects pertaining to eviction proceedings. It is, therefore, hoped that this study will contribute towards the expansion of jurisprudence in this regard. It is also envisaged that from the

[106] Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (Unpublished LLM dissertation Stellenbosch University 2016) 1.

findings of the study, recommendations that would be made would greatly assist in the formulation and development of uniform eviction rules at a later stage. The rules, when implemented, will not only assist in the litigation and execution aspects pertinent to evictions but also enhance the development of case law and scholarly reviews of substantive and procedural laws in this sphere. This will potentially also encourage the consistent, expeditious, clear and uniform conduct of eviction proceedings throughout the different courts nationwide.

1.8 Chapter overview

Chapter 1: Introduction
Chapter 2: Civil procedural law: Evictions emanating from sales in execution
Chapter 3: Sections 25 and 26 of the Constitution
Chapter 4: Substantive laws impacting on the evictions regulatory framework: Evictions in the pre-constitutional era
Chapter 5: Substantive laws impacting on the evictions regulatory framework: Legislation in the democratic era
Chapter 6: Eviction laws in selected foreign jurisdictions
Chapter 7: Conclusions and recommendations

The first chapter, which is this current one, covers the introduction and problem statement. It provides a brief background to the study. It also sets out research questions relevant to the thesis.

The second chapter entails an examination of the existing procedural laws of the High Court and Magistrates' Courts of South Africa, the various courts' practice directives, and the extent to which all of these incorporate or accommodate eviction law principles, viewed from a civil procedural law perspective. It further evaluates which principles may prevail in the form of common law, statutory law or case law.

In the third chapter the provisions of sections 25 and 26 of the Constitution are evaluated in-depth to determine their impact on the existing substantive and civil procedural laws regarding evictions and balancing of competing rights in land occupation. This is done through first, an analysis of the historical basis of these

provisions as informed by case law and available literature; secondly, a consideration of judicial interpretation of the provisions and thirdly, an interrogation of the extent of the incorporation or absorption of these provisions in eviction and civil procedural laws.

An analysis of substantive laws on evictions in South Africa is conducted in the fourth and fifth chapters. This is done in the form of a discussion of pertinent common-law principles; pre-democratic era legislation such as PISA; Group Areas Acts; post-democracy legislation comprising, amongst others, LTA; ESTA; PIE and REHA. Background factors informing each of the mentioned legislative instruments are analysed, as well as the interpretation and development of some of the provisions of these laws through case law. The implementation and advancement of provisions of the stated laws through civil procedural laws is also analysed contextually.

Chapter 6 focuses on a comparative analysis of eviction laws and procedural rules in selected foreign jurisdictions, namely the United Kingdom; and the states of Arizona and Texas in the USA.[107] Focus is directed at these jurisdictions as they happen to have separate stand-alone eviction laws, rules and jurisprudence, from which South Africa can hopefully benefit.

The seventh chapter unpacks the findings, conclusions and recommendations emanating from the evaluation of the factors described in the preceding chapters. Depending on the study's findings, elements of a tool in the form of uniform eviction rules of procedure may be recommended for use in South African civil court proceedings. If suggested, such model eviction rules will draw from deductions validated through analysis of various procedural laws, rules, practice directives, eviction laws, pertinent case law and comparative assessment of selected foreign jurisdictions.

[107] The comparative method used is discussed below.

1.9 Description of research methods

1.9.1 Research method and literature review

The study is literature-based and qualitative in nature. It theoretically analyses aspects outlined below, evaluating relevant legislation and case law. A comparative assessment of selected foreign jurisdictions is envisaged, with the ultimate aim of recommending components of a model set of eviction rules of procedure for use in South African civil courts.

As such, the thesis' research method is mainly by way of literature study comprising law-books, journal articles, dissertations and theses, newspaper articles and on-line writings (internet-based resources)

Library, inter-library, and related legal sources are also accessed. As far as is practically possible, no reliance will be placed on interviews, questionnaires and the like. Due to the nature of the study the documentary research method is the preferable route over other methods such as social surveys, in-depth interviews or participant observation. Both primary and secondary documents are analysed to select and categorise data, provide background and context, investigate and interpret evidence, track developments, verify findings and so forth.[108] For instance, data sourced from secondary documents such as on-line articles and journals is verified or tested against public documents such as *Government Gazettes*, documented legislation and case-law reports. In all instances maximum care will be taken to ensure the scientific handling of documentary sources using quality control criteria such as authenticity, credibility, representativeness, meaning and accuracy.[109]

[108] See Mogalakwe M "The use of documentary research methods in social research" 2006 *African Sociological Review*, Vol.10, No. 1, 221–222; Bowen GA "Document analysis as a qualitative research method" 2009 *Qualitative Research Journal*, Vol. 9, No. 2, 27–31.

[109] Mogalakwe 2006 *African Sociological Review* 224–228; and Bowen 2009 *Qualitative Research Journal* 33.

1.9.2 Comparative research method

Comparative law is a method or process of comparing laws, the more appropriate term being comparative method.[110] The comparative research method followed in the study avoids merely importing rules and perceived solutions from other legal systems. Instead, the envisaged approach mainly encompasses elements of the functional method and the law-in-context method of comparative research.[111]

Van Hoecke asserts that six different methods for comparative research may be distinguished: the functional method; the structural method; the analytical method; the law-in-context method; the historical method and the common-core method.[112] For him, together these probably constitute the whole toolbox for comparative research. The functional method seems most applicable to this study, despite some of its shortcomings. It focuses on common legal problems and legal solutions in the compared legal systems, rather than on the diverging rules and doctrinal framework. It requires a less-thorough analysis of the broader cultural context.[113] On the other hand, the law-in-context approach shifts the research away from mere comparison of legal rules, concepts or systems to the way the law works in practice as observed from judicial decisions.[114]

However, the methods are complementary and interdependent, and seemingly not exhaustive. For instance, Van Hoecke indicates that by definition the functional method already refers to and includes a context: which societal problem is solved with what kind of legal construction?[115] Linked to this is the notion that comparison can be more manageable if it is considered that the world's legal systems may be classified into various families.[116] In this study the Anglo-Saxon and Anglo-

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[110] Church J and Edwards AB "Comparative law/comparative method" in Hosten WJ *et al Introduction to South African law and legal theory* 2nd edition (Butterworths Durban 1995) 1261.

[111] Discussed in Van Hoecke M "Methodology of comparative legal research" http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001/fullscreen (Date of use: 28 December 2016).

[112] Van Hoecke http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001/fullscreen (Date of use: 28 December 2016).

[113] Van Hoecke http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001/fullscreen (Date of use: 28 December 2016).

[114] Van Hoecke http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001/fullscreen (Date of use: 28 December 2016).

[115] Van Hoecke http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001/fullscreen (Date of use: 28 December 2016).

[116] Church *Comparative Method* 1264

American legal systems are analysed comparatively, partly because South African law is a so-called 'mixed' legal system:

> This means that, although the foundation of South African law is Roman-Dutch law (that is, a civilian system), there has been a marked influence of English law in many areas of the law. However, one of the areas of South African private law in which the principles of Roman-Dutch law have been preserved to a large extent is the law of property.[117]

Indeed, prior to the British occupation,[118] the South African legal system was governed by the procedural rules of the Roman-Dutch civil tradition.[119] The Roman-Dutch procedural rules were substituted with the English procedural rules, principles and practices subsequent to the British occupation.[120] In the European countries however, particularly in the Netherlands, Germany, Sweden as well as in Italy, evictions seem to have received little interest in the social sciences generally.[121] Evictions in these legal systems occur mostly in the sphere of landlord-tenant disputes. However, there are no comprehensive rules specifically dedicated to evictions in those countries. As elaborated upon in chapter 6, in most instances the laws there seem pro-tenant, and the eviction of tenants is not simple.[122] As such, comparison with these legal systems is not suitable for the objectives of this study.

The UK and the two USA states of Arizona and Texas are selected for comparative analysis as evictions therein are governed by specialised procedures. As stated earlier, the two states are selected from a practical perspective of demonstrating the possibility of having separate, uniform eviction rules. Their selection is not based on their uniqueness in respect of other American states. The position in the USA is that the relevant procedure is regulated by state law.

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[117] De Waal MJ "*Numerus clausus* and the development of new real rights in South African law" http://www.ejcl.org/33/art33-1.doc (Date of use: 30 December 2016).

[118] The British first occupied the Cape in 1795 taking over from the Dutch East India Company, and re-annexed it in 1806: https://.britannica.com>place (Date of use: 8 September 2021).

[119] Erasmus H "The interaction of substantive law and procedure" in Zimmerman R and Visser D (eds) *Southern cross: civil law and common law in South Africa* (Clarendon Press Oxford 1996) 145.

[120] Erasmus *Substantive law and procedure* 146. Per Erasmus, all pertinent factors in the South African legal system, including the role plus hierarchy of courts, and the scope of the powers and jurisdiction of the courts were governed by the English procedural law. See also Cloete C and Boggenpoel ZT "Re-evaluating the court system in pie eviction cases" 2018 *SALJ*, Vol. 3, 432–446 434.

[121] Stenberg S, Van Doorn L and Gerull S "Locked out in Europe: a comparative analysis of evictions due to rent arrears in Germany, the Netherlands and Sweden" 2011 *European Journal of Homelessness,* Vol. 5, No. 2, 39–61 40.

[122] Stenberg, Van Doorn and Gerull 2011 *European Journal of Homelessness* 56.

The choice of a state or a city is therefore significant for America.[123] In his earlier analysis of eviction laws in England, New York City and two other countries Spamann also confirms this unique position: [124]

> Note in this connection that England and New York City provide special procedures for eviction claims: the possession claim under CPR Part 55 in England, and the non-payment variant of the summary proceeding to recover possession of real property under RPAPL § 732 in New York City.

Even though the UK and the USA have no provisions, constitutional or otherwise, which correspond to sections 25 and 26 of the South African Constitution, comparative analysis with eviction laws in those countries seems more useful for this study from a functional method perspective. This is so, notwithstanding the fact that the UK is regarded as a parliamentary democracy:[125]

> In many states, such as the USA, Germany and South Africa, written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights. However, the UK has not followed this approach. Instead, over the last few decades, it has developed its own distinctive system, which gives courts a role in protecting individual rights while respecting the sovereign law-making authority of Parliament.

In the UK the Human Rights Act 1998[126] 'incorporated' most of the rights and freedoms contained in the European Convention on Human Rights (ECHR) into UK law.[127] This gives more substantive legal protection to individual rights, with the European Court of Human Rights (the 'Strasbourg Court') acting as a court 'of last resort' to protect human rights across the whole of Europe.[128] For evictions, article 8 of the Convention is the most relevant, dealing with the right to respect for

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[123] Spamann H "Legal origin, civil procedure, and the quality of contract enforcement" http:// www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_31.pdf (Date of use: 30 December 2020).

[124] Spamann http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_ 31.pdf (Date of use: 30 December 2016). In New York the position on evictions is regulated by section 732 of the Real Property Actions and Procedural Law (RPAPL) titled: "Special provisions applicable in non-payment proceeding if the rules so provide". This section is made applicable in New York City by section 208.42(d) of the Uniform Rules of the New York City Civil Court (NYCRR). See also Saks SR "RPAPL § 732(3): Appellate Division, First Department, holds that RPAPL prohibits routine scheduling of inquests prior to signing default judgments in residential summary nonpayment proceedings" 2012 *St. John's Law Review*, Vol. 68, No. 3, Article 9, 799–809.

[125] O'Cinneide C *Human rights and the UK Constitution* September 2012 (A peer reviewed report for the British Academy Policy Centre), 8.

[126] Human Rights Act 1998, c.42 https://www.legislation.gov.uk/ukpga/1998/42.

[127] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Art 3, 1950.

[128] O'Cinneide *Human rights and the UK Constitution* 8.

private and family life.[129] As concerns the Brexit[130] aspect, it is worth noting that the UK's membership of the European Union (EU) has no connection to its membership of, and therefore obligations under, the ECHR.[131] Furthermore, EU legislation which applied directly or indirectly to the UK before 11.00 p.m. on 31 December 2020 has been retained in UK law as a form of domestic legislation known as "retained EU legislation".[132] This is contained in sections 2 and 3 of the UK's European Union (Withdrawal) Act 2018.[133] Section 4 of the 2018 Act ensures that any remaining EU rights and obligations, including directly effective rights within EU treaties, continue to be recognised and available in domestic law after Brexit.[134]

Even though there is no formal federal, state, or constitutional right to housing in the USA, the human right to housing is nevertheless consistent with explicit and implicit USA constitutional norms.[135] Alluding to the US Constitution, Alexander maintains that:[136]

> The First Amendment of the Constitution also protects individuals' rights to privacy, autonomy, freedom of association, and self-determination. While the right to housing does not have an explicit textual foundation in the Constitution, it is not implausible to argue that Americans without adequate housing lack equal dignity, equal citizenship, privacy, personal autonomy, or self-determination. The human right to housing, therefore, provides a normative framework to allocate housing entitlements in a manner that is consistent with fundamental norms in a free and democratic society.

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[129] Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for his private and family life, his home and his correspondence. It further prohibits unlawful interference by a public authority with the exercise of this right.

[130] This aspect and its legal ramifications are covered at length in chapter 6. For the purposes of chapter 1 it will suffice to just describe the position briefly. 'Brexit' is the name given to the United Kingdom's departure from the European Union (EU) and is a combination of 'Britain' and 'exit'. The UK left the EU on 31January 2020. Up to and including 31 December 2020 a transition period was in place, during which time the UK continued to comply with all EU laws and rules. 1 January 2021 is the date scheduled for the coming into effect of the actual, formal separation: https://www.government.nl/topics/brexit/question -and-answer/what-is-brexit (Date of use: 3 February 2021).

[131] https://www.thelawyerportal.com/blog/how-will-brexit-affect-human-rights-law/ (Date of use: 19 December 2020).

[132] https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021). A position also confirmed in in sections 2 and 3 of the European Union (Withdrawal) Act 2018, c.16.

[133] UK's European Union (Withdrawal) Act 2018, c. 16 https://www.legislation.gov.uk/ukpga/2018/16/contents.

[134] https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021).

[135] Alexander LT "Occupying the constitutional right to housing" 2015 *Nebraska Law Review*, Vol. 94, 245–301 248–250.

[136] Alexander 2015 *Nebraska L R* 260.

Moreover, both the USA, UK and South Africa share in the common values of upholding human rights. This is affirmed by, amongst others, the fact that these countries are signatories to the United Nations' International Covenant on Economic, Social and Cultural Rights.[137] The Covenant formalises and codifies the principles outlined in the 1948 Universal Declaration of Human Rights.[138] Article 11(1) of the Covenant affirms the right to housing as forming part of all people's rights to an adequate standard of living.[139]

The discussion on these selected foreign jurisdictions is explored comprehensively in chapter 6.

1.10 Conclusion

The quote below, from the case of *Ndlovu* provides an inkling of the types of issues faced with eviction proceedings, and which this study aims to address:[140]

> But, *in those cases where PIE is admittedly applicable*, for example in the case of squatters, the common law has been changed drastically, both as to procedure and to substance. No longer is there in such cases a simple *rei vindicatio* procedure available to the owner. Section 4 of PIE introduces a unique and peremptory procedure. Section 4(2) requires that notice of the eviction proceedings be given to the unlawful occupier and the municipality having jurisdiction, at least 14 days before the hearing of those proceedings. The juxtaposition of this procedure and that prescribed by the Court Rules is opaque,

[137] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (Date of use: 15 February 2021). United Nations' International Covenant on Economic, Social and Cultural Rights (the Covenant) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (Date of use: 15 February 2021). South Africa signed the Covenant on 3 October 1994 and ratified it on 12 January 2015. The US signed it on 5 October 1977 but has not yet ratified. The UK signed on 16 September 1968 and ratified on 20 May 1976.

[138] Universal Declaration of Human Rights. 1. United Nations. 2. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December. 1948.

[139] Article 11(1) of the Covenant provides: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent".

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[140] *Ndlovu* [47].

> and has already given rise to an appeal to this Court - *vide Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA). In terms of that judgment, both the ordinary court procedures and the procedure under PIE must be followed. Furthermore, it seems that a further *ex parte* application is necessary in order to obtain the court's directions for serving the notice required by s 4(2).

The first aspect to be addressed in the quest for a uniform set of rules regulating eviction proceedings in South Africa - an overview of the execution processes against immovable property which may culminate in an eviction, as informed by civil procedural laws - is conducted in the next chapter.

Chapter 2: Civil procedural law: Evictions emanating from sales in execution

2.1 Introduction

This chapter focuses mainly on the execution processes against immovable property, which often result in the loss of ownership for the homeowner. The resultant loss of ownership renders the former owner an unlawful occupier, thus paving the way towards him or her being evicted.[141] As will be illustrated in this chapter, execution is one of the crucial steps in civil litigation. Generally, civil litigation permeates all spheres of evictions and it will be discussed in this research. Civil litigation, in turn, is regulated by civil procedure, which will be unpacked in this chapter. As such, this chapter revolves around the procedural laws of the High Court, Magistrates' Courts and the Land Claims Court, as well as the manner of their application in the regulation of processes pertinent to or culminating in evictions. The examination of such procedural laws will also entail a discussion of applicable civil court rules, and the way that these have been developed by case law. Furthermore, the nature and impact of various courts' practice directives will be analysed and explained, particularly as they supplement the court rules. Actual eviction processes will be discussed separately in other chapters depending on the category under which they fall and on the applicable legislation, be it PIE, REHA, ESTA, LTA and so forth.

Whilst substantive law describes what a person's rights, duties and remedies are, procedural law (of which the law of civil procedure is a part) prescribes how these rights, remedies and duties may be enforced.[142] The distinction is comprehensibly described by Hutchison *et al*:[143]

> The substantive law defines 'ownership', and then proceeds to tell one how ownership is acquired, what are the acts that an owner may do and what are those that he may not do, and finally, how his ownership is terminated … The law of procedure, on the other hand, is composed of the rules which govern the

[141] In *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* 2018 (6) SA 492 (GJ) [57] the court confirmed that the process of granting judgment against the homeowner is the first step that may lead to his or her eviction from the property. In the same paragraph it stated: "Thus a court is to consider all the relevant factors when declaring a property specially executable at the behest of a bondholder".

[142] Theophilopoulos C *et al Fundamental principles of civil procedure* (LexisNexis Butterworths Durban 2006) 1.

[143] Hutchison D *et al Wille's Principles of South African law* 8th ed (Juta Cape Town 1991) 45.

> enforcement of the various rights …: it sets forth the nature of proceedings to be taken in the courts in order to secure redress when legal rights have been infringed, or legal duties have been neglected … It tells, among other things, in what court he should institute legal proceedings; what documents should be prepared by his legal advisers; what proof or evidence he should produce in court in order to substantiate his claim; how the proceedings in court are carried out; and how the judgment of the court is enforced.

Procedural law is also referred to as adjective law, as it is merely accessory to the main or substantive branch of the law, and cannot be properly appreciated without comprehending the principles of substantive law.[144] Adjective law in its widest sense deals with the proof and enforcement of rights, duties and remedies.[145] However, the law of evidence, dealing with the rules and principles for *proving* rights, duties and remedies,[146] falls beyond the ambit of this research. The law of procedure in a narrow sense is concerned with the body of rules regulating the general conduct of litigation and relating to the *enforcement* of rights, duties and remedies, and thus the term 'civil procedure' serves to distinguish it from the law of criminal procedure.[147]

The most significant sources containing the procedures making up the law of civil procedure relevant to this study are: the Superior Courts Act; the High Court Rules; practice directives of the respective divisions of the High Court; the Magistrates' Courts Act; and the Magistrates' Courts Rules. The nature of practice directives of the regional divisions of the Magistrates' Courts will be briefly touched on. The Acts referred to constitute primary legislation, whilst the court rules are secondary legislation by virtue of deriving their authority from the stated statutes. Primary legislation may be amended only by Parliament, whilst the Rules Board is responsible for the review, amendment and making of the court rules.[148]

The significance and import of court rules have been well articulated by the Constitutional Court in matters such as those of *Mukaddam v Pioneer Foods (Pty) Ltd*[149] and *Eke v Parsons*.[150] In *Mukaddam* Jafta J's view was that a litigant who wishes to exercise the right of access to courts in terms of section 34 of the

[144] Hutchison *et al Wille's Principles* 45.
[145] Cilliers AC, Loots C and Nel HC *Herbstein & Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa*, Vol. 1, 5th ed (Juta Cape Town 2009) 3.
[146] Cilliers, Loots and Nel *Herbstein & Van Winsen The civil practice of the High Courts*, Vol. 1, 3.
[147] Cilliers, Loots and Nel *Herbstein & Van Winsen The civil practice of the High Courts*, Vol. 1, 3.
[148] Theophilopoulos *et al Fundamental principles* 4. See also the Rules Board Act.
[149] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) (hereinafter *Mukaddam*).
[150] *Eke v Parsons* 2016 (3) SA 37 (CC) (hereinafter *Eke*).

Constitution is required to follow certain defined procedures to enable the court to adjudicate a dispute, which procedures are mainly contained in the rules of each court.[151] He explained that these rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.[152] The court rules should thus be used as tools to facilitate access to courts rather than hindering it.[153] He confirmed a long established principle that was also reiterated by Madlanga J in *Eke*[154] that the rules are made for courts and not that the courts are established for rules.[155] As such, the primary function of the rules of courts is the attainment of justice.[156] The court further pointed out that sometimes circumstances arise which are not provided for in the rules, in which case the best course would be to approach the court itself for guidance, given that in terms of section 173 of the Constitution each superior court is the master of its process.[157]

As will be noticed in the discussion below court rules also feature prominently in execution processes against immovable property, which precede evictions.

2.2 Overview of execution processes against immovable property

Legal processes ordinarily instituted for the recovery of debts in some instances culminate in the repossession of a debtor's immovable property, followed by an eviction. These legal processes may originate in different ways, such as foreclosures and other ordinary recovery proceedings for unsecured debts. Foreclosure in the context of this research refers to a procedure by which the holder of a mortgage—an interest in land providing security for the performance of a duty or the payment of a debt—sells the property upon the failure of the debtor to pay the mortgage debt and, thereby, terminates his or her rights in the

[151] *Mukaddam* [31].
[152] *Mukaddam* [31].
[153] *Mukaddam* [32].
[154] *Eke* [39].
[155] *Mukaddam* [32]. This is trite law as also affirmed in cases such as *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) [18], citing *Republikeinse Publikasies (Edms.) Bpk. v Afrikaanse Pers Publikasies (Edms.) Bpk.* 1972 (1) SA 773 (A) 783A-B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130.
[156] *Mukaddam* [32].
[157] *Mukaddam* [32]. A point also well-articulated in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) [30].

property.[158] According to Brits "it follows from the mortgagor's duty to repay the loan that the mortgagee has a corresponding right to foreclose the bond" and sell the property in execution where the mortgagor defaults.[159] As mentioned in chapter 1, in foreclosures the creditor (bondholder) is allowed to ask for an order declaring the immovable property specially executable, instead of first attempting to execute against the debtor's movables. Once the immovable property is declared specially executable it can then be sold in execution, paving the way for the eviction of the debtor (former home-owner). In *Nedcor Bank Ltd v Kindo and Another*[160] the court explained that the essence of securing a mortgage bond is that "in the event of non-payment of a debt on the due date, the mortgagee is entitled to foreclose and to have a hypothecated immovable property declared executable".[161] The mortgagee would thus have the right and effective remedy, in the event of non-payment and subsequent foreclosure of the bond.[162]

In the normal course of events an eviction order will be preceded by: (1) summons; (2) judgment: for payment of debt; (3) order declaring immovable property executable; (4) writ of execution; (5) attachment; and (6) sale in execution. As clarified by Theophilopoulos, obtaining a civil court judgment is not necessarily the final step in the litigation process.[163] Where the judgment debtor is recalcitrant and unwilling to pay the debt as ordered by the court it will be necessary for the judgment creditor to obtain satisfaction through more formal means, and follow a process called 'execution', as prescribed in the specific rules of the High Court and the Magistrates' Courts.[164] Such execution procedures provide a mechanism by which court orders may be enforced, and ensure the effectiveness and integrity of the process of judicial decision making:[165]

> In general terms the process of execution entails the attachment and sale by public auction, by the sheriff of the court, of the property of the judgment debtor in order

[158] https://legal–dictionary.thefreedictionary.com/foreclosure (Date of use: 12 May 2018).
[159] Brits R *Real security law* (Juta Cape Town 2016) 62. See also *Nedcor Bank Ltd v Kindo and Another* 2002 (3) SA 185 (C) 187, where it was held that the mortgagee's right to claim execution against the property is a natural consequence of calling up a mortgage, subject to a court authorising the sale.
[160] *Nedcor Bank Ltd v Kindo and Another* 2002 (3) SA 185 (C) (hereinafter *Nedcor Bank*).
[161] *Nedcor Bank* 188.
[162] *Nedcor Bank* 188.
[163] Theophilopoulos *et al Fundamental principles* 347.
[164] Theophilopoulos *et al Fundamental principles* 347.
[165] Theophilopoulos *et al Fundamental principles 347.*

> to realise money and thereby satisfy a money judgment. An attachment in execution creates a judicial mortgage (*pignus judiciale*).

The following requirements must be complied with before it may be said that execution has been levied:[166]

(a) the issue of a valid writ of execution;
(b) the attachment of the judgment debtor's property by the sheriff, unless the debtor pays the amount of the writ and costs; and
(c) the sale by the sheriff, through public auction, of the property attached.

As Brits correctly points out, a writ (or warrant) of execution is a document, requested by the party in whose favour any judgment of the court had been pronounced, issued by the registrar of the High Court or the clerk of the Magistrates' Court, directed to the sheriff, ordering him or her to take possession of as much of the debtor's property as will realise, by public sale, the amount of the judgment and the costs incurred in satisfying it.[167] The litigation path ultimately leading to the issuing out of a writ of execution would have ordinarily been commenced through a legal process in the form of summons, which initiates the action procedure against the defendant.[168] As mentioned by Theophilopoulos:[169]

> The function of a summons is twofold: firstly, it informs the defendant of the nature of the plaintiff's cause of action and claim and secondly, it initiates the process whereby the defendant is brought before the court.

Having issued summons and complied with various pertinent procedures, obtaining a judgment order against the defendant is the other significant phase towards execution. Obtaining a judgment order is a prerequisite for the execution process, including the applicable sale of the attached property.[170] The primary principle in execution is that it can be carried out only once judgment is granted, and then only by means of the issue of a warrant of execution.[171] Ordinarily,

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[166] Cilliers AC, Loots C and Nel HC *Herbstein & Van Winsen The civil practice of the High Courts and the Supreme Court of Appeal of South Africa*, Vol. 2, 5th ed (Juta Cape Town 2009) 1021, and Theophilopoulos *et al Fundamental Principles* 347.
[167] Brits R *Mortgage foreclosure under the Constitution: property, housing and the National Credit Act* (Unpublished LLD thesis Stellenbosch University 2012) 52. Also, in Cilliers, Loots and Nel *Herbstein & Van Winsen The civil practice of the High Courts*, Vol. 2, 1024.
[168] Theophilopoulos *et al Fundamental principles* 147.
[169] Theophilopoulos *et al Fundamental principles* 147.
[170] Brits *Mortgage foreclosure under the Constitution* 51.
[171] Theophilopoulos *et al Fundamental principles* 349.

execution is levied against the debtor's movable assets first before attaching the immovable property. As pointed out by Brits:[172]

> In the case of unhypothecated property, no writ of execution may be issued against a debtor's immovable property until the registrar or clerk of the court is satisfied that there is insufficient movable property to satisfy the writ. Proof that there is no or insufficient movable property to satisfy the judgment is usually supplied by a *nulla bona* return. After it appears that no or insufficient movable property is available to satisfy the judgment debt, the creditor can (without any further order of court) levy execution against the immovable property of the judgment debtor.

As indicated above and illustrated by the judgment in *Saunderson*, amongst others, there is no need to rely on the sheriff's *nulla bona* return where the immovable property concerned is hypothecated, usually with a mortgage, as the court can be asked to declare such property specially executable. In such special circumstances, the first ordinary step of executing against movables can be skipped and the court be asked instead to declare the immovable property executable.[173] According to Brits the court also has the power to declare immovable property executable in terms of the common law.[174] This power is qualified where the property happens to be a primary residence, due to the constitutional requirement for a home to be lost only as a last resort.[175]

The nature and purport of a warrant of execution is succinctly captured by Theophilopoulos *et al*:[176]

> A writ or warrant of execution is issued by the registrar of the High Court or the clerk of the Magistrate's Court and it instructs the sheriff of the court to attach and sell, by public sale, so much of the judgment debtor's property as is necessary to satisfy the judgment debt plus the costs of the execution process.

However, if execution is against the home of a person the court rules now prescribe that the registrar or clerk of the court shall not issue a warrant of execution against the residential immovable property of any judgment debtor unless the court has ordered execution against such property.[177] This is to ensure judicial oversight and consideration of all relevant factors in instances where a

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[172] Brits *Mortgage foreclosure under the Constitution* 53.
[173] Brits *Real security law* 67, wherein the author also points out that it is "traditionally accepted that such an order will be permitted if the property has been hypothecated as security for debt".
[174] Brits *Mortgage foreclosure under the Constitution* 53, and the authorities cited therein.
[175] Brits *Real security law* 67.
[176] Theophilopoulos *et al Fundamental principles* 351.
[177] High Court rule 46A(2)(c) and Magistrates' Courts rule 43A(2)(c).

person stands to lose his or her house, following judgments in matters such as *Jaftha* and *Gundwana*.

Methods of attachment and sale in execution for various classes of property – movable (corporeal and incorporeal) and immovable – are regulated by the rules of court, by statutes and in some instances by judicial authority.[178] Attachment is the legal process of seizing property to ensure satisfaction of a judgment.[179] The attachment of immovable property is made by the sheriff of the district in which it is situated,[180] upon a writ corresponding substantially with the prescribed court forms.[181] Practically, this entails the sheriff serving notice of the attachment, corresponding substantially with Form 20A[182] of the High Court Rules or Form 33[183] of the Magistrates' Courts Rules, upon the following:[184]

- the owner of the immovable property;
- the registrar of deeds or other officer charged with the registration of such property; and
- if the property is occupied by some person other than the owner, also upon such occupier.

Attachment is then followed by the sale of the immovable property in the manner stipulated by rules 46 and 46A in the High Court or 43 and 43A in the Magistrates' Courts. This then often culminates in the purchaser initiating eviction proceedings against occupiers of the immovable property sold in execution. Diagram 2.1 below briefly illustrates the relevant legal framework.

As the emphasis is on civil procedural laws and prescripts pertinent to execution processes culminating in evictions, I will now turn to the prevailing position in the litigation forums starting with the High Court. In the analysis that follows, leading

[178] Cilliers, Loots and Nel *Herbstein & Van Winsen The civil practice of the High Courts,* Vol. 2, 1053.
[179] https://legal-dictionary.thefreedictionary.com/attachment (Date of use: 21 February 2018).
[180] High Court rule 46(2) and Magistrates' Courts rule 43(2).
[181] The applicable forms in this regard are Form 20 of the First Schedule of the High Court Rules, and Form 32 of Annexure 1 of the Magistrates' Courts Rules.
[182] Form 20A of the First Schedule of the High Court Rules.
[183] Form 33 of Annexure 1 of the Magistrates' Courts Rules.
[184] According to High Court rule 46(3)(a) and Magistrates' Courts rule 43(3)(a).

cases in relation to specific procedural laws or court rules will be comprehensively unpacked, particularly in the way they may have influenced or prescribed legislative amendments.

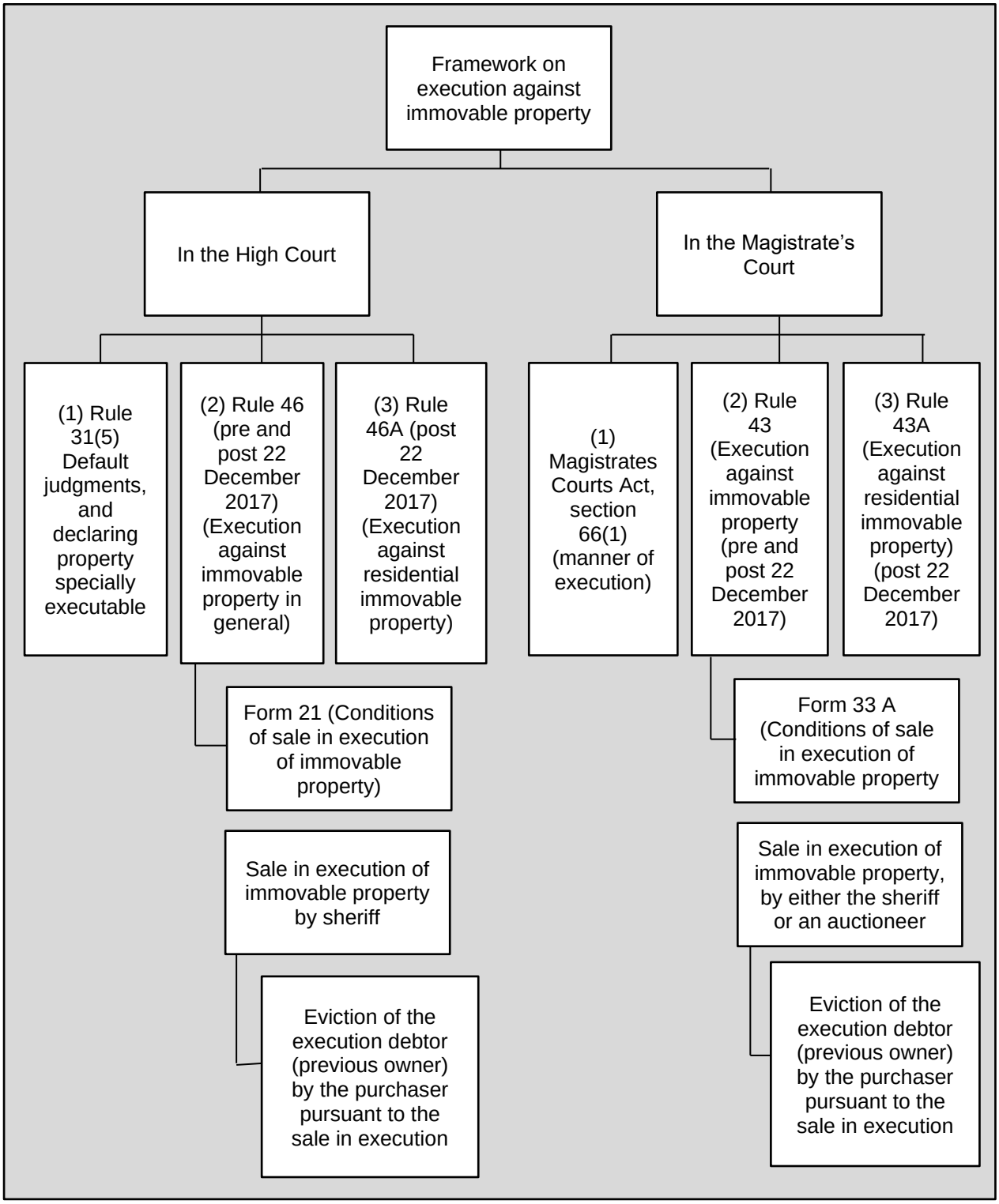

Diagram 2.1: Framework on execution against immovable property

2.3 High Courts

2.3.1 Introduction

Currently, the principal legislative instrument regulating the High Court and its procedures is the Superior Courts Act. This Act replaced the Supreme Court Act,[185] and commenced on 23 August 2013 with some few exceptions. Of significance is section 51 thereof, which stipulates that the rules applicable to the Constitutional Court, SCA and the various High Courts immediately before the commencement of this section remain in force to the extent that they are not inconsistent with this Act, until repealed or amended. The Act confirms that rules for the SCA, the High Court and the Magistrates' Courts continue to be made in accordance with the Rules Board Act.[186] The Superior Courts Act therefore has not interfered with the existing court rules, and has ensured their continued existence.

The High Court Rules (also referred to as the Uniform Rules of Court) were first promulgated on 12 January 1965,[187] commencing on 15 January 1965. They were initially made by the Chief Justice, after consultation with the judge presidents of several divisions of the Supreme Court (High Court), and subject to the approval of the State President.[188] This position continued until 20 February 1987 when the Rules Board Act came into operation, establishing the Rules Board. Amongst others, this board may, with a view to the efficient, expeditious and uniform administration of justice in the SCA, the High Court of South Africa and the lower courts, from time to time review existing rules of court.[189] Subject to the approval of the Minister, the board may also make, amend or repeal rules for the stated courts regulating the practice and procedure in connection with litigation.[190] The object and purpose of the court rules are well articulated by Van Loggerenberg:[191]

> The object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of

[185] Supreme Court Act 59 of 1959.
[186] Section 30(1) of the Superior Courts Act.
[187] *Government Gazette Extraordinary* 999 dated 12 January 1965: GN R. 48.
[188] Van Loggerenberg DE *Erasmus Superior courts practice*, Vol. 2, 2nd ed (Juta Cape Town 2017) D1–7.
[189] Section 6(1) of the Rules Board Act.
[190] Section 6(1) of the Rules Board Act.
[191] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 2, D1-7.

> the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible.

This objective and significance of the rules were also underpinned by the Constitutional Court in *Eke*,[192] wherein it too reiterated the flexible principle that the rules exist for the courts, and not the courts for the rules. In *Eke*, the court stated further that *"…* the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to secure the inexpensive and expeditious completion of litigation and … to further the administration of justice. *…".* [193] It is therefore trite that court rules exist to ensure fair play and good order in the conduct of litigation.[194] Rules may not lay down substantive legal requirements for a cause of action.[195] Rules may also re-state the existing law and regulate the procedure that applies to that law[196] but where a rule of court is not procedural but substantive in nature, or seeks to expand the substantive law, it will be *ultra vires* and of no force or effect.[197]

There are no rules directly governing evictions in the High Court. However, certain court rules feature prominently in the two processes paving the way towards evictions, being the granting of judgments (including declaring the immovable property specially executable) and execution against immovable property. These processes are the precursors to the debtor's eventual loss of ownership rights over the immovable property. Summary judgment can be sought in actions involving evictions, via rule 32, in instances where the plaintiff reckons that the defendant lacks a *bona fide* defence and is merely intent on delaying the matter. Prior to 22 December 2017, the two rules significant in this regard were 31 and 46. However, in December 2017 the rules and forms pertaining to execution against immovables

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[192] *Eke* [39]–[40].

[193] *Eke* [40].

[194] *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) [9].This position was also confirmed in *Standard Bank of South Africa Limited v Hendricks and Another; Standard Bank of South Africa Limited v Sampson and Another; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams and Another; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* 2019 (2) SA 620 (WCC) (full bench) [25].

[195] *Standard Bank of South Africa Limited v Hendricks and Another; Standard Bank of South Africa Limited v Sampson and Another; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams and Another; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* 2019 (2) SA 620 (WCC) (full bench) [26].

[196] *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) (hereinafter *United Reflective Converters*) 463F–G.

[197] *United Reflective Converters* 463B–C and *Ex parte Christodolides* 1953 (2) SA 192 (T) 195A–D.

were overhauled.[198] An analysis of the stated rules pre- and post-December 2017, as developed or shaped by case law in appropriate instances, follows.

2.3.2 Rule 31

This rule generally allows a court registrar the authority to grant judgment in certain instances where a defendant has defaulted in delivering a notice of intention to defend a court action or a plea. Normally, the registrar directly deals with and grants such applications for default judgment himself or herself, though sub-rule 31(5)(b)(vi) allows him or her the option of requiring the matter to be enrolled for hearing in an open court by a judge. However, the stated sub-rule was amended in 2013 to make it obligatory for a court registrar to refer to court any application for default judgment where an order is sought declaring residential property specially executable. This is to ensure judicial oversight in instances which may result in a person being evicted from his or her home. The amendment is as a result of the Constitutional Court judgment in *Gundwana*.

In the *Gundwana* matter the applicant (Elsie Gundwana) purchased immovable property in Thembalethu, George, Western Cape in 1995 for R52 000. She paid part of the price, R25 000, with money lent to her by Nedbank under a mortgage bond. The property served as security for the loan. During 2003 she fell in arrears with her monthly repayments. On 7 November 2003 the registrar granted default judgment against her in the High Court at the bank's instance for payment of R33 543.06 together with a further order declaring the property executable for that sum. A writ of attachment was subsequently issued to give effect to the declaration of executability.[199] Four years down the line, on 15 August 2007, the property was sold in execution under the original writ to the first respondent, Steko Development CC (Steko). Steko transferred the property into its own name, and launched an application for her eviction from the property on 23 August 2007, which was eventually granted on 3 June 2008 by the local Magistrates' Court.[200] In October 2008 she applied in the High Court for rescission of the default judgment which had led to the eventual eviction order. However, the parties to the action agreed to

[198] Through the amendments contained in GN R. 1272 *Government Gazette* 41257 dated 17 November 2017, which commenced on 22 December 2017.
[199] *Gundwana* [5].
[200] *Gundwana* [7]–[8].

postpone the rescission application until the determination of the application which had been simultaneously launched by Elsie Gundwana in the Constitutional Court.[201]

The ultimate issue for decision by the Constitutional Court was whether a High Court registrar (registrar), in the course of ordering default judgment under rule 31(5)(b) of the High Court Rules, may grant an order declaring mortgaged property that is a person's home (primary residence) specially executable. Elsie Gundwana's contention was that such power of the registrar (exercised without any oversight from a judge) was constitutionally invalid, particularly as it had eventually resulted in an eviction order being granted against her. She sought a direct access to the court for a declaratory order to that effect. She also claimed consequential relief in the form of rescission of the default judgment that included the order declaring her property executable (rescission application), and for the setting aside on appeal of an order evicting her from her property (eviction order).[202]

In dealing with the constitutional validity of the High Court Rules and practice Judge Froneman pointed out that rule 31(5) makes no explicit reference to orders declaring mortgaged property specially executable. For that reference one needed to turn to erstwhile rule 45(1), the rule dealing with execution following upon a judgment.[203] Actually, at the time of delivery of the judgment rule 45(1) had been amended in December 2010 and substituted with rule 46(1)(a)(ii) in so far as the portion dealing with immovable property is concerned. Although they will be discussed extensively later,[204] the provisions of rule 46(1)(a)(ii), prior to its amendment in December 2017, are worth noting.[205]

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[201] *Gundwana* [9].
[202] *Gundwana* [1]–[2].
[203] *Gundwana* [36].
[204] Discussed fully in 2.3.3 below, which is dedicated to Rule 46, and to a certain extent in 2.3.4 below.
[205] As amended by GN R. 981 *Government Gazette* 33689 dated 19 November 2010, which came into effect on 24 December 2010. Rule 46(1)(a)(i) and (ii) provided as follows prior to 22 December 2017:
"No writ of execution against the immovable property of any judgment debtor shall issue until -
(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or

After evaluating various judicial pronouncements the judge came to the conclusion that an evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executable may be made. It is the kind of evaluation that must be done by a court of law, not the registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional.[206] In essence therefore, the court found that the registrar was not constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b).[207] In the process the judge made some cautionary remarks that these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money.[208] Instead, what the judgment does is:[209]

> … to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.

In the circumstances, following upon this judgment, High Court rule 31(5)(b) was amended with effect from 16 August 2013 to provide as follows (the actual amendment is underlined):[210]

> (b) The registrar may-
> (i) grant judgment as requested;
> (ii) grant judgment for part of the claim only or on amended terms;
> (iii) refuse judgment wholly or in part;
> (iv) postpone the application for judgment on such terms as he or she may consider just;
> (v) request or receive oral or written submissions; and
> (vi) require that the matter be set down for hearing in open court:

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property".

[206] *Gundwana* [49].
[207] *Gundwana* [52].
[208] *Gundwana* [53].
[209] *Gundwana* [53].
[210] High Court rule 31(5)(b) was amended by GN R. 471 *Government Gazette* 36638 dated 12 July 2013, the commencement date being 16 August 2013.

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

2.3.3 Rule 46 pre-22 December 2017

Rule 46 generally regulates execution against immovable property, such as the process of issuing of writs of attachment after judgment and the eventual sale. The underlying principle is that, save where immovable property has been specially declared executable, execution shall not be levied against such immovable property until the movable property of the debtor has been excussed.[211]

The rule specifically governing the issuing of writs of attachment is 46(1). As alluded to earlier, rule 46(1)(a)(ii) was amended in 2010 subsequent to *Jaftha* to ensure that a writ shall not be issued where the immovable property sought to be attached is the primary residence of the judgment debtor unless the court orders execution upon consideration of all relevant circumstances.[212] Primary residence in this instance can be construed as the debtor's usual or ordinary place of residence, "the home of a person".[213] The amendment to rule 46(1)(a)(ii) has its roots in the Constitutional Court judgment of *Jaftha*, which will be discussed in-depth with regard to Magistrates' Courts laws.[214] Briefly, the case was about whether a law that permits the sale in execution of peoples' homes (primary residences) because they have not paid their debts, thereby removing their security of tenure, violates the right to have access to adequate housing, protected in section 26 of the Constitution.[215] In declaring such a law unconstitutional the court had to consider a remedy that would somehow balance the interests of both debtors and creditors.[216]

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[211] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 2, D1–611. See also *Barclays Nasionale Bank Bpk v Badenhorst* 1971 (1) SA 333 (N).

[212] See also Brits *Real security law* 73.

[213] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 2, D1–614. See also *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) [28.1]–[31] and [49]–[51].

[214] See paragraph 2.4.2 below.

[215] *Jaftha* [1].

[216] *Jaftha* [53]. The court stated as follows therein: "An appropriate remedy should be sufficiently flexible, therefore, to accommodate varying circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure, but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home".

The court agreed that an appropriate remedy would be the provision of judicial oversight over the execution process. It would then be for the court to order execution and only if the circumstances of the case make it appropriate.[217] In other words, a court would have to weigh up relevant factors at play in each case in order to make an appropriate determination on the aspect of execution. Some of these factors would include, but are not limited to:[218]

> … the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.

In *Nedbank Ltd v Mortinson*[219] the full bench amplified these factors, to be contained in an affidavit filed simultaneously with an application for default judgment where a creditor seeks an order declaring specially hypothecated immovable property executable.[220]

2.3.4 The era post-22 December 2017

With effect from 22 December 2017 rule 46 and the forms plus the processes regulating execution against immovable property were drastically amended.[221] The altered rule 46(1)(a)(ii) now provides that:

> (1)(a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless−
>
> (ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).

The proviso[222] to the rule has now been shifted to the new rule 46A, inserted into the rules as part of the amendments. Rule 46A applies whenever an execution

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[217] *Jaftha* [54].
[218] *Jaftha* [60].
[219] *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) (hereinafter *Mortinson*).
[220] *Mortinson* [33]. The following factors must be contained in the stated affidavit: "The amount of the arrears outstanding as at the date of the application for default judgment; whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy; whether to the knowledge of the creditor the immovable property is occupied or not; whether the immovable property is utilised for residential purposes or commercial purposes; and whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not".
[221] Amendments contained in GN R. 1272 *Government Gazette* 41257 dated 17 November 2017, commencing on 22 December 2017.

creditor seeks to execute against the residential immovable property of a judgment debtor.[223] Amongst others, it regulates applications to declare residential immovable property executable, and enjoins the court to consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.[224]

Rule 46A has resulted in numerous substantial changes:

- A court cannot authorise execution against immovable property that is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted;[225]

- The registrar is expressly prohibited from issuing a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property;[226]
- An application to declare residential property executable should be accompanied by several supporting documents, such as:
  - proof of the market value of the property;
  - local authority valuation of the property;
  - amounts owing on mortgage bonds registered over the property;
  - municipal rates and taxes plus body corporate levies owing in respect of the property; and
  - any other factor that may assist the court in deciding.[227]

Unlike the position under the old rule 46(12) whereby the property had to be sold by the sheriff without a reserve price, the court is now accorded a discretion to set a reserve price, seemingly in an endeavour to avoid sales of immovable properties

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[222] The portion to the rule which stated: "Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property".
[223] Rule 46A(1). New Form 2A is the specimen for applications to declare immovable property executable in terms of rule 46A.
[224] Rule 46A(2)(a)(ii).
[225] Rule 46A(2)(b).
[226] Rule 46A(2)(c).
[227] Rule 46A(5).

below cost.[228] In deciding whether to fix a reserve and the appropriate amount therefor, the court is mandated to consider various factors, including:[229]

- the market value of the property;
- any equity which may be realised between the reserve price and the property's market value;
- whether the immovable property is occupied, the persons occupying it and the circumstances of such occupation;
- any prejudice which any party may suffer if the reserve price is not achieved; and
- any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

Rule 46A has subsequently been affirmed by the full bench in the *Hendricks*[230] case as being *intra vires* the powers of the Rules Board because it procedurally confirms that execution against residential immovable property may not occur without judicial oversight.[231]

Besides being considered in *Hendricks*, rule 46A provisions were extensively evaluated in *Absa Bank Limited v Mokebe*.[232] In *Mokebe* the court had concluded that there is a duty on creditors to bring their entire case, which includes the application for money judgment based on a mortgage bond and an order to declare the immovable property, which is the primary residence of the judgment debtor, specially executable, simultaneously in one proceeding.[233] It reckoned that

[228] Rule 46A(8)(e).
[229] Rule 46A(9)(a) and (b).
[230] *Standard Bank of South Africa Limited v Hendricks and Another; Standard Bank of South Africa Limited v Sampson and Another; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams and Another; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* 2019 (2) SA 620 (WCC) (hereinafter *Hendricks*).
[231] *Hendricks* [27].
[232] *Absa Bank Limited v Mokebe; Absa Bank Limited v Kobe; Absa Bank Limited v Vokwani; Standard Bank of South Africa Limited v Colombick and Another* 2018 (6) SA 492 (GJ) (full bench) (hereinafter *Mokebe*).
[233] *Mokebe* [29].

should the matter require postponement for whatever reason, then the entire matter falls to be postponed and piecemeal adjudication is not appropriate.[234]

The court in *Hendricks* agreed, also holding that the consequence is that a combined application for the money judgment and the order of special executability against a primary residence, in terms of rule 46A, require personal service.[235] In this regard the court pointed out that since High Court rule 46A(3)(d) requires personal service by the sheriff on the debtor provided that "*the court may order service in any other manner*" (emphasis added), it is no longer feasible for courts to approach service in the way it has been undertaken in the past.[236] As such, the essence of rule 46A(3)(d) would be that where personal service is not possible, the court must be approached to order service in any other manner and sufficient material is required to be placed before it to allow it to make such an order.[237] The court explained that the application for the money judgment may be postponed together with the application for an order declaring the property specially executable, given that the two applications are intrinsically linked and therefore together engage a debtor's section 26 constitutional rights.[238]

Furthermore, in *Mokebe* the court made a ruling to the effect that any document initiating proceedings where a mortgaged property may be declared executable must contain the following statement in a reasonably prominent manner:[239]

> The defendant's (or respondent's) 'attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he / she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.

It also held that, save in exceptional circumstances, "a reserve price should be set by a court, in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order".[240]

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[234] *Mokebe* [29].
[235] *Hendricks* [38].
[236] *Hendricks* [33].
[237] *Hendricks* [33].
[238] *Hendricks* [48]–[49].
[239] *Mokebe* [46].
[240] *Mokebe* [66].

In *Nedbank Limited v Bestbier and Others*[241] the court held that rule 46A is only triggered when a property is the primary residence of a debtor.[242] However, rule 46 still ensures judicial oversight where execution is against immovable property in general other than the residential property of a judgment debtor.[243] So, the nature of the property and the nature of the debtor will ascertain whether or not rule 46A will be triggered.[244] In *Bestbier* rule 46A was found to be not applicable as the property was not a 'primary residence' of the defendants but a well-oiled commercial enterprise whereby no section 26 constitutional rights would be infringed upon the granting of the order declaring the property specially executable.[245] Simply put, in this instance the property sought to be declared specially executable was not the primary residence of the debtor but a business entity, and thus did not trigger the provisions of rule 46A. The rights enshrined in section 26 of the Constitution would not have been violated as the defendants were not at risk of being rendered homeless.

Another important change to the position is in respect of the amended conditions to be used in sales in execution of immovable properties, which are outlined in specimen Form 21 to the rules. The very first condition underpins that the sale must be conducted in accordance with rule 46 provisions and all other applicable law.[246] Significantly, condition 10(a) allows the purchaser to take possession of the property after signature of the sale conditions, payment of the deposit, and upon securing the balance of the purchase price. However, condition 10(d) confirms that the execution creditor and the sheriff selling the property give no warranty that the purchaser shall be able to obtain personal or vacant occupation of the property or that such property is not occupied. As such, the responsibility of evicting people occupying the property sold in execution lies squarely on the purchaser, particularly as the property is then at the risk and profit of the purchaser.[247] Conversely, the sheriff may apply for the eviction of the purchaser from the

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[241] *Nedbank Limited v Bestbier and Others (Scholtz Intervening)* (12654/18) [2020] ZAWCHC 107 (17 September 2020) (hereinafter *Bestbier*).
[242] *Bestbier* [47].
[243] *Bestbier* [47].
[244] *Bestbier* [48].
[245] *Bestbier* [57].
[246] Form 21(1).
[247] Form 21(10)(c).

property if the sale is subsequently cancelled as a result of the purchaser failing to fulfil obligations in terms of the conditions of sale.[248]

Furthermore, new forms serving as guidelines for a notice to declare immovable property executable and a notice of attachment have now been introduced.[249] Form 2A basically informs the debtor of the creditor's intention to apply for an order declaring immovable property executable in terms of new rule 46A. It also informs the debtor that he or she may oppose such an application or make relevant submissions to the court, and gives some guidance on appropriate steps to be followed in this regard.[250] Form 20A basically notifies the debtor that the sheriff has on a certain day laid under judicial attachment the property specified in an accompanying inventory in pursuance of a writ of execution whereby the judgment debt and costs are sought to be realised.

The essence and practical effect of these 2017 rule amendments will become clearer in the long run upon their implementation and as they are being continuously interpreted by the courts. The extent of their potential influence, if any, on the current courts' practice directives will also continue to be monitored. As will be illustrated in the analysis which follows, these practice directives are a significant cog in the conduct of civil litigation matters (including eviction applications) in courts.

2.3.5 Practice directives for High Courts

2.3.5.1 Introduction

In *PFE International*[251] Jafta J confirmed that since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice.[252] Thus, it is this power that makes every superior court the master of its own process. This power enables

[248] Rule 46(11) and Form 21(8).
[249] As Forms 2A and 20A respectively.
[250] New High Court Form 2A.
[251] *PFE International Inc. (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) (hereinafter *PFE International*) [30].
[252] Section 173 of the Constitution provides:
"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe.[253] As such, the ability of courts to make and issue their own practice directives is consistent with the power described above. In order to effectively and efficiently manage the court rolls various divisions of the High Court nationally have consistently issued practice directives.[254] These practice directives are in turn collectively contained in a practice manual compiled by a Judge President of a particular court division, or his or her deputy. For instance, the first practice manual that applied in both the then Transvaal Provincial Division and the Witwatersrand Local Division was compiled by Deputy Judge President Coetzee.[255] In its introduction Coetzee DJP remarked that the title 'Practice Manual' in itself "proclaims that there is no question of rules of law or any rule for that matter…it is concerned mainly with how Rules of Court are applied in the daily functioning of the courts".[256] This status of a practice manual was further clarified in May 2011 by Deputy Judge President Van der Merwe (North Gauteng High Court, Pretoria) in this introduction of the amended practice manual:[257]

> The provisions set out in the practice manual are not rules of court. It does not displace or amend rules of court. It merely tells practitioners how things are done in this court.

In February 2014 Chief Justice Mogoeng issued a directive containing norms and standards for the exercise of judicial functions of all courts, in terms of section 165(6) of the Constitution read with section 8 of the Superior Courts Act.[258] The norms and standards are intended to incorporate the practice directives for all Superior Courts, Regional Courts, District Courts and all other courts. However, all protocols and directives currently in operation remain intact, seemingly because they encapsulate and expand the broad outline contained in the norms and standards.[259] But these norms and standards prevail in the event of a conflict between them and any practice directive. The aim is to develop uniform practice

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[253] *PFE International [*30].
[254] Van Loggerenberg DE *Erasmus Superior courts practice*, Vol. 3, 2nd ed (Juta Cape Town 2017) J1–1.
[255] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–1.
[256] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–1.
[257] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–1.
[258] The directive containing these norms and standards was published under GN 147 of 28 February 2014 (*Government Gazette* 37390 dated 28 February 2014).
[259] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, E1–3.

directives for all courts as far as is practicable codified under the norms and standards.[260] The practice directives of the various provincial High Court divisions pertinent to evictions discussed herein therefore remain applicable and operative. The terms 'practice directive' and 'practice direction' are used interchangeably.

A study of the practice manuals of the respective High Court divisions indicates a lack of uniformity regarding aspects of evictions. The most comprehensive practice manuals are those of Gauteng, particularly that of the Johannesburg Local Division, as will be elaborated upon later on.[261] The Mpumalanga Division practice directions do not touch on evictions.[262] I will now comparatively consider the practice manuals of the different provincial High Court divisions.

2.3.5.2 The position in KwaZulu-Natal, Free State, North West, Eastern Cape, Northern Cape and Western Cape

2.3.5.2.1 KwaZulu-Natal, Free State, North West, Eastern Cape and Northern Cape

In the KwaZulu-Natal Division of the High Court practice directive 26 deals with claims in which immovable property is sought to be declared specially executable. It enforces the *Saunderson* ruling stipulating that summons initiating such a claim should draw the defendant's attention to the provisions of section 26(1) of the Constitution, amongst others. Practice directions 4 and 30(8) of the Northern Cape and North West Divisions respectively reiterate the position. Similarly in the Free State Division of the High Court, rule 8.1, dealing with default judgments, provides that where declaring property executable or eviction is requested the practice note issued by the Supreme Court of Appeal in *Saunderson* must be complied with.[263] Both the Northern Cape and North West Divisions take into consideration judgments in the *Jaftha*, *Mortinson* and *Saunderson* cases, and stipulate the nature of averments to be contained in an affidavit to be filed simultaneously with an application for default judgment wherein an order is sought declaring specially

[260] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, E1–3.
[261] See paragraph 2.3.5.4 below.
[262] The latest comprehensive practice directives for the Mpumalanga Division of the High Court were issued by its Judge President, Legodi JP, on 9 January 2020, and are silent on foreclosures.
[263] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, G1–5.

hypothecated immovable residential property executable.[264] However, those divisions' practice directions fail to take cognisance of the *Gundwana* judgment, and still prescribe that a warrant of execution pursuant to "an order by the registrar declaring immovable residential property executable" must contain a note advising the debtor of the provisions of rule 31(5)(d).[265]

Practice direction 14A of the Eastern Cape Division dealing with default judgments contains similar provisions as those in practice directions 1, 2 and 3 of the Northern Cape Division, with 14A(c) also failing to take cognisance of the *Gundwana* judgment.

2.3.5.2.2 Western Cape

In the Western Cape Division practice direction 37(11) provides that an application may be brought in chambers for directions for service in matters involving the PIE Act.[266] Further, amongst pertinent judgments in the Western Cape High Court worth mentioning in this regard are that of *Jessa*[267] and *Dawood*.[268] In *Jessa* the court was of the view that the *Saunderson* rule of practice should be amplified to include an appropriate notification in the summons to the defendant.[269] The notification should inform the defendant that he is entitled to place information regarding *relevant circumstances* within the meaning of section 26(3) of the Constitution and High Court rule 46(1) before the court hearing the matter.[270] Blignault J also held that if it is intended to place additional facts regarding relevant circumstances before the court, they should be alleged in plaintiff's summons and served on the defendant, to advance the objectives of the *audi alteram partem* rule.[271] However, whilst the full bench in *Dawood* essentially agreed with *Jessa*, Griesel J, delivering the judgment, observed that:[272]

> where a court dealing with an application to declare immovable property executable requires further information relating to any relevant circumstances that

[264] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, M3–1 and L1–17. Practice directions 1 (Northern Cape) and 30(5) (North West).
[265] Practice directions 3 (Northern Cape) and 30(7) (North West).
[266] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, N1–10.
[267] *Nedbank Ltd v Jessa and Another* 2012 (6) SA 166 (WCC) (hereinafter *Jessa*).
[268] *Standard Bank v Dawood* 2012 (6) SA 151 (WCC) (hereinafter *Dawood*).
[269] *Jessa* [12].
[270] *Jessa* [12].
[271] *Jessa* [15]–[17].
[272] *Dawood* [28].

> have not been specifically mentioned in the summons, it will be necessary and unavoidable to place such further information before the court by way of an affidavit by the creditor. In those circumstances, the court will, of course, be astute to protect the rights of the defendant.

More significantly for the purposes of this study, the judge in *Dawood* made an order directing that, as a rule of practice in the Western Cape High Court Division in all matters issued subsequent to the date of the judgment, the summons should contain a notice directed to the defendant, guiding and drawing the defendant's attention to certain constitutional rights.[273] Amongst others, the stated notice should inform the defendant that in terms of section 26(3) of the Constitution he or she may not be evicted from his or her home or his or her home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances.[274]

More recently, on 14 December 2018, the full bench of the Western Cape High Court Division handed down a confirmatory judgment in respect of various applications heard together (the '*Hendricks* case', cited above), revolving around High Court rule 46A. The applications were for an order declaring immovable property constituting the residence or home of a debtor to be specially executable. The court was of the view that it would be of benefit to have the practice of the Western Cape High Court Division more closely aligned with that of the other divisions when determining applications of this nature.[275] In particular, the court remarked that it would be beneficial if a practice directive on foreclosures is

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[273] *Dawood* [37].

[274] *Dawood* [37]. In full, the notice to be attached to the summons as per the court's directive should read as follows:

"Take notice that:

(a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before the court;

(b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;

(c) in terms of rule 46(l)(a)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (i.e. your home), unless the court, having considered all the relevant circumstances, orders execution against such property; and

(d) if you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(l)(a)(ii) of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your home may be sold in execution".

[275] *Hendricks* [67].

implemented in the Western Cape Division, which is congruent with High Court rule 46A and the evolving constitutional jurisprudence. That practice directive would provide for the manner and form in which information should be placed on affidavit before the court so that it can exercise its judicial oversight role in foreclosure matters as intended by the Constitutional Court.[276] The judges believed that creating a greater degree of national uniformity between divisions, as far as is possible, would be advantageous to litigants and the Western Cape Division itself.[277] The judges therefore proposed that a directive, coupled with a draft foreclosure affidavit, be inserted into the Western Cape Practice Directions as 33A, taking substantially the same form as the similar practice directive contained in the Gauteng: Johannesburg Practice Manual (namely Chapter 10.17 which is fully discussed below).[278]

Amongst the multiplicity of facts to be disclosed in such a foreclosure affidavit would first be that the judgment debtor has been advised that in terms of High Court rule 46A no writ of execution shall be issued against his or her primary residence (home), unless a court, having considered all the relevant circumstances, orders execution against such property. The other crucial fact to be deposed to would be that the judgment debtor has been advised that if he or she objects to his or her home being declared executable, he or she is called upon to place facts and submissions before the court in terms of rule 46A(6). This would enable the court to consider those facts and submissions in terms of rule 46A(8).

2.3.5.3 The position in Gauteng (Pretoria Division) and Limpopo

The practical handling and administration of eviction applications is covered extensively in the directives of the Gauteng and Limpopo Divisions more than in those of the other provinces discussed above. Practice directions 15.10 and 15.7 of the Gauteng Division of the High Court, Pretoria (Pretoria Division) and the Limpopo Division respectively deal with evictions in terms of PIE. Aspects regulated therein include:

- the procedure to be adopted when launching eviction applications;

[276] *Hendricks* [67].
[277] *Hendricks* [68].
[278] *Hendricks* [67].

- the institution of a PIE section 4(2) notice in the normal course of proceedings and when a matter has been postponed; and
- the identification of local, provincial or national authorities that might be affected by an eviction order.

The specimen standard orders contained under category 18 in both divisions' practice manuals clearly distinguish the nature of default judgments for determination either by the court (where property is declared executable) or by the registrar. Appendices to both divisions' directions make note of the December 2010 amendments to rule 46 concerning writs of execution and the 2011 *Gundwana* judgment. Both remark that urgent measures were taken by the courts (subsequent to the *Gundwana* decision) to deal with a substantial number of applications for default judgments which had previously been dealt with by the registrar.[279] With regard to the stated amendments to rule 46 the Pretoria practice manual takes it even further, explaining that a full court was constituted in that division to consider factors to be considered by a court when performing its judicial oversight functions in applications for sales in execution of mortgaged immovable property, citing the *Folscher*[280] case amongst others.[281]

In *Folscher* the court's view was that a sale in execution of a debtor's home limits the fundamental right to access of a roof over a person's head.[282] As such, amongst other things, the court resolved that a creditor applying for a default judgment where a debtor's primary residence is at stake must file an affidavit setting out all the applicable circumstances, which it specified.[283]

Furthermore, in Pretoria, Appendix IV of the practice manual is dedicated to applications for default judgments and authorisation of writs of execution. It prescribes several directives to be complied with in applications for default

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[279] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–149 and J1–82.

[280] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) (hereinafter *Folscher*).

[281] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–150.

[282] *Folscher* [12].

[283] *Folscher* [19] where some of the specified circumstances include: "(i) The amount of the arrears outstanding on the date of application for default judgment; (ii) whether the hypothecated property was acquired with a state subsidy or not; (iii) whether…the property is occupied or not; (iv) whether the property is utilised for commercial or for residential purposes; (v) whether the debt sought to be enforced was incurred to acquire the property or not", and so forth.

judgments of the type referred to in the *Gundwana* case, as well as applications for orders of execution against the immovable property referred to.[284]

Upon the commencement of amended High Court rules 46 and 46A and after the judgments of *Mokebe* and *Hendricks* the Judge President of the Gauteng Division, Mlambo JP, issued an additional directive on 18 April 2019. In terms of this directive applications by sheriffs for the cancellation of sales in execution of immovable property in terms of High Court rule 46(11) will no longer be dealt with by a judge in chambers but, instead, be referred to or enrolled in the interlocutory court. Further, should the sheriff wish to re-sell the property, the execution creditor must file an affidavit with the court registrar in terms of rule 46A(5)(a) to (e), which must comply with the requirements set out in the *Mokebe* and *Hendricks* cases. Some of the details for inclusion in such affidavit are:

- the property's market value;
- relevant factors which the court may consider in terms of High Court rules 46A(8) and (9);
- charges owing to the local authority;
- amounts owing on mortgage bonds; and
- municipal valuation of the property, and so forth.

2.3.5.4 The position in Gauteng (Johannesburg Local Division)

(a) Introduction

The practice manual of the Gauteng Local Division of the High Court, Johannesburg (Johannesburg Division) is the most comprehensive on matters pertaining to evictions. Practice directive 10.9 also deals with PIE evictions in the same manner as practice directions 15.10 and 15.7 of the Pretoria and Limpopo Divisions respectively, discussed above.[285] However, it does not require the identification of local, provincial or national authorities that might be affected by an eviction order. Instead, it refers to pro forma (specimen) orders attached for the

[284] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H2–157–158.
[285] See paragraph 2.3.5.3 above.

guidance of practitioners, which must be adapted to meet the exigencies of each case.[286] The four specimen orders are in respect of:[287]

- order for substituted service of the main application papers and PIE's section 4(2) notice;
- order for the authorisation of a section 4(2) notice;
- notice in terms of section 4(2); and
- order of eviction under section 4(8).

Chapter 16 of the practice manual also contains specimen standard orders, including the one for the granting of default judgment by the registrar (16.1). However, this specimen erroneously still retains the clause that allows the registrar to declare property executable, contrary to the *Gundwana* pronouncement. This can be remedied by following the Pretoria and Limpopo Divisions' example of having two specimen orders in this regard: one for the granting of default by the court, and the other by the registrar.

(b) Practice directive 10.17

What sets the practice manual of the Johannesburg Local Division apart is practice directive 10.17 dedicated to foreclosure (and execution when property is, or appears to be, the defendant's primary home). Van Loggerenberg makes a note that practice directive 10.17 was initially added in 2013 and substituted with effect from 1 January 2016 in terms of a circular of Judge President Mlambo.[288] It is based on various judgments, including *Saunderson*, *Jaftha*, *Folscher*, *Mortinson*, *Sebola*,[289] *Petersen*,[290] *Ntsane*,[291] *Rossouw*,[292] *Gundwana* and *Lekuku*. Saliently it prescribes, amongst others, that:[293]

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[286] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H3–89.
[287] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H3–144D/144F.
[288] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H3–100A.
[289] *Sebola and Another* v *Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) (hereinafter *Sebola*).
[290] *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) (hereinafter *Petersen*).
[291] *Absa Bank Ltd* v *Ntsane and Another* 2007 (3) SA 554 (T) (hereinafter *Ntsane*).
[292] *Rossouw and Another* v *Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) (hereinafter *Rossouw*).
[293] The full text of the directive including the specimen affidavit is contained in the practice manual, and is reproduced in Van Loggerenberg *Erasmus Superior courts practice* Vol. 3 H3-100A – H. An extract from practice directive 10.17 reads:

- in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit dealing with all requirements is required, and should be attached to the Notice of Set Down;
- an order declaring property specially executable shall only be granted on notice to the defendant or respondent; and
- when arrears are low, and/or the period of non-payment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served. However, default judgment should not be granted for the monetary amount and the order for execution only postponed as this will defeat the object of postponing the matter, which is to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default.

The required details to be set out in the specimen affidavit stated in directive 10.17.1 are specified and include:

- confirmation of compliance with the judgments in *Saunderson*, *Jessa*

"1. Without derogating from the requirements regarding applications contained in the Rules Regulating the Conduct of the Proceedings of the Several Provisional and Local Divisions of the High Court of South Africa ('Rule' or 'the Rules') or Chapter 9 of the Practice Manual of the South Gauteng High Court ('Practice Manual'), in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required. A *PRO FORMA* AFFIDAVIT DEALING WITH ALL THE REQUIREMENTS IS ATTACHED HERETO. The affidavit shall be attached to the Notice of Set Down.
2. An order declaring property specially executable shall only be granted by the Court on notice to the defendant or respondent.
3. Where action proceedings have been instituted and the provisions of Rule 31(5) are applicable, the Registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court.
4. Note: When arrears are low, and/or the period of nonpayment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served. NB: Default judgment should not be granted for the amount and the order for execution only postponed as this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default. (*Sebola* para 46 and *Petersen* para 7. See *Ntsane*. Also see *Maleke* and *Lekuku*.) At the adjourned date, an affidavit should be filed, setting out what efforts the Bank has made to effect settlement and/or prevent foreclosure.
5. Numbered flags should be attached to the relevant page dealing with each requirement set out in the affidavit (e.g. Debtor's payment record will have flag 5.4).
6. A certificate of balance may be handed in at the hearing (*Rossouw* para 48)".

and *Dawood*;

- relevant factors for consideration by the court as suggested in *Mortinson*, *Folscher* and *Lekuku*;
- manner of service of court process to the judgment debtor; and
- the sheriff's return of service reflecting the documents relied on by the judgment creditor and attached and served together with the court process.

(c) Discussion of some of the court decisions forming the basis of practice directive 10.17

(i) *Absa Bank Ltd v Ntsane and Another; Nedbank Limited v Fraser and Another and Four Other Cases*

Ntsane concerned an instance where the bank was claiming default judgment on the accelerated mortgage bond debt of R62 042.43,[294] whereas at the date of the application the actual amount in arrears was only R18.46.[295] Even though the amount claimed fell under the jurisdiction of a Magistrate's Court, the matter was referred to the court in view of the *Mortinson* judgment, which obliges the registrar to direct all cases of this nature wherein a hypothecated property is sought to be declared executable for a hearing before a judge.[296] From the onset, Bertelsmann J was scathing in his criticism of the bank's conduct to enforce the bond in circumstances which appeared morally and ethically questionable, strongly reminiscent of Shylock insisting upon every single ounce of his pound of flesh.[297] He indicated that the plaintiffs' right to commercial activity and the right to enforce agreements lawfully entered into must be balanced against the right to adequate housing that the defendants indubitably enjoy.[298] Even though a mortgage bond provides for its acceleration upon non-payment the court can refuse to grant execution against an immovable property where the result is so seemingly iniquitous or unfair to the house-owner that the enforcement of the full rights to execution would amount to an abuse of the system, particularly where the small arrears could be collected through an

[294] *Ntsane* [6].
[295] *Ntsane* [12].
[296] *Ntsane* [10].
[297] *Ntsane* [22].
[298] *Ntsane* [70].

alternative execution against movable assets.[299] The court also held that enforcing the right to execute against immovable property in this instance and thereby terminate defendants' right to adequate housing would be in conflict with section 26 of the Constitution.[300] In the circumstances, the application to declare the immovable property executable was refused and judgment granted only for the arrear amount of R18.46 instead of the accelerated principal bond amount of R62 042.43.[301]

Du Plessis points out that in a similar vein with *Jaftha* the *Ntsane* judgment makes it easy to accept that judicial oversight in some instances leads to fairer results:[302]

> Here was a clear abuse of the court procedure (preferring execution to alternative means of recovering a trifling debt). It was a modest home executed for a small debt. The fact that *Ntsane* is not a first-time owner means that he will not qualify for state subsidy of a house and that the sale of his house will therefore limit is access to adequate housing.

Brits argues[303] that the facts of *Ntsane* were so extraordinary that it cannot be regarded as a general requirement that creditors must always justify their election to accelerate payment of the outstanding debt. He states thus:[304]

> As it was conceded in *Ntsane*, the creditor's decision to accelerate repayment of the debt cannot be regarded as unlawful. It seems that the decision to foreclose would only have to be justified where it would lead to disproportionate results. An example would be if the amount in arrears is extraordinarily small in comparison to the hardship that the debtors would face if their home were to be sold.

The *Ntsane* approach was criticised and deemed wrong in *Nedbank Limited v Fraser and Another and Four Other Cases.*[305] Peter AJ was unable to agree with the *Ntsane* judgment to the extent that it lays down a rule that the constitutional imperative of judicial oversight of execution, to prevent abuse in relation to execution against a person's home in satisfaction of a judgment debt, extends a power to the court to redefine the creditor's contractual entitlement to a judgment

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[299] *Ntsane* [78].
[300] *Ntsane* [81]–[86].
[301] *Ntsane* [92]–[93].
[302] Du Plessis E "Judicial oversight for sales in execution of residential property and the National Credit Act" 2012 *De Jure*, Vol. 45, 532–555 549.
[303] Brits *Mortgage foreclosure under the Constitution* 230.
[304] Brits *Mortgage foreclosure under the Constitution* 230.
[305] *Nedbank Limited v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) (hereinafter *Fraser*).

debt, in terms where executing against immovable property for such a redefined judgment debt amounts to unconscionable abuse.[306] Peter AJ's view was that this would be tantamount to a situation where the creditor's lawful right to claim acceleration is ignored in favour of the debtor's interests and advancement of the considerations of section 26(3) of the Constitution with reference only to the amount of arrears and not to the true amount in respect of which the judgment creditor is entitled to judgment.[307] However, Brits maintains that the court, in *Fraser*'s rejection of the approach adopted in *Ntsane,* was *obiter*, since – on the facts – it was not necessary to decide this issue.[308] He also asserts in-depth that *Fraser*'s criticism of *Ntsane* is not valid in its totality.[309]

(ii) *Rossouw and Another v Firstrand Bank Ltd; Sebola and Another v Standard Bank of South Africa Ltd and Another*

The Supreme Court of Appeal in *Rossouw* dealt with a matter wherein, on 22 May 2009, Firstrand Bank had issued a summons against the appellants to which was attached a certificate of compliance stating that the bank had issued and delivered the requisite notice in terms of section 129(1)(a) of the National Credit Act .[310] The summons claimed payment of the sum of R1 117 180.65 from the appellants and ancillary relief, including an order declaring the mortgaged immovable property executable. The basis of the claim was that the appellants had failed to maintain regular instalments and that the full outstanding amount had thus become due and payable in terms of the agreement.[311] When the appellants filed a notice of intention to defend the proceedings, the bank applied for a summary judgment.[312]

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[306] *Fraser* [35].
[307] *Fraser* [35].
[308] Brits *Mortgage foreclosure under the Constitution* 235.
[309] Brits *Mortgage foreclosure under the Constitution* 235–239.
[310] National Credit Act 34 of 2005 (hereinafter referred to as NCA). Section 219(1)(a) provides that: "If the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date." Section 130(1)(a) on the other hand stipulates that: "a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be."
[311] *Rossouw* [5].
[312] In terms of High Court rule 32.

The appellants opposed the application, on the basis that, amongst others: they had not received the notice as envisaged in sections 129(1) and 130(1) of the NCA.[313] Upon an extensive interrogation of the nature and import of the requisite delivery of a notice to a consumer as contemplated in section 129(1) of the NCA, the court held that the bank (as the credit provider) had failed to prove compliance.[314]

Rossouw, in the process, entrenched the principle that a plaintiff must not only allege compliance with the provisions of sections 129 and 130 of the NCA, but must go a step further and explain the method employed in delivering the prescribed notice to the consumer (defendant). Maya JA, in overturning the decision of the court *a quo*, pointed out that sections 129(1)(b)(i) and 130(1)(b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement and a critical cog of a plaintiff's cause of action.[315] For Maya JA failure to comply must, of necessity, preclude a plaintiff from enforcing its claim, despite the fact that in *Rossouw* it was not disputed that the appellants were in arrears and thus breached their contractual obligations. The bank, therefore, failed to make out a case for summary judgment and it ought to have been refused.[316] It should be noted though that in *Rossouw* the court seems to have been more pre-occupied with the *delivery* of the section 129(1) notice than the *receipt* thereof by the consumer. The court reckoned that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders.[317] Maya JA concluded that, from the NCA's express language in section 65(2), the legislature considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for

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[313] *Rossouw* [6].

[314] *Rossouw* [33]–[37]. At [33] the court pointed out the following: "Having established what section 129(1) required of the bank, it remains to determine whether or not the latter complied with the relevant provisions. No allegation was made either in the summons or the summary judgment affidavit regarding the method employed in delivering the notice. The bank merely stated cryptically in its summons that '[t]he plaintiff has … complied with section 129(1) and 130 of the said Act. Copies of the notices in terms of the aforementioned sections are annexed hereto as "A" and "B" respectively.' Annexures A and B were documents titled 'NOTICE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT' and 'CERTIFICATE OF COMPLIANCE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT', respectively".

[315] *Rossouw* [37].

[316] *Rossouw* [37].

[317] *Rossouw* [31].

purposes of section 129(1)(a) and that actual receipt is the consumer's responsibility.[318]

In *Sebola*, however, the Constitutional Court adopted a different, approach, the main judgment being delivered by Cameron J. His view was that the statute does not oblige the credit provider to prove that the notice has actually come to the attention of the consumer, nor does it demand proof of delivery to an actual address.[319] However, given the high significance of the section 129 notice, it seemed to him that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.[320] In instances where post was chosen as a delivery method, mere despatch was not sufficient because the risk of non-delivery by ordinary mail is too great. The judge maintained that registered mail is essential as there was a higher probability of such mail being delivered than going astray.[321] But beyond registered mail the statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1).[322] This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.[323] Practically, this entails that the credit provider must obtain a post-dispatch 'track and trace' print-out from the website of the South African Post Office.[324] Furthermore, the court made this significant injunction:[325]

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[318] *Rossouw* [31]. Section 65(2) of the NCA provides:

"If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

(a) make the document available to the consumer through one or more of the following mechanisms-
  (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
  (ii) by fax;
  (iii) by email; or
  (iv by printable web-page; and
(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)".

[319] *Sebola* [74].
[320] *Sebola* [74].
[321] *Sebola* [75].
[322] *Sebola* [75].
[323] *Sebola* [75].
[324] *Sebola* [76].

> The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.

(iii) *Absa Bank Ltd v Petersen*

Lastly, the *Petersen* judgment provides an excellent illustration of an instance where the bank's application for leave to execute against the hypothecated immovable property was upheld, as indeed it should have been when default judgment was granted on the money claim.[326] The judgment debtor's conduct and approach to the court proceedings and notices in this instance displayed a casual and lackadaisical attitude. Included were the failure to honour settlement undertakings with the judgment creditor and the late filing of his application for rescission of default judgement. In evaluating the relevant personal factors advanced by the judgment debtor the court applied the following principles:[327]

> The proper approach would have been to give effect to the provisions of the mortgage bond... The right to housing is not an absolute right; and it is a right to adequate housing, not to housing that a mortgagor is unable to afford. In the context of hypothecation, the defendant-mortgagor's right to ownership of his or her home must, in general, yield to the mortgagee's right to realise its security. It is only when the exercise of the mortgagee's right is in bad faith that effect should not be given to the right. An indication of bad faith would be provided if the mortgagee seeks to proceed with execution against the defendant's home when it is evident that the judgment debt can probably be satisfied in a reasonable manner, without involving the drastic consequences of the loss of the mortgaged home. This much has been acknowledged in various ways in a number of cases … The recognition of the important role played by the provision of mortgage finance in assisting towards the realisation of the right of adequate housing that is evident in all of these judgments is significant. It confirms that public policy supports the enforcement of home-related mortgage contracts, except where it is apparent that their enforcement is sought in bad faith.

Applying the principles cited above Binns-Ward J made the following findings against the judgment debtor:[328]

> The fact that the mortgaged property is the defendant's family home is, in itself, not a reason to deny the mortgagee's contractual right to realise its security. Indeed,

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[325] *Sebola* [77].
[326] *Petersen* [42].
[327] *Petersen* [34].
[328] *Petersen* [37].

> by giving the property in security the defendant voluntarily derogated from the extent of his full dominium over the property in favour of the bank. He did so for his own benefit and upon an undertaking in favour of the bank that if he defaulted in his payment obligations to the bank the full amount owed by him would become immediately due and payable, and the property given as security could be sold to realise the funds to settle the debt. The result is that on the application of the principles … there is nothing in the first point raised by the defendant … as indications of bad faith by the bank. There is in any event no evidence to suggest that the defendant and his family will be unable to afford alternative accommodation.

(d) Conclusion

The distinctive feature of the practice manual of the Johannesburg Local Division is practice directive 10.17 that is dedicated to the aspects of foreclosure and execution when property is, or appears to be, the defendant's primary home. As elaborated upon above, practice directive 10.17 is based on various judgments, including *Saunderson*, *Jaftha*, *Folscher*, *Mortinson*, *Sebola*, *Petersen*, *Ntsane*, *Rossouw*, *Gundwana* and *Lekuku*. Further, practice directive 10.9 directly deals with evictions in terms of PIE. Aspects regulated therein include the procedure to be adopted when launching eviction applications as well as the institution of a section 4(2) PIE notice in the normal course of proceedings and when a matter has been postponed. In addition, practice directive 10.9 introduces pro forma (specimen) orders for the guidance of practitioners, which must be adapted to meet the exigencies of each case in an eviction application. It will seemingly benefit legal practitioners and litigants generally if these practice directives were to be comprehensively adopted *mutatis mutandi* by other High Court divisions throughout the country, and thereby create a uniform practice in eviction matters.

2.3.6 Summary

From my analysis thus far, it seems clear that in the High Court there are no legislative instruments directly governing evictions. The Superior Courts Act, which regulates procedures in the High Court, does not have provisions specifically dedicated to evictions. Instead, aspects relating to execution against or evictions from immovable property constituting a person's primary residence are regulated in certain court rules and practice directives. These include rule 31(default judgments) and pre-22 December 2017 rule 46 (execution against immoveable

property), as enhanced by case law. The processes that are extensively covered by the rules are those preceding evictions, pertaining to:

- summons;
- judgment: for payment of debt;
- order declaring immovable property executable;
- writ of execution;
- attachment; and
- sale in execution.

From 22 December 2017 extensive amendments were ushered in on the execution rules, forms and conditions of sale pertinent to immovable property constituting a debtor's home. These amendments are meant to be safeguards in the chain of processes that eventually culminate in a debtor losing his or her rights to the house, resulting in such a debtor becoming an unlawful occupier susceptible to eviction.

The practice directives of the various High Court divisions supplement the court rules in this regard, the comprehensive ones being those of the Gauteng divisions (Pretoria and Johannesburg). These directives are aimed at practically implementing various judicial pronouncements concerning the granting of judgments and executions against immovable property which happens to be a residence of a person. The Gauteng practice directives also touch on evictions in terms of PIE, and provide practical guidelines and imperatives to practitioners and users of the rules. However, it seems prudent to harmonise these practice directives and make their application uniform throughout the High Court divisions of the country. Alternatively, some of these directives can be incorporated into uniform eviction court rules for practical and easier usage.

2.4 Magistrates' Courts

2.4.1 Introduction

Magistrates' Courts are essentially 'creatures of statute', created by and operating within the confines of the Magistrates' Courts Act, and exist in two levels: District

Courts and Regional Courts.[329] Since the commencement of the Jurisdiction of Regional Courts Amendment Act[330] on 9 August 2010 Regional Courts now also exercise both civil and criminal jurisdiction, just like the District Courts. As pertains to civil matters the stark distinction between the two levels is that District Courts do not exercise jurisdiction over matrimonial matters and have a monetary jurisdiction lower than that of Regional Courts. But both can adjudicate over evictions. The Magistrates' Courts Act provides for a court, in respect of causes of action, to have jurisdiction in actions of ejectment against the occupier of any premises or land within the district or regional division.[331]

2.4.2 Magistrates' Courts Act

The Magistrates' Courts Act regulates Magistrates' Courts in South Africa and procedural aspects connected therewith. It does not contain provisions directly concerned with evictions. However, section 66 deals with the manner of execution of court judgments. It reinforces the principle that execution first lies against movable property.[332]

As indicated earlier, in *Jaftha* the Constitutional Court held that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1)(a) is unconstitutional and invalid.[333] As a remedy, the court ordered that this section must be read as if the words "a court, after consideration of all relevant circumstances, may order execution" appear before the words "against the immovable property of the party".[334] The judgment creditor will need to approach a court to allow execution against immovable

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[329] Per Theophilopoulos *et al Fundamental principles* 12.

[330] Jurisdiction of Regional Courts Amendment Act 31 of 2008.

[331] At section 29(1)(b). However, as further stipulated by this section, where the right of occupation of any such premises or land is in dispute between the parties, such right may not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in clear value to the occupier.

[332] Section 66(1)(a) of the Magistrates' Courts Act reads: "Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made".

[333] *Jaftha* [61] and [67].

[334] *Jaftha* [64] and [67].

property, and the court will have to consider all relevant circumstances, examples of which were indicated by the Constitutional Court, in order to make an appropriate decision.[335]

To contextualise this, the facts in the *Jaftha* matter necessitate some consideration. Ms Jaftha and Ms Van Rooyen (appellants) were two elderly, poor women from Prince Albert, Western Cape, whose state-subsidised homes had been sold in execution on 17 August 2001 for meagre sums of R5 000 and R1 000 respectively subsequent to judgments obtained in the Prince Albert Magistrates' Court, as a result of them owing initial capital sums of R250 and R190 respectively.[336] They then launched proceedings in the High Court for the setting aside of the sales in execution and a restraining order against some of the respondents taking transfer of the appellants' homes. In the process, some constitutional aspects were raised, culminating in the Constitutional Court proceedings.[337] In essence, the appellants challenged the constitutionality of both sections 66(1)(a) and 67 of the MCA. Section 67 essentially protects certain debtor's property from being attached or sold in execution, such as: necessary beds, bedding and wearing apparel; necessary furniture and household utensils; supply of food and drink; professional books and documents used by the debtor in his profession; and so forth. The appellants wanted this list to be expanded to also exempt the homes of debtors below a particular value.[338] However, the court held that such a blanket prohibition is inappropriate, as it would also potentially foreclose the possibility of creditors recovering debts owed to them by owners of excluded properties.[339] With regard to section 66(1)(a), Mokgoro J deemed its provisions to be a severe limitation of a right to own a home.[340]

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[335] See also Van Loggerenberg DE *The civil practice of the Magistrates' Courts in South Africa*, Vol. 1, 10th ed (Juta Cape Town 2012) 453–455.

[336] *Jaftha* [3]–[5].

[337] *Jaftha* [6].

[338] *Jaftha* [18].

[339] *Jaftha* [51].

[340] *Jaftha* [39]. In Mokgoro J's own words: "Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to

She pointed out that in the case in question it was clear that section 66(1)(a) is so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable.[341] Thus, this section is overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure.[342]

2.4.3 Magistrates' Courts Rules

2.4.3.1 Introduction

As in the High Court[343] there are no rules directly regulating evictions in the Magistrates' Courts. However, certain rules play a pivotal role in processes connected with evictions, such as the commencement of court actions via summons (rule 5) and execution against immovable property (rule 43). Summary judgments can also be sought in actions concerned with ejectments (rule 14). The December 2017 amendments concerning execution rules pertaining to execution against immovable property[344] also impacted Magistrates' Courts rule 43 and introduced rule 43A that corresponds substantially to High Court rule 46A.

2.4.3.2 Rules 5 and 12

As indicated earlier, rule 5(10) of the Magistrates' Courts Rules was amended to give effect to the practice direction laid out by the SCA in *Saunderson*.[345]

However, in contrast to High Court rule 31 and contrary to the judicial pronouncement in *Saunderson*, Magistrates' Court rule 12, which deals with default judgments and applications incidental thereto, lacks a provision that specifically obliges a court registrar or clerk to refer to court a request for default judgment wherein it is sought to declare a residential property specially executable. However, this anomaly is to a certain extent mitigated by the provisions of section 66 of Magistrates' Courts Act and those of rules 43 and 43A,

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restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right".

[341] *Jaftha* [48].
[342] *Jaftha* [52].
[343] See paragraph 2.3.1 above.
[344] As described in paragraph 2.3.1 above.
[345] As discussed above, particularly in chapter 1 under paragraph 1.2.1.2.

which ensure that the issuing of warrants of execution against immovable property are overseen by a court.

2.4.3.3 Rule 36

Rule 36(1) provides that the process for the execution of any judgment for the payment of money, for the delivery of movable or immovable property, or for ejectment must be by warrant issued and signed by the registrar or clerk of the court. However, rule 36(7) stipulates that such process in execution shall not be issued without leave of the court which granted judgment, unless where judgment has been granted by consent or default. Form 30 is the specimen for warrant of ejectment.

2.4.3.4 Rule 43

Rule 43 is specifically concerned with execution against immovable property, which may ultimately result in the sale of a house and the eviction of occupiers therefrom. It is the corresponding equivalent of High Court rule 46 touched upon earlier.[346] The rules and forms pertaining to execution against immovable property in the Magistrates' Courts were similarly amended with effect from 22 December 2017, in an endeavour towards attaining harmony with their High Court counterparts.[347] Significantly, rule 43 provides that:

> Subject to the provisions of rule 43A, no warrant of execution against the immovable property of any judgment debtor shall be issued unless─
>
> (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the warrant; or
> (ii) such immovable property has been declared to be specially executable by the court.

Rule 43 corresponds in almost all material respects with High Court rule 46. One of the slight differences is that sub-rule 43(10) provides that immovable property attached in execution must be sold by public auction conducted either by the sheriff or a private auctioneer. So the execution creditor is allowed to give notice to

[346] Discussed in 2.3.3 and 2.3.4.

[347] These amendments are also contained in GN R. 1272 *Government Gazette* 41257 dated 17 November 2017, the commencement date being 22 December 2017.

the sheriff requesting that the property be sold by an auctioneer.[348] However, in the High Court only the sheriff can conduct the sale.

2.4.3.5 Rule 43A

The new rule 43A referred to is substantially similar to the new High Court rule 46A discussed above,[349] and is likewise applicable whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.[350] All that has been mentioned with reference to High Court rule 46A equally applies. For the first time conditions of sale of immovable property in execution akin to those in High Court Form 21 are introduced in the Magistrates' Courts Rules, contained in the new Form 33A.

2.4.4 Practice directives for regional courts

There are Civil Practice Directives for the Regional Courts in South Africa, effective from 1 August 2013.[351] These directives were recently amended, with effect from 14 December 2020.[352] They cover aspects such as: judicial case management; motion court; civil trials; virtual proceedings; substituted service and edictal citation. However, they will not be discussed in-depth as they do not address aspects specifically dedicated to evictions.

2.4.5 Summary

Although the Magistrates' Courts Act and the Magistrates' Courts rules also lack provisions specifically regulating evictions, the execution processes against peoples' homes are comprehensively taken care of to ensure judicial oversight in line with judgments such as *Jaftha*. The *Saunderson* directive is now also reflected in rule 5(10), which makes it obligatory for summons initiating claims in which immovable property is sought to be declared executable to draw the defendant's attention to the provisions of section 26(1) of the Constitution, amongst others.

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[348] Magistrates' Courts rule 43(10)(b).
[349] In paragraph 2.3.4 above.
[350] Magistrates' Courts rule 43A(1). New Form 1B is the specimen for applications to declare immovable property executable in terms of rule 43A.
[351] Initially adopted by resolution of the Regional Court Presidents' Forum on 28 May 2013. These are contained as Appendix G in Van Loggerenberg DE *The civil practice of the Magistrates' Courts in South Africa*, Vol. 2, 10th ed (Juta Cape Town 2012).
[352] 2020 Fifth Revision, as per the resolution of the Regional Court Presidents' Forum meeting of 9 December 2020.

Like the High Court position, execution rules, forms and conditions of sale for residential properties have been extensively overhauled from 22 December 2017 to provide judicial safeguards in instances that may result in debtors ultimately losing their homes. But contrary to the High Court position there are no practice directives in the Magistrates' Courts dedicated to evictions or execution processes against immovable property.

2.5 Land Claims Court

Section 22 of the Restitution of Land Rights Act[353] establishes the Land Claims Court, which plays a pivotal role in matters involving the LTA and ESTA, including evictions.[354] With effect from 21 February 1997 the President of the Land Claims Court, exercising the authority vested in him in terms of section 32(1) of the RLRA, prescribed rules regulating matters relating to the proceedings of and before that court.[355] The rules that directly concern eviction-related matters are 43 and 67.

Rule 43 deals with referrals of eviction cases to arbitration. It provides that a judge referring an eviction case for arbitration under section 33(3) of the LTA must appoint an arbitrator, and the registrar must notify the involved parties accordingly. Such a referral must be done only after a reply to a plea or a replying affidavit has been delivered, or the time for such delivery has lapsed.[356]

Rule 67 stipulates that High Court rules 45 and 46 and forms incidental thereto apply interchangeably regarding the execution of an order of the Land Claims Court.[357]

On 8 June 2012 the Acting Judge President of the Land Claims Court replaced all previous practice directions with the current consolidated practice directions.[358] Practice direction 16, inserted on 4 February 2015, provides that in eviction cases

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[353] Restitution of Land Rights Act 22 of 1994 (hereinafter referred to as RLRA).

[354] Section 20(1) of ESTA provides that the Land Claims Court "shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act". On the other hand, in terms of the definitions section of LTA: ""Court" means the Land Claims Court established by section 22 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994)".

[355] Published under GN R. 300 in *Government Gazette* 17804 dated 21 February 1997.

[356] Rule 43(2).

[357] See paragraphs 2.3.2, 2.3.3 and 2.3.4 above.

[358] These are also contained in Van Loggerenberg *Erasmus Superior courts practice* Volume 3 R2–1–22.

under the LTA and ESTA the relevant municipality must file a report on the availability of suitable alternative accommodation.

However, as mentioned in chapter 1, the Land Claims Court is set to be replaced by the Land Court, coupled with the Land Court of Appeal, in terms of the Land Court Bill, 2021.[359] The Schedule[360] of laws amended by the Bill indicates that the Land Court and the Land Court of Appeal are bound to have exclusive jurisdiction over matters adjudicated in terms of various statutes including the RLRA, LTA, IPILRA, ESTA and PIE. For instance, 'Court' in terms of ESTA is no longer going to be any "competent court having jurisdiction" but will now mean "the Land Court established by section 3 of the Land Court Act, 2021", and the definition of the "Land Claims Court" will be deleted accordingly.[361] The same applies to PIE, whereby 'Court' will no longer mean "any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated".[362] The rules governing the procedure of the Land Court are effectively those of the High Court.[363]

As concerns the envisaged Land Court of Appeal[364] the applicable rules of procedure must be made by the Rules Board in consultation with the President of that court.[365] Pending the making of those rules the SCA rules will apply.[366] It is

[359] The long title of the Bill sets out its scope and purpose thus: "To provide for the establishment of a Land Court and a Land Court of Appeal; to make provision for the administration and judicial functions of the Land Court and Land Court of Appeal; to make provision for budgetary matters; to provide for the exclusive jurisdiction of the Land Court and Land Court of Appeal for certain matters; to provide for mediation and arbitration procedures; to amend certain laws relating to the adjudication of land matters by other courts; and to provide for matters connected therewith".

[360] The Schedule in terms of section 52 of the Land Court Bill, 2021 lists all the laws amended by the Bill and the extent of amendment or repeal.

[361] Item No. 8 in the Schedule in terms of section 52 of the Land Court Bill, 2021.

[362] Item No. 9 in the Schedule in terms of section 52 of the Land Court Bill, 2021.

[363] See sections 14 and 15 of the Land Court Bill, 2021. Section 14(1) stipulates, amongst others, that except "as is otherwise provided for in this Act, the provisions of the Superior Courts Act, and of the Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa made under the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and published by Government Notice R. 48 of 12 January 1965, as amended, apply with the necessary changes required by the context to the Court…". Section 14(3) further provides that those rules must "facilitate the expeditious handling of disputes and the minimisation of costs involved".

[364] The Land Court of Appeal is established by section 34 of the Land Court Bill, 2021.

[365] This is provided for in section 41(1) of the Land Court Bill, 2021.

[366] Section 41(4) of the Bill provides: "Until such time as rules for the Land Court of Appeal are made in terms of subsection (1), the rules applicable in the Supreme Court of Appeal apply with such changes as the context may require in respect of any matter before the Land Court of Appeal in terms of this Act".

encouraging to note that the Bill encourages the resolution of matters via alternative dispute mechanisms including mediation, arbitration and settlements.[367] For now though the *status quo* remains as the Bill is not yet promulgated, there is no Land Court Act in operation, and therefore no new court structure pertaining to eviction matters exists.

2.6 Conclusion

This chapter entailed an examination of the existing civil procedural laws of the High Court, Magistrates' Courts and Land Claims Court of South Africa, particularly in relation to execution processes against immovable property and the extent to which these procedural laws (including court rules) incorporate or accommodate eviction-law principles. The procedural laws in the different courts were examined mainly from an evictions-regime perspective: essentially touching on the processes preceding or building-up to evictions.[368] The Land Court Bill has also been discussed, but it is a discussion that is shrouded with uncertainties and restrictions as the Bill is yet to become law, if at all.

The analysis indicates that currently there are no procedural laws directly or exclusively dedicated to evictions across all spheres in which evictions occur. Instead, the procedural laws of the various courts mainly regulate execution processes against immovable property, which potentially culminate in evictions. Court decisions such as *Saunderson*, *Mortinson*, *Gundwana*, *Jaftha* and so forth, have contributed to amendments being introduced to pertinent rules such as High Court rules 31 and 46, Magistrates' Courts rule 5(10) and changes to section 66(1)(a) of the Magistrates' Courts Act.

Practice directives of the various High Court divisions also endeavour to implement judicial pronouncements concerning processes incidental to evictions, and offer some practical guidelines albeit in a disjointed fashion. As previously observed, the practice directives of the Gauteng High Court divisions, particularly the Johannesburg Local Division, regulate execution and eviction related matters in a most comprehensive manner, from which much can be learnt in other

[367] See sections 31, 32 and 33 respectively.

[368] Namely: (1) summons; (2) judgment: for payment of debt; (3) order declaring immovable property executable; (4) writ of execution; (5) attachment; and (6) sale in execution.

provinces. For instance, practice directions 15.10 and 15.7 of the Pretoria Division elaborately cover evictions in terms of PIE. The Pretoria Division's practice manual is remarkable in relation to High Court rule 46 amendments prior to 22 December 2017. It explains that a full court was constituted in this division to consider factors to be considered by a court when performing its judicial oversight functions in applications for sales in execution of mortgaged immovable property, citing the *Folscher* case amongst others. In addition, in Pretoria, Appendix IV of the practice manual is dedicated to applications for default judgments and authorisation of writs of execution, as discussed earlier.

The Johannesburg Division practice directive 10.9 also deals with PIE evictions in the same manner as practice directions 15.10 and 15.7 of the Pretoria and Limpopo Divisions. However, its practice manual also contains pro forma (specimen) orders attached to guide legal practitioners, which must be adapted to meet the exigencies of each case. These specimen orders cover various stages of evictions under respective sections of PIE as shown above. Clearly, the prominent aspect of the practice manual of the Johannesburg Local Division is practice directive 10.17. Its elements can arguably contribute immensely in the development of uniform eviction rules.

However, procedural laws impacting on evictions still remain obscured amongst a rubric of laws, rules and practice directives meant for litigation of general categories of disputes (including but not limited to evictions). Simply put, eviction-related rules, including execution processes against immovable properties, are not a unique, stand-alone feature but are currently lumped amongst bulk court rules. This undesirable situation would seem to indicate that there remains room for improvement in so far as concerns a procedural system for conducting eviction cases in various courts. Even if the Land Court Act becomes law the situation does not change much as the governing rules will be those of the High Court which currently are not dedicated to eviction matters alone. From the Preamble of the Land Court Bill, 2021 it is clear that the Land Court would mainly be preoccupied with the advancement of the provisions of section 25 of the Constitution geared towards land, water and related reforms than eviction

matters.[369] An analysis of the provisions of both sections 25 and 26 of the Constitution will therefore now be ideal.

[369] The Preamble to the Land Court Bill, 2021 provides in part:

"**NOTING THAT** section 25 of the Constitution of the Republic of South Africa, 1996, which is enshrined in the Bill of Rights— (a) obliges the State to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis; and (b) envisages the State taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination;

AND ALSO NOTING THAT section 166(e) of the Constitution of the Republic of South Africa, 1996, recognises courts established in terms of an Act of Parliament with a status similar to either the High Court of South Africa or the Magistrates' Courts;

AND SINCE land reform initiatives to address the destructive impact of colonialism and apartheid have not progressed at the desired pace, sometimes giving rise to expensive and protracted litigation, to the detriment of the poorest of the poor and most vulnerable in society;

AND SINCE THEREFORE IT IS necessary that land reform in its entirety be accelerated in a lawful and equitable manner, guided by progressive jurisprudence;

AND SINCE IT IS FURTHERMORE necessary and desirable that there should be specialised, well-resourced, accessible and streamlined adjudication structures in place with the institutional, transformative and social justice wherewithal in land matters, in order to enhance and promote fairness and equity at all stages of the adjudication processes before and during court proceedings,

PARLIAMENT of the Republic of South Africa enacts, as follows:—".

Chapter 3: Sections 25 and 26 of the Constitution

3.1 Introduction

It is worth reiterating that in an endeavour to adhere to and promote the human rights and freedoms enshrined in our Constitution, certain laws were promulgated to ensure that in instances where evictions occur the process is conducted in a manner sensitive to constitutional values.[370] The laws that feature prominently in eviction processes include the LTA, ESTA, PIE, REHA, and to a certain extent the Housing Act.[371] In turn, the rules that provide courts with the authority to grant execution and eviction orders also have to be compliant with both the Constitution and primary legislation from which they derive authority.[372]

Several land reform and housing laws have been enacted since 1996.[373] All these laws include provisions that, in one way or another, have a significant effect on property rights.[374]

Sections 25 (the property clause) and 26 (the housing clause) of the Constitution play a crucial role in these laws. Section 25 contains the deprivation provision:[375]

> No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Section 26 has the eviction provision:[376]

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 25 concerns property (including land) rights,[377] whilst section 26 deals with the entitlements associated with housing. Land rights, the right of access to adequate housing and of not being arbitrarily evicted are closely intertwined. The

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[370] Significant laws in this regard are the: LTA; ESTA; PIE; and REHA. Others that are related to housing are: Housing Act 107 of 1997; and Social Housing Act 16 of 2008.
[371] Housing Act 107 of 1997.
[372] See also Brits *Mortgage foreclosure under the Constitution* 314.
[373] Van der Walt AJ *Constitutional property law* 3rd ed (Juta Cape Town 2011) 7.
[374] Van der Walt *Constitutional property law* 7.
[375] Section 25(1) of the Constitution.
[376] Section 26(3) of the Constitution.
[377] Section 25(4)(b) of the Constitution explains that for the purposes of section 25 'property' is not limited to land. However, this study's focus is on eviction from an *immovable* property. This aspect is elaborated upon in paragraph 3.2.2.1 below.

stronger the right to land, the greater the prospect of a secure home.[378] Sections 25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the state to seek to satisfy both.[379] Both of these sections, as well as section 27, expressly oblige the state to take reasonable legislative and other measures, within its available resources, to achieve the realisation of the rights with which they are concerned.[380] Sections 25 and 26 are discussed at this early stage as they form a pivotal anchor around which numerous post-democratic legislative pieces crucial to evictions revolve.[381] The *Port Elizabeth Municipality* case dealt with the eviction of unlawful occupiers in terms of section 26(3), and significantly helped in explaining the relationship between section 25 property rights and section 26 rights of access to adequate housing.[382] Sachs J maintained that the Constitution now imposes new obligations on the courts concerning rights relating to property that were not previously recognised by the common law. The Constitution now counter-poses to the normal ownership rights of possession, use and occupation, a new and equally relevant right not to be deprived arbitrarily of a home.[383] The judicial function in these circumstances is to adequately consider all the interests involved and specific factors relevant in each particular case, as opposed to merely imposing the rights of ownership over the right not to be dispossessed of a home, or vice versa.[384] In evaluating these sections, the major focus will be on section 26 as it touches directly on eviction and the concomitant principles.

In this chapter the provisions of sections 25 and 26 of the Constitution will be evaluated in-depth to determine their impact on the existing substantive and civil procedural laws concerning evictions. This will be done through an analysis of the historical basis of these constitutional clauses as informed by case law and available literature, consideration of judicial interpretation of parts of these provisions relevant to this study, and an interrogation of the extent of the

[378] *Port Elizabeth Municipality* [19].
[379] *Port Elizabeth Municipality* [19].
[380] *Grootboom* [74].
[381] Laws enacted to enhance the values enshrined in sections 25 and 26 of the Constitution include the: LTA; ESTA; PIE; and REHA. The Housing Act 107 of 1997 and Social Housing Act 16 of 2008 are also significant in this regard, particularly in the promotion and protection of housing rights.
[382] Van der Walt *Constitutional property law* 9. See also *Port Elizabeth Municipality* [19].
[383] *Port Elizabeth Municipality* [23].
[384] *Port Elizabeth Municipality* [23].

incorporation or absorption of these provisions in eviction laws and civil procedural laws.

3.2 Property clause (section 25)[385]

3.2.1 Introduction

The South African property clause uniquely combines a traditional cluster of provisions that protect existing property interests against unconstitutional interference (section 25(1)–(3)) with a set of provisions that provide authority for state action to promote land and other related reforms (section 25(4)–(9)).[386] These two main parts of the section can also be sub-divided into four clusters of provisions respectively, dealing with: deprivation (section 25(1)); expropriation

[385] Section 25 of the Constitution provides:

"25. Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application:-
    (a) for a public purpose or in the public interest; and
    (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:-
    (a) the current use of the property;
    (b) the history of the acquisition and use of the property;
    (c) the market value of the property;
    (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
    (e) the purpose of the expropriation.
(4) For the purposes of this section:-
    (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
    (b) property is not limited to land.
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
(9) Parliament must enact the legislation referred to in subsection (6)."

[386] Van der Walt *Constitutional property law* 12.

(section 25(2)–(3)); interpretation (section 25(4)); and land plus other related reforms (section 25(5)–(9)).[387] This is the framework within which the property clause must be interpreted and applied.[388] In turn, this framework must be understood and applied with reference to the historical context of and values enshrined in the Constitution, with the aim of advancing human dignity, equality and freedom. Fundamentally, the framework of section 25 rights must be comprehended in the context of the protection of existing private property rights on the one hand,[389] and, on the other hand, the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.[390] As articulated by Pienaar[391] section 25 contains a "clearly more reform-centred and expansive land reform approach" than its precursor, namely section 28 of the Republic of South Africa Act.[392]

In *First National Bank,*[393] the leading case concerning the development of the property clause, Ackerman J viewed the purpose of section 25 as being threefold. The two main purposes are, first, to protect existing private property rights, and secondly, to serve the public interest (mainly in the sphere of land reform but not limited thereto), whilst the third general one is to strike a proportionate balance between the aforementioned.[394] However, section 25 embodies a negative protection of property and does not expressly guarantee the right to acquire, hold and dispose of property.[395] Van der Walt and Viljoen agree with Ackerman J's assertion that section 25 fulfils a double function, namely to protect private property and to promote land and related reforms. The two main purposes of

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[387] Van der Walt *Constitutional property law* 16.
[388] Van der Walt *Constitutional property law* 16.
[389] As illustrated in *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC).
[390] *Port Elizabeth Municipality* [15]. See Dugard J "Unpacking section 25: what, if any, are the legal barriers to transformative land reform?" 2019 *CCR* Vol. 9, 135–160 138, wherein she points out that section 25 "undoubtedly affords a degree of protection to existing property owners by prohibiting arbitrary deprivation of property", and yet, it simultaneously "includes an imperative to advance access to land on an equitable basis, and a framework to pursue land restitution, *inter alia* through authorising expropriation (albeit with some form of compensation) when in the public interest".
[391] Pienaar JM *Land reform* (Juta Cape Town 2014) 167.
[392] Republic of South Africa Act 200 of 1993 (hereinafter referred to as the Interim Constitution).
[393] *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance* 2002 (4) SA 768 (CC) (hereinafter *FNB*).
[394] *FNB* [50].
[395] *FNB* [48].

section 25 embody a creative tension rather than a fundamental conflict.[396] To this extent, they contend that section 25 allows and necessitates a progressive-property approach to the relationship between extant property rights and land reform.[397]

Perhaps at this stage it is ideal to briefly touch on the aspect of expropriation embodied in section 25(2)–(3), and explain why it is not a major focal point in this study. An analysis of sections 25(2) and (3) indicates that expropriation is a narrower process, undertaken (by the state) for a public purpose or in the public interest, and subject to compensation. Van der Walt's formal approach towards the distinction between the broader property deprivation on the one hand, and expropriation on the other is helpful. In terms of this approach, section 25(1) is concerned with deprivation in the form of uncompensated, regulatory restrictions on the use, enjoyment and exploitation of property, while sections 25(2) and (3) deal with expropriation in the form of compensated state acquisition or destruction of property.[398] So, unless it can be proved that a specific property deprivation constitutes expropriation, there is no need to prove compliance with sections 25(2) and (3).[399] Up until December 2021 there have been efforts aimed at amending section 25(2)(b) of the Constitution to include a proviso whereby a court may "where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil".[400] The proposed amendments, if successful, would have enabled the adoption of national legislation that empowers government to expropriate land without compensation

[396] Van der Walt AJ and Viljoen S "The constitutional mandate for social welfare – systemic differences and links between property, land rights and housing rights" 2015 *PER/PELJ*, Vol. 18, No.4, 1035–1090 1046.

[397] Van der Walt and Viljoen 2015 *PER/PELJ* 1047.

[398] Van der Walt *Constitutional property law* 192.

[399] Brits *Mortgage foreclosure under the Constitution* 324.

[400] In terms of Notice 652 contained in *Government Gazette* No. 42902 dated 13 December 2019 Parliament of the Republic of South Africa invited comments on the draft Constitution Eighteenth Amendment Bill, 2019. This Bill amends section 25(2)(b) of the Constitution to include a proviso to the effect that: *"*Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.*"* The Bill then also introduces a new section 25(3A) to the Constitution which provides that *"*National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil". See Ngcukaitobi T *Land matters: South Africa's failed land reforms and the road ahead* (Penguin Books Cape Town 2021) 201–218.

under specific circumstances, as introduced by the Expropriation Bill.[401] However, on 7 December 2021 the National Assembly failed to pass the Constitution Eighteenth Amendment Bill as it could not obtain the requisite two-thirds majority vote.[402] For now though landowners have "a constitutional property right, in terms of section 25", which prohibits the arbitrary deprivation of property and expropriations that are not in terms of a law of general application.[403]

Execution processes against immovable property culminating in evictions, whether in terms of PIE, ESTA, LTA and so forth cannot be classified as compensated state acquisitions for the public good. Instead, the state only assists by providing forums (courts) and sheriffs for the adjudication and resolution of civil disputes involving immovable property, purely in a law-enforcement capacity (which is non-expropriatory), to ensure, for instance, that evictions are carried out in a legitimate, peaceful manner.[404] By way of an illustration, the process of a sheriff enforcing an eviction order by removing an unlawful occupier from a house demonstrates an instance in which it becomes necessary and legitimate for the state to deprive private persons of their property in the course of regulating civil disputes.[405] However, such conduct does not amount to expropriation. Brits wraps-up the position more succinctly:[406]

> The procedural legislation that authorises courts to grant execution orders and provides for the way in which sheriffs should conduct sales in execution does not mention anything about expropriation, compensation or the circumstances, procedures and conditions for expropriation. This is simply not legislation that authorises expropriation; it authorises forced transfers of property of a different

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[401] The specific circumstances are listed in section 12(3) of the Expropriation Bill [B 23–2020], as introduced in the National Assembly (proposed section 76); explanatory summary of Bill and prior notice of its introduction published in *Government Gazette* No. 43798 dated 9 October 2020. See also Ngcukaitobi *Land matters* 213–218.

[402] See https://www.parliament.gov.za>news (Date of use: 22 February 2022); https://www.golegal.co.za/constitution-eighteenth-amendment/ (Date of use: 22 February 2022); and https://sabcnews.com>sabcnews (Date of use: 22 February 2022). In terms of section 74(2)(a) of the Constitution Chapter 2 thereof may be amended by a Bill passed by the National Assembly with a supporting vote of at least two thirds of its members. Currently therefore, 267 National Assembly members out of a total of 400 must vote in favour of the Bill. In this instance only 204 Members of Parliament voted in favour.

[403] Fick S "Compensating land-owners? The state's (limited) duty toward landowners in delayed eviction matters" 2021 *PER / PELJ*, Vol. 24, *on-line version* -DOI http://dx.doi.org/10.17159/1727-3781/2021/v24i0a6190, 1–35 5.

[404] See Brits *Mortgage foreclosure under the Constitution* 326, and Van der Walt *Constitutional property law* 349.

[405] Van der Walt *Constitutional property law* 349.

[406] Brits *Mortgage foreclosure under the Constitution* 327.

kind and for different purposes, namely to enforce payment of private debts for the public purpose of ensuring security in the market.

In view of the nature of this study it is more appropriate that the spotlight at this stage is focused on the deprivation cluster of provisions protecting existing property interests against unconstitutional interference in the form of sub-section 25(1), to which I now turn.[407]

3.2.2 Section 25(1)

Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Deprivation of property is therefore possible but only if allowed by law of general application in a non-arbitrary manner. Property and interests therein may be limited lawfully through regulatory deprivation which complies with the requirements stipulated in section 25(1).[408] The different components constituting this provision will be analysed, starting with 'property'. I now consider the meaning of property in terms of section 25.

3.2.2.1 Meaning of property

Although section 25(4)(b) clarifies that for the purposes of section 25 'property' is not limited to land, this study's focus is on eviction from *immovable* property. It does not matter whether such *immovable property* is encumbered or not, as occupiers of any land falling under the ambit of section 25(4((b) are capable of being evicted. Simply put, this study does not concern itself with deprivation of movable assets which may constitute 'property' in terms of section 25(4)(b). For Brits the implication of subsection 25(4)(b) is that property at the very least includes immovable property, which covers even land over which a mortgage bond is registered.[409]

As observed in chapter 2 an unpaid home-loan debt secured through a mortgage bond may result in foreclosure proceedings which may ultimately lead to the eviction of the debtor. In 2002 the court in *FNB* noted that it is practically

[407] Aspects relating to land reform measures and the protections emanating therefrom against evictions will be covered in the chapter dealing with resultant legislative instruments such as ESTA and LTA.
[408] Van der Walt *Constitutional property law* 167.
[409] Brits *Mortgage foreclosure under the Constitution* 308.

impossible to furnish – and judicially unwise to attempt to furnish – a comprehensive definition of property for purposes of section 25.[410] Of utmost importance is that in principle section 25 protects ownership of property including the object of such a right.[411] As such, the court, in the *FNB* case, classified the bank's vehicles that had been leased out or sold via an instalment agreement as corporeal movables eligible to be constitutional property.[412] Limited usage of such object by the owner has no bearing on it qualifying as 'property' under section 25. The limited usage may, however, be relevant to decide whether a deprivation is arbitrary and, if it is, whether such deprivation is justified under section 36[413] of the Constitution.[414] Some of the aspects that had to be resolved in the *FNB* case included whether cars qualify as constitutional property, and the preliminary question of whether FNB, as a juristic person, was entitled to the property rights protected by section 25. The court ultimately decided both issues in the affirmative. As will be indicated below, the latter question involving juristic persons is significant for this study in those instances wherein financial institutions seek to foreclose on bonded property with the aim of evicting the debtor.

Once a court determines that a right or interest at stake amounts to constitutionally protected property, then the next stage in the enquiry is to assess whether deprivation has occurred or not.[415]

3.2.2.2 Deprivation

The term 'deprivation' broadly connotes and extends to any interference with the use, enjoyment or exploitation of private property in respect of the person having title or right to or in the property concerned.[416] According to Van Wyk a

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[410] *FNB* [51].
[411] *FNB* [51]. See also Brits *Mortgage foreclosure under the Constitution* 308–309.
[412] *FNB* [54].
[413] Section 36(1) of the Constitution basically provides: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...".
[414] *FNB* [54].
[415] Roux T "Property" in Woolman S *et al* (eds) 2nd ed *Constitutional law of South Africa* (OS 2003), Vol. 3, 1–35 7; and Muller *et al Silberberg & Schoeman's law of property* 613.

[416] *FNB* [57], Van der Walt *Constitutional property law* 203–204; Van der Sijde E *Reconsidering the relationship between property and regulation: a systemic constitutional approach* (Unpublished LLD thesis Stellenbosch University 2015) 97–104; and Van Wyk J *Planning law* 3rd ed (Juta Cape Town 2020) 223.

'deprivation' is generally defined as an "uncompensated, regulatory restriction or limitation on the use, enjoyment and exploitation of property, in terms of legislation or other 'law'".[417] In various cases[418] that came before the Constitutional Court its approach has not been uniform in the interpretation of 'deprivation' as used specifically in the context of section 25(1) of the Constitution.[419] In *FNB* the court did not give an exhaustive definition of the term, but supported a wide interpretation thereof in principle. According to this wide interpretation method all restrictions imposed on property will be regarded as deprivations, since "any interference with the use, enjoyment or exploitation of private property" qualifies as a deprivation that must comply with the requirements set out in section 25(1).[420] This seems to be the generally preferred interpretation, as it allows any legally significant (as opposed to a *de minimis*) interference with property rights to be challenged in terms of section 25(1).[421]

Eviction amounts to one form of deprivation, particularly as it takes away the right of use and occupation of the property. Deprivation though is wider than – but includes – the narrower concept of expropriation. In other words, expropriation

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[417] Van Wyk *Planning law* 223. Van der Walt, in Van der Walt *Constitutional property law* 195, describes this as the "police power" of the state to regulate the use, enjoyment and exploitation of property to protect and promote public health and safety. See also Muller *et al* S*ilberberg & Schoeman's law of property* 626 wherein 'deprivation' of property is described as "the (usually) uncompensated, duly authorised and fairly imposed restriction on the use, enjoyment, exploitation or disposal of property for the sake of the common good".

[418] Cases including: *FNB; Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae*) 2005 (1) SA 530 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC); *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC); and *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC).

[419] Van der Sijde *Reconsidering the relationship between property and regulation* 98–104.

[420] *FNB* [57]. See also Van der Sijde *Reconsidering the relationship between property and regulation* 99–100 and Van der Walt *Constitutional property law* 203–204.

[421] Van der Sijde *Reconsidering the relationship between property and regulation* 104; Van der Walt AJ "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ*, Vol. 122, 75–89 80; Van der Walt *Constitutional property law* 264; Alexander GS "The potential of the right to property in achieving social transformation in South Africa" 2007 *ESR Review*, Vol. 8, No. 2, 2–9 5–6.

also constitutes deprivation of property.[422] In fact, Van der Walt points out that section 25 distinguishes between deprivation and expropriation by regulating these through separate subsections, namely section 25(1) and (2) respectively.[423] Further, as expropriation refers to the actual taking away of property for public purposes, 'deprivation' in section 25(1) seemingly refers to other, possibly lesser forms of limitation than expropriation.[424] Ackerman J contends that if the deprivation, in its wider sense, infringes section 25(1) and cannot be justified under section 36 then that is the end of the enquiry, as it will be unconstitutional.[425] This study is therefore mainly concerned with deprivation in the wider sense (section 25(1)), than with expropriation.[426] The infringement aspect in relation to section 25(1) is therefore limited to determining whether the deprivation of property enacted by a law of general application is 'arbitrary', in the context of that concept as developed by the Constitution.[427] Thus, to determine whether the deprivation is arbitrary or not, the non-arbitrariness test has been developed, more so in the *FNB* case, and warrants some analysis.

3.2.2.3 Non-arbitrariness test

After an intensive analysis of various authors' views on the subject, examination of case law, and comparative research on foreign jurisdictions Ackerman J concluded that a deprivation of property is 'arbitrary' within the confines of section 25 when the law of general application (referred to in section 25(1)) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.[428] The judge listed eight aspects through which 'sufficient reason' is to be established.[429] I will confine myself to two of those aspects, significant to this study.

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[422] Roux *Property* 18. See also Van der Walt *Constitutional property law* 191–192.
[423] Van der Walt *Constitutional property law* 191.
[424] Van der Walt *Constitutional property law* 191.
[425] *FNB* [58].
[426] An in-depth discussion of 'expropriation' in terms of section 25(2) of the Constitution is beyond the scope of this study. This is particularly so as most eviction legislation and court rules are primarily concerned with deprivation in the form of section 25(1). Currently, expropriation is regulated through the Expropriation Act, 1975 (Act No. 63 of 1975), as amended.
[427] *FNB* [61].
[428] *FNB* [100].
[429] *FNB* [100]. According to Ackerman J sufficient reason is to be established as follows:

First, the judge held that generally where the property concerned is land and the deprivation embraces all the incidents of ownership, the purpose for the deprivation must be more compelling than when the deprivation entails only some incidents of ownership. Secondly, he found that the question of whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, remembering that the actual enquiry is concerned with the arbitrariness of the deprivation of property under section 25.[430]

Deprivation of property can thus be in conflict with section 25(1) if it is either substantively arbitrary through lack of sufficient reason, or procedurally unfair.[431] Procedural unfairness now constitutes an independent ground for arbitrariness, although the court in *FNB* did not dwell on this concept or seek to define it further.[432] Van der Walt, therefore, indicates that in the absence of clearer indications from case law, it may be assumed that procedural arbitrariness in terms of section 25(1) will be constituted when the deprivation of property directly

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(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
(b) A complexity of relationships has to be considered.
(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25.

[430] *FNB* [100], criteria (e), (f) and (h).
[431] Van der Walt *Constitutional property law* 245.
[432] Van der Walt *Constitutional property law* 264–265.

via legislation was procedurally unfair in terms of the principles that apply in administrative law, but not caused by administrative action.[433]

Where the deprivation results from a procedurally unfair administrative action, as opposed to legislative action, then the challenge should be launched on the basis of the Promotion of Administrative Justice Act[434] and section 33 of the Constitution rather than section 25(1).[435] Whereas section 33 of the Constitution guarantees to everyone "the right to administrative action that is lawful, reasonable and procedurally fair", PAJA was enacted to give effect to section 33 of the Constitution.[436] PAJA cannot, however, be used to evaluate a constitutional challenge as that is the preserve of section 33 of the Constitution.[437]

In fact, Van der Sijde explains that in terms of the subsidiarity principles, this would mean that a litigant in a case involving administrative action is precluded from relying on section 33 directly, and must instead make use of the applicable provision(s) in PAJA,[438] unless the litigant wishes to challenge the constitutionality of the provision(s) in PAJA.[439]

Generally, PAJA only becomes applicable when it is sought to review administrative action[440] as "[t]he cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past."[441] As the right to be heard is one of the fundamental principles of administrative law, deprivation on the basis of section 25(1) would possibly be deemed procedurally fair where the legislation concerned provides for judicial

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[433] Van der Walt *Constitutional property law* 269.
[434] Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA).
[435] Van der Walt *Constitutional property law* 266–269; and Van der Sijde *Reconsidering the relationship between property and regulation* 185.
[436] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (hereinafter *Zondi*) [99].
[437] *Zondi* [99].
[438] Van der Sijde *Reconsidering the relationship between property and regulation* 185. See Hoexter C *Administrative law in South Africa* 2nd ed (Juta Cape Town 2012) 119 and 134.
[439] Van der Sijde *Reconsidering the relationship between property and regulation* 186. In other words, to challenge the constitutionality of the provision(s) in PAJA a litigant would then rely directly on section 33 of the Constitution. See: Van der Walt AJ *Property and Constitution* (Pretoria University Law Press 2012) 36; and Hoexter *Administrative law* 119.
[440] *Zondi* [99].
[441] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

oversight.[442] Considering the consequences that an administrative decision might have on the individual, the decision-maker ought to take some steps to ascertain the identity of the individual to be affected by the decision for the purposes of notice and the opportunity to be heard.[443] Procedural fairness, by its very nature, imports the element of fairness.[444] Fairness itself is a relative concept which is informed by the circumstances of each particular case.[445] Procedural fairness has the potential to ensure that all relevant considerations are brought to the attention of the administrator before a decision is made,[446] just as in the case of judicial oversight whereby all pertinent circumstances should be considered before declaring the home of a debtor specially executable. This aspect of procedural fairness is therefore particularly significant in the property context, where considerations other than the rights of the property owner could influence the decision.[447]

Van der Sijde contends that case law makes it clear that procedural fairness in the context of section 25(1) corresponds closely (if not exactly) with what administrative law jurisprudence considers to constitute procedural fairness.[448]

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[442] Van der Walt *Constitutional property law* 269–270.

[443] *Zondi* [112].

[444] *Zondi* [112].

[445] *Zondi* [112]. See also Van der Sijde *Reconsidering the relationship between property and regulation* 220, wherein she confirms that procedural fairness is therefore essentially a ”flexible and contextual concept”.

[446] Van der Sijde *Reconsidering the relationship between property and regulation* 221; Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” 2007 *ESR Review*, Vol. 8, No. 2, 25–28 27.

[447] Van der Sijde *Reconsidering the relationship between property and regulation* 221. See also: *Walele v City of Cape Town* 2008 (6) SA 129 (CC); *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA), *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); T*urnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC); and *Aboobaker N.O and Others v Serengeti Rise Body Corporate and Another* 2015 (6) SA 200 (KZD).

[448] Van der Sijde *Reconsidering the relationship between property and regulation* 223. In this regard, Van der Sijde cites: *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), wherein paragraph 65 merely states that the Constitutional Court has indicated “in contexts other than section 25(1)” that procedural fairness is a flexible concept that must be evaluated with reference to the circumstances of each case; and *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) which accepted the *Mkontwana dictum* at paragraph 40. She also refers to: Van der Walt AJ “Procedurally arbitrary deprivation of property” 2012 *Stellenbosch Law Review*, Vol. 23, 88–94 89; and Iles K “Property” in Currie I & De Waal J (eds) *The bill of rights handbook* 6th ed (Juta Cape Town 2013) 530–562 541.

Judicial oversight is now an intrinsic requirement incorporated in various court rules regulating execution processes against immovable property leading to eviction, pursuant to judgments such as *Jaftha*, *Grootboom, Gundwana*, *Saunderson*, *Folscher*, *Mortinson*, *Sebola*, *Petersen*,[449] *Ntsane*, *Rossouw*, and *Lekuku*. These court rules also form part of the 'law of general application' referred to in section 25(1), to which we can now turn our focus.

3.2.2.4 Law of general application

The law of general application requirement embodies the general rule of law and legitimacy principles of the Constitution, ensuring that deprivation of property shall only be lawful when it is imposed in terms of and authorised by properly promulgated and valid law.[450]

A deprivation should be authorised by a law of general application, meaning a law that is generally and equally applicable, non-arbitrary, clear, precise, not discriminatory in application, publicly available and accessible.[451] All original and delegated legislation (such as rules and regulations) qualify as law of general application, but not internal administrative policy documents.[452] Van der Walt further points out that rules of common and customary law can also authorise deprivation of property, though this should also be done in a non-arbitrary manner.[453]

As discussed in the previous chapter, various legislative instruments, such as section 66(1) of the Magistrates' Courts Act, High Court rules 31, 46, 46A, Magistrates' Courts rules 43 and 43A, which also qualify as 'law of general application', now make it obligatory for the court to evaluate all relevant circumstances before declaring immovable property executable or even authorising writs of execution against peoples' homes. In terms of section 39(2) of the Constitution, when interpreting and enforcing such legislation the courts must promote the spirit, purport and objects of the Bill of Rights and thus ensure that the principles set out in sections 25 and 26 are not violated. Brits maintains that this

[449] *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) (hereinafter *Petersen*).
[450] Van der Walt *Constitutional property law* 232.
[451] Van der Walt *Constitutional property law* 232; and Roux *Property* 21.
[452] Van der Walt *Constitutional property law* 233.
[453] Van der Walt *Constitutional property law* 234.

exercise of judicial discretion contributes to the non-arbitrary nature of the sale in execution process in general, also ensuring that individual cases comply with the constitutional values in sections 25 and 26.[454] For instance, in mortgage-foreclosure matters courts have to apply the common-law principles of mortgage foreclosure in each individual case, as well as applicable rules of court and pertinent legislation, on the assumption that the effect of foreclosure should not amount to arbitrary deprivation of property or even an unjustifiable limitation of the right to have access to adequate housing in terms of section 26(1) of the Constitution.[455] Generally, this applies equally in other spheres of evictions, whether emanating from PIE, landlord – tenant law (REHA), rural land tenure sphere (ESTA and LTA), and so forth.

3.2.2.5 Summary

In view of the current legislation as shaped and advanced by cited case law, it seems that processes for execution against and for evictions from immovable property covered in this study do not constitute arbitrary deprivations as the general laws of application authorising them largely conform to section 25(1) provisions. If that were not the case such deprivations and the laws authorising them would be susceptible to declarations of invalidity by our courts. On the assumption that these deprivations are not arbitrary and indeed comply with section 25(1), it will therefore be unnecessary to proceed to the next step of the enquiry prescribed in the *FNB* case, that is whether the deprivation amounts to expropriation, and as such complies with sections 25(2) and (3) or not.

As indicated earlier, execution processes against immovable property culminating in evictions cannot be classified as compensated state acquisitions for the public good. The procedural legislation that authorises courts to grant execution orders and provides for the way in which sheriffs should conduct sales in execution does not concern itself with expropriation. Instead, it authorises forced transfers of property of a different kind and for different purposes, namely to enforce payment of private debts for the public purpose of ensuring security in the market.[456]

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[454] Brits Mortgage f*oreclosure under the Constitution* 322.
[455] Brits Mortgage f*oreclosure under the Constitution* 322.
[456] Brits *Mortgage foreclosure under the Constitution* 324.

This also applies to any uniform rules of evictions that may be envisaged if warranted by the findings of this research. Deprivations of property authorised by such rules will also have to comply with section 25 provisions, and in the process pass the non-arbitrariness test. In addition, such envisaged rules of eviction will also have to comply with the housing clause contained in section 26 of the Constitution, on which we now focus our attention.

3.3 Housing clause (section 26)[457]

3.3.1 Introduction

In the *Jaftha* case Mokgoro J outlined the historical background informing the enactment of section 26 of the Constitution, and the mischief sought to be cured thereby. She explained that the section focuses on security of tenure, the intention being to reject that part of our history where invasive legislation was used to remove people from their land and homes forcefully, rendering them homeless through senseless evictions.[458]

This provision emanates from circumstances wherein pre-democratic era laws allowed the summary eviction of people from their land and homes that had, in some instances, been occupied for a long time, and criminalised continued occupancy of land in contravention of such legislation.[459] It is also aimed at ensuring access to adequate housing for all, which cannot be interfered with without justification.[460] Specifically with regard to sub-section 26(3) Mokgoro J mentions that it directly curtails historical forced removals, home demolitions and summary evictions from land without a court order.[461]

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[457] Section 26 of the Constitution provides as follows in full:

> **"26. Housing**
> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[458] *Jaftha* [25].
[459] *Jaftha* [27].
[460] *Jaftha* [28].
[461] *Jaftha* [28].

As alluded to earlier in the first chapter, the right to adequate housing generally is recognised internationally. It is therefore appropriate at this stage to briefly analyse the international human rights position in this regard.

3.3.2 The right to adequate housing from an international perspective

Article 11(1) of the United Nations' International Covenant on Economic, Social and Cultural Rights (ICESCR, also commonly referred to as the Covenant) confirms that signatory countries recognise the right of everyone to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions. South Africa signed the Covenant on 3 October 1994 and ratified it on 12 January 2015. The US signed it on 5 October 1977 but has not yet ratified. The UK signed on 16 September 1968 and ratified on 20 May 1976.[462]

At its sixth session on 13 December 1991 the UN Committee on Economic, Social and Cultural Rights (CESCR) contextualised the right to adequate housing contained in Article 11(1) of the Covenant.[463] The CESCR started by observing that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies, and are not confined to developing countries.[464] The CESCR also noted that at that stage the United Nations estimated that there were over 100 million persons homeless worldwide and over one billion inadequately housed.[465] It significantly noted that the right to housing should not be interpreted in a narrow or restrictive sense that equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity.[466] It should instead be seen as the right to live somewhere in security, peace and dignity.[467] As such, for the CESCR, instances of forced eviction are considered as being *prima facie* incompatible with the Covenant's provisions, which can only be justified in the most exceptional

[462] See https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx (Date of use: 15 February 2021).
[463] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* (13 December 1991 E/1992/23) https://resourcingrights.org/en/document/9c55otxgab9jyodmjwgdnuq5mi?page=1 (Date of use: 1 February 2021).
[464] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 4.
[465] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 4.
[466] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 7.
[467] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 7.

circumstances, and in accordance with the relevant principles of international law.[468] It also identified some aspects it considered crucial in the determination of adequate housing, amongst them being the legal security of tenure.[469] Such tenure includes, amongst others, rental accommodation (public and private), cooperative housing, lease, owner-occupation, emergency housing and informal settlements.[470] The CESCR requires that everyone should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats.[471] It enjoins states to take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection.[472]

Article 17.1 of the UN's International Covenant on Civil and Political Rights (ICCPR) also complements the right not to be forcefully evicted without adequate protection.[473] It prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence, amongst others. In its 1997 general comment the CESCR mandated States Parties to adopt legislative measures that:[474]

> (a) provide the greatest possible security of tenure to occupiers of houses and land,
> (b) conform to the Covenant and
> (c) are designed to control strictly the circumstances under which evictions may be carried out.

In instances where evictions are justified – such as occasioned by sustained non-payment of rent – then it is incumbent upon the relevant authorities to ensure that those evictions are carried out in a manner warranted by a law that is compatible with the ICCPR and that all the legal recourses and remedies are available to those affected.[475]

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[468] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 18.
[469] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 8.
[470] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 8.
[471] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 8.
[472] UNCESCR General Comment No. 4: *The Right to Adequate Housing (Art.11(1))* paragraph 8.
[473] UNCESCR General Comment No. 7: *The Right to Adequate Housing (Art.11(1))*: forced evictions (20 May 1997, E/1998/22, annex IV) paragraph 8 https://www.refworld.org/docid/47a70799d.html (Date of use: 1 February 2021).
[474] UNCESCR General Comment No. 7: *The Right to Adequate Housing (Art.11(1))*: forced evictions paragraph 9.
[475] UNCESCR General Comment No. 7: *The Right to Adequate Housing (Art.11(1))*: forced evictions paragraph 11. See also paragraph 14, where the CECSR mentioned that in cases where eviction is considered to be justified, it should be carried out in strict compliance with

Article 8 of the European Convention on Human Rights (ECHR) also provides that everyone has the right to respect for his (or her) private and family life, his (or her) home and his (or her) correspondence. It further prohibits unlawful interference by a public authority with the exercise of this right. The UK incorporated this right to adequate housing and most rights and freedoms contained in the ECHR through the Human Rights Act 1998 (HRA).[476]

International human rights trends are significant as the South African Constitution stipulates[477] that when interpreting the Bill of Rights, a court, tribunal or forum:

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.

Any eviction rules which may be conceptualised through this study should also comply with or conform to international law trends or principles. The principles of adequate housing outlined above, and the prevention of homelessness are therefore at the core of the purpose and objectives of section 26 of the Constitution, to which I now turn.

3.3.3 Section 26 and its broader purpose

At the centre of section 26 lies first, the aim to alleviate homelessness and, secondly, the intention to prevent an unjustified increase in homelessness, through sub-sections (1) and (3).[478] Another main objective of section 26 is to oblige the state, as far as is reasonably possible, to adopt legislative measures towards the progressive realisation of the right to adequate housing (sub-section (2)). Prior to *Jaftha* the meaning and scope of section 26 provisions were considered by Yacoob J in the *Grootboom* case. Amongst others, the judge remarked that section 26(1), at the very least, places a negative obligation upon the state and all other entities and persons to refrain from preventing or impairing the right of access to adequate housing, and that this is further echoed in section 26(3) which

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the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.

[476] See in-depth discussion of the UK position in chapter 6.
[477] In section 39(1).
[478] Brits *Mortgage foreclosure under the Constitution* 62.

prohibits arbitrary evictions.[479] The focus of this study will dwell more on section 26(3), which deals directly with evictions.

Brits indicates that section 26(3) establishes the principle that any proceeding that might lead to a person being evicted from his or her home, must be authorised by a court and only after all relevant circumstances have been taken into consideration.[480] Simply put, the sub-section provides protection against arbitrary evictions.[481] It evinces special constitutional regard for a person's place of abode.[482] Basically, section 26(3) introduces the procedural rule that necessitates judicial oversight of all relevant circumstances prior to the granting of an order which authorises an eviction.[483] However, section 26(1) is the one that outlines "the right that section 26 as a whole is meant to promote and protect – everyone's right to have access to adequate housing".[484]

In the *Port Elizabeth Municipality* case Sachs J pointed out three salient features – related to section 26(3) – of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights.[485] First, the rights of the dispossessed relative to land are not couched in unqualified terms intended to be immediately self-enforcing.[486] Instead, these are mainly structured in such a way as to necessitate the adoption of legislative and other measures (outside the Constitution itself, such as PIE) to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing.[487] As such, the rights involved in section 26(3) are defensive rather than affirmative, as they do not affirm a landowner's right or entitlement to do as he or she pleases with the land.[488] Secondly, through section 26(3) the Constitution expressly acknowledges that eviction of people living in informal settlements may take place, even if it results in loss of a home.[489] Thirdly, section 26(3) emphasises the need to seek concrete and case-specific solutions to the difficult problems that

[479] *Grootboom* [34].
[480] Brits *Mortgage foreclosure under the Constitution 65*.
[481] *Jaftha* [21].
[482] Per Sachs J in *Port Elizabeth Municipality* [17].
[483] Brits *Real security law* 78.
[484] Brits *Real security law* 78.
[485] *Port Elizabeth Municipality* [20].
[486] *Port Elizabeth Municipality* [20].
[487] *Port Elizabeth Municipality* [20].
[488] *Port Elizabeth Municipality* [20].
[489] *Port Elizabeth Municipality* [21].

arise.[490] It does this by allowing the courts a wide discretion to consider all relevant circumstances in the adjudication of eviction cases, without being prescriptive:[491]

> The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.

According to Van Wyk, two categories of legislative measures dealing with eviction have developed from this provision, namely measures which respond to unlawful occupation of land and buildings, with PIE being an example, and measures dealing with the redistribution of land and land tenure issues, as in the case of ESTA and LTA.[492] The significance of section 26(3) is therefore demonstrated by its contribution to:

- the enactment of legislation such as PIE, ESTA and LTA;
- the amendment of section 66 of the Magistrates' Courts Act and High Court rule 46 post *Jaftha*;
- the amendment of High Court rule 31 post-*Gundwana*; and generally; and
- the recent amendments pertaining to High Court rules 46, 46A, Magistrates' Courts rules 43 and 43A.

All of these legislative developments compel judicial oversight and consideration of relevant circumstances in execution processes pertaining to residential immovable property through which evictions and homelessness may result. Judicial oversight has become increasingly vital particularly in view of Sachs J's observation that the Constitution now imposes new obligations on the courts concerning rights relating to property which were not previously recognised by the common law.[493] The Constitution juxtaposes normal ownership rights of possession, use and occupation against the right not to be arbitrarily evicted from a home. The function of the courts in this regard is to balance out and reconcile competing claims, taking account of all the interests involved and the specific factors relevant in each

[490] *Port Elizabeth Municipality* [22].
[491] *Port Elizabeth Municipality* [22].
[492] Van Wyk J "The role of local government in evictions" 2011 *PER/PELJ*, Vol. 14, No. 3, *on-line version* ISSN 1727-3781, 1–25 2.
[493] *Port Elizabeth Municipality* [23].

particular case.[494] It is therefore appropriate to analyse the manner in which the courts have dealt with matters pertaining to section 26, particularly sections 26(1) and (3), and the impact of these judicial pronouncements on the regulatory framework of evictions and related execution processes. Relevant aspects in *Port Elizabeth Municipality* have already been covered extensively in this chapter, and the case will be revisited in the next chapter dealing with PIE and related legislation.

Cases that will be discussed in this regard at this stage are: *Government of the Republic of South Africa and Others v Grootboom* because it was the first, landmark judgment on evictions and set out a number of principles; *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* as it stresses that legislation which permits the deprivation of a person's access to adequate housing without justification under section 36 of the Constitution severely limits the rights enshrined in section 26(1); *Standard Bank of South Africa Ltd v Saunderson and Others* that issued a direction whereby a defendant should be adequately informed in the summons of section 26(1) protections; *Gundwana v Steko Development CC and Others* since it confirmed the desirability of judicial oversight in instances involving execution against residential property; and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* wherein it was emphasised that government's obligations under section 26(2) meant that it should provide alternative housing where it sought to evict.

3.3.4 Court decisions

3.3.4.1 *Government of the Republic of South Africa and Others v Grootboom*

The respondents in this case were some 510 children and 390 adults (including the first respondent, Mrs Irene Grootboom), who were rendered homeless as a consequence of their eviction from their informal homes situated on private land where there were plans for formal low-cost housing.[495] They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants (essentially

[494] *Port Elizabeth Municipality* [23].
[495] *Grootboom* [4].

comprising all three tiers of government) were ordered to provide the respondents with shelter and amenities, in the form of “tents, portable latrines and a regular supply of water” as a bare minimum.[496] The appellants, in turn, challenged the correctness of the stated order. In his assessment of the matter Yacoob J narrowed down the plight of the respondents to a housing shortage acutely created by *apartheid*.[497]

In the High Court case the respondents had based their claim on two constitutional provisions: First, section 26 of the Constitution, particularly sub-section (2) that imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of the right to adequate housing within its available resources; and secondly, section 28(1)(c)[498] of the Constitution, providing that children have the right to shelter, basic nutrition, basic health care services and social services (the emphasis here being on the right to shelter). The High Court rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the programme to provide adequate housing.[499] Instead, the court made a more favourable finding for the respondents in terms of section 28.

On the second claim concerning the right of children to shelter in terms of section 28(1)(c) the High Court first maintained that the parents bore the primary obligation to provide shelter for their children, but that section 28(1)(c) imposed an obligation on the state to provide that shelter if parents could not.[500] Further, it reasoned that the shelter to be provided according to this obligation was a significantly more rudimentary form of protection from the elements than is provided by a house and falls short of adequate housing. The court held, amongst others, that the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with shelter until such time as

[496] *Grootboom* [4].
[497] *Grootboom* [6].
[498] Section 28 of the Constitution is concerned with the rights and interests of children. Section 28(1)(c) specifically provides that every child has the right to basic nutrition, shelter, basic health care services and social services.
[499] *Grootboom* [14].
[500] *Grootboom* [15].

the parents are able to shelter their own children.[501] This was the order appealed against in the Constitutional Court (the appellants being the three spheres of government responsible for housing matters).

Yacoob J started by emphasizing that the rights contained in sections 26 and 28 must be considered in the context of the cluster of socio-economic rights enshrined in the Constitution.[502] They entrench the right of access to land, to adequate housing, to health care, food, water and social security, and also protect the rights of the child and the right to education.[503] The judge went on to state that the right of access to adequate housing cannot be seen in isolation as it is closely related to other socio-economic rights, and the state is thus obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.[504] On the aspect raised by the *amici* relating to minimum core obligation[505] incurred by the state in terms of section 26 of the Constitution the court extensively examined international law trends in this regard, particularly the interpretation and implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant).[506] It noted that the differences between the relevant provisions of the Covenant and our Constitution are crucial in weighing-up the extent to which the provisions of the Covenant may

[501] *Grootboom* [15]–[16]. The court's judgment in this regard was premised on the fact that an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parent, and that such an approach would be in accordance with the spirit and purport of section 28 as a whole.
[502] *Grootboom* [19].
[503] *Grootboom* [19].
[504] *Grootboom* [24].
[505] The concept that socio-economic rights contain a 'minimum core obligation' emanates from paragraph 10 of the UNCESCR General Comment No. 3: *The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant* (14 December 1990, E/1991/23) https://www.refworld.org/docid/4538838e10.html (Date of use: 1 February 2021).The paragraph states, amongst others, that: "On the basis of the extensive experience gained by the Committee … the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être".
[506] See also paragraph 3.3.2 above.

be a guide to interpret section 26. These differences, in so far as they relate to housing, being that:[507]

(1) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.
(2) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

In the process, the court pointed out that the right delineated in section 26(1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant, and therefore recognises that housing entails more than bricks and mortar.[508] Access to adequate housing entails the provision of available land, appropriate sanitation services and the financing of all of these, including the building of the house itself. In Yacoob J's view access to land for housing purposes is therefore included in the right of access to adequate housing in section 26.[509] However, the court had difficulties in applying the 'minimum core' concept in the South African legal context of 'the right to have access to adequate housing', which it regarded as being complex.[510] In the court's view, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. More so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. In any event, the court lamented the fact that sufficient information had not been placed before it to enable it to determine the minimum core in any given context.[511] It therefore found it unnecessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.[512]

Following upon an extensive evaluation of sections 26 and 28 the court determined that neither section entitles the respondents to claim shelter or housing immediately upon demand, and that the High Court order was therefore

[507] *Grootboom* [28].
[508] *Grootboom* [35].
[509] *Grootboom* [35].
[510] *Grootboom* [31]–[33].
[511] *Grootboom* [33].
[512] *Grootboom* [33].

erroneous.[513] The extent of the state's obligation in terms of section 26(2) is defined by three key elements, namely: [514]

(a) to "take reasonable legislative and other measures";
(b) to "achieve the progressive realisation" of the right; and
(c) "within available resources".

Nonetheless, the court was of the view that section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time when the application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.[515] In the result, the court ultimately pronounced that section 26(2) of the Constitution places an obligation on the state to devise and implement, within its available resources, a comprehensive and coordinated programme to progressively realise the right of access to adequate housing.[516]

3.3.4.2 *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*

In the *Jaftha* case the basic question was whether a law that permits the sale in execution of peoples' homes because they have not paid their debts, thereby removing their security of tenure, violates the right to have access to adequate housing that is protected in section 26 of the Constitution.[517] Earlier, the High Court had articulated the view that the right of access to adequate housing does not encompass an entitlement to any of the following: the ownership of housing; a particular form of housing; or the occupation of a specific residential unit.[518]

The presiding officer in the High Court, Van Reenen J, was of the view that it was not the execution process per se that essentially deprived the erstwhile homeowner of his or her ownership to the disputed immovable property. His reasoning was that the judgment debtor, once the legal basis for his or her

[513] *Grootboom* [95].
[514] *Grootboom* [38].
[515] *Grootboom* [95].
[516] *Grootboom* [99].
[517] *Jaftha* [1].
[518] *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2003 (10) BCLR 1149 (C) (hereinafter *Jaftha* (High Court judgment)) [39].

occupation of an immovable property namely, his or her *dominium* therein, has been terminated via the transfer of the property title to the purchaser, has a choice.[519] The choice is either to vacate the property voluntarily or simply continue to occupy it without having concluded any arrangements with the purchaser.[520] If he or she vacates voluntarily the loss of access to housing in respect of that particular property is the result of a volitional act on the part of the judgment debtor and not the execution process. Remaining in the property on the other hand is tantamount to a holding over by the judgment debtor, thus entitling the new owner to institute legal proceedings for the eviction of the judgment debtor in accordance with PIE provisions.[521] The judge therefore held that section 66(1)(a) of the Magistrates' Courts Act, which essentially permitted the sale in execution and the eventual transfer of immovable property that constitutes the home of a person, did not conflict with the provisions of section 26 of the Constitution.[522] It is this decision that the Constitutional Court subsequently disagreed with on appeal.

In the Constitutional Court Mokgoro J examined the essence and historical context of the right to adequate housing as embodied in section 26, and prevailing international law trends. In the process, she remarked that section 26 should be viewed as making a decisive break from the past evil laws and conduct practised by and in the era of the *apartheid* regime.[523] The indignity associated with unjustified evictions from homes has to be replaced with a system in which the state strives to provide access to adequate housing for all.[524]

In the circumstances, she held that, at the very least, any measure that permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1), except where justified under section 36 of the Constitution.[525] Having reiterated the significance of access to adequate housing and its link to the inherent dignity of a person, she found that section 66(1)(a) of the Magistrates' Courts Act constituted a severe limitation of an important right,

[519] *Jaftha* (High Court judgment) [46].
[520] *Jaftha* (High Court judgment) [46].
[521] *Jaftha* (High Court judgment) [46].
[522] *Jaftha* (High Court judgment) [47].
[523] *Jaftha* [29].
[524] *Jaftha* [29].
[525] *Jaftha* [34]. See also Brits *Real security law* 78–86, wherein the author states that a "limitation of this right is only allowable if the requirements of section 36 are fulfilled, which involves a strict proportionality test".

unjustifiable under section 36, with a potential to undermine a most empowering and dignifying human experience associated with owning a home.[526] Consequently she ruled that this provision is overbroad and a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure.[527] She held further that section 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution.[528] This is a well-reasoned judgment in advancement of constitutional principles, which goes a long way towards ensuring that debtors do not easily lose their homes over a petty loan amount and without judicial oversight.

3.3.4.3 *Standard Bank of South Africa Ltd v Saunderson and Others*

Unlike *Jaftha* this case concerned execution processes against immovable properties emanating from debtors' failure to comply with *mortgage bond* conditions. Standard Bank had launched separate claims against respective mortgage bond defaulters, which were adjudicated under one case by the SCA. In other words, in the cases before the SCA Standard Bank had issued summons against nine borrowers who defaulted on loans secured through mortgage bonds.[529] In these claims the bank had simultaneously also asked for ancillary orders declaring the mortgaged properties to be executable.[530] Blignaut J in the court *a quo* had declined to order the mortgaged properties to be executable, relying on *Jaftha* and concluding that the summonses were deficient in that they lacked sufficient allegations to show that orders for execution were constitutionally permissible.[531] The bank had then appealed against the refusal to order the immovable properties executable in three of the cases, as a test case for a plethora of similar other cases coming to courts.

[526] *Jaftha* [39].
[527] *Jaftha* [52].
[528] *Jaftha* [52]. See also the discussion in chapter 2, approached from the angle of section 66 of the Magistrates' Courts Act.
[529] *Saunderson* [4].
[530] *Saunderson* [4].
[531] *Saunderson* [5].

The SCA started by comprehensively analysing the *Jaftha* judgment as it had been relied upon by the court *a quo*, ultimately disagreeing with Blignaut J's interpretation and implementation of *Jaftha*. SCA Judges Cameron and Nugent pointed out that it was because section 66(1)(a) of the Magistrates' Courts Act did not provide the opportunity for a court to balance various interests before execution ensued that the provision was held to be constitutionally objectionable in *Jaftha*.[532] This legislative deficiency was remedied by reading into section 66(1)(a) a requirement that a writ of execution against immovable property could be issued only upon an order of the court after consideration of all relevant circumstances. Blignaut J, in the court *a quo,* had maintained that the Constitutional Court, in *Jaftha,* held that section 26 is compromised whenever it is sought to execute against residential property, irrespective of the nature of the property or the circumstances of the owner.[533] Further, per Blignaut J's interpretation of *Jaftha* in all such cases it must be shown that execution is justified under section 26(3) of the Constitution after taking account of all relevant circumstances.[534] Cameron and Nugent JJA found the interpretation in *Jaftha* as misplaced. Their view was that at issue in *Jaftha* was section 26(1) of the Constitution, which enshrined the right of access to adequate housing, as well as the impact of such right on execution against residential property. Section 26(3) was not at issue, as it is only relevant in the event of eviction consequent a sale in execution.[535] The Constitutional Court had indicated in *Jaftha* that section 26(1) is not compromised in every case where execution is levied against residential property.[536] Instead, per Cameron and Nugent JJA, the court in *Jaftha* had only decided that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her section 26(1) rights and would therefore need to be justified as contemplated by section 36(1).[537] The judges emphasised that section 26(1) does not confer a right of access to housing *per se* but only a right of access to 'adequate' housing, and this concept is relative.[538] Hence the finding by the Constitutional Court in *Jaftha*

[532] *Saunderson* [12]. As the provisions of section 66(1)(a) of the Magistrates' Courts Act entitled an ordinary judgment creditor to a writ of execution against immovable property as of right once no movables were found to satisfy the judgment.
[533] *Saunderson* [13].
[534] *Saunderson* [13].
[535] *Saunderson* [15].
[536] *Saunderson* [15].
[537] *Saunderson* [15].
[538] *Saunderson* [16].

that the threat to ownership (as opposed to occupation) of a residence that constituted 'adequate housing' was itself invasive of section 26(1).[539] They stated that *Jaftha* did not decide that the ownership of all residential property is protected by section 26(1), nor could it have done so in view of the fact that what constitutes 'adequate housing' is necessarily a fact-bound enquiry:[540]

> One need only postulate executing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all.

The SCA further distinguished the situation in *Jaftha* from the one at hand. In *Jaftha* the sale in execution deprived the debtor of ownership of a home acquired through state subsidy, merely because she was unable to pay a relatively trifling extraneous debt, and no judicial oversight of all the relevant factors was interposed.[541] On the contrary, the property owners in the present case had willingly bonded their properties to the bank to obtain capital, and thus their debt was not extraneous, but fused into the property titles. In *Jaftha* the effect of section 26(1) on such cases had not been considered, except for observations made in the judgment concerning mortgage bonds in the context of the kind of interests that might need to be considered once it was shown that section 26(1) was in fact compromised.[542] The Constitutional Court in *Jaftha* had further stated that one of the relevant factors that can serve as a guideline in the exercise of judicial oversight pertaining to execution against immovable properties will be the circumstances in which the debt arose.[543] Mokgoro J was of the view that if the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure.[544] Mokgoro J deemed the need to ensure that homes may be used by people to raise capital as an important aspect of the value of a home.[545]

In *Saunderson* the presiding judges pointed out that the case did not require them to decide whether section 26(1) may be compromised when the rights conferred

[539] *Saunderson* [16].
[540] *Saunderson* [17].
[541] *Saunderson* [18].
[542] *Saunderson* [18].
[543] *Jaftha* [58].
[544] *Jaftha* [58].
[545] *Jaftha* [58]. A fact also alluded to by Cameron and Nugent JJA in *Saunderson* [19].

by a mortgage bond are sought to be enforced in cases where the property concerned does in fact constitute 'adequate housing'.[546] But they indicated that cases in which execution against mortgaged property could conflict with section 26(1) are likely to be rare, if ever. The SCA found that the sole fact that the property is residential in character is not enough to conclude that an infringement of section 26(1) will necessarily occur, and the onus is on defendants to show that orders for execution would indeed infringe section 26(1) before the bank can be called on to justify the grant of such orders.[547] As a result, Cameron and Nugent JJA held that none of the defendants had alleged or shown that an order for execution would infringe their rights of access to adequate housing, and in such circumstances the appellant bank was not called upon to justify the execution orders it sought, which orders ought to have been granted.[548]

Furthermore, they found that in cases where the constitutional validity of an order of execution is not disputed, there can be no objection to the registrar entering judgment in accordance with rule 31(5), thereby obviating the need for judicial oversight.[549]

In addition, although it was not a question that was before them or had as yet been explored by the courts, the judges stated that it was possible that section 26(1)'s right to adequate housing in the case of bonded property might be infringed by execution.[550] This led to them deeming it desirable to issue a practice direction which made it obligatory for summons – through which action is initiated whereby a plaintiff claims relief that embraces an order declaring immovable property executable – to draw the defendant's attention to section 26(1) provisions.[551] In addition, the summons had to inform the defendant that should he or she claim that the order for execution will infringe the right to adequate housing then it is incumbent on the defendant to place information supporting that claim before the

[546] *Saunderson* [19].
[547] *Saunderson* [20].
[548] *Saunderson* [21].
[549] *Saunderson* [24].
[550] *Saunderson* [25].
[551] *Saunderson* [25] and [27].

court.[552] As discussed previously,[553] this resulted in the subsequent amendment of Magistrates' Courts rule 5(10) to incorporate this practice direction.

3.3.4.4 *Gundwana v Steko Development CC and Others*

The facts of this case have already been considered in-depth in chapter 2. Of relevance to this chapter, amongst others, is the fact that in the Constitutional Court Froneman J, relying on the *Lesapo*[554] and *Jaftha* judgments, held that judicial oversight is compulsory where execution against the homes of indigent debtors is sought pursuant to judgment on a money debt. This is mainly because such indigent debtors run the risk of losing their security of tenure.[555] One of the grounds that had been advanced by the bank in support of the argument that the present case did not fall within the ambit of *Jaftha* had been that mortgaged property does not come within *Jaftha*'s reach, "because mortgagors willingly or voluntarily accept the risk of losing their secured property in execution when entering into a mortgage loan agreement".[556] However, Froneman J rejected all grounds advanced by the bank as being based on incorrect premises, and without reliance on precedent-based reasoning.[557] He accepted that a mortgagor willingly provides her immovable property as security for the loan thereby accepting that "the property may be executed upon in order to obtain satisfaction of the debt".[558] However, he did not think that that willingness implies that she accepts that—[559]

(a) the mortgage debt may be enforced without court sanction;
(b) she has waived her right to have access to adequate housing or eviction only under court sanction under sections 26(1) and (3); and
(c) the mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith.

[552] *Saunderson* [25] and [27].
[553] In chapters 1 and 2.
[554] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) (hereinafter *Lesapo*). In *Lesapo* section 38(2) of the North-West Agricultural Bank Act 14 of 1981 was declared constitutionally invalid, Mokgoro J remarked in paragraph 15 that the judicial process, guaranteed by section 34 of the Constitution, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution.
[555] *Gundwana* [41].
[556] *Gundwana* [42].
[557] *Gundwana* [42].
[558] *Gundwana* [44].
[559] *Guadiana* [44].

The court held that agreeing to a mortgage bond does not amount to agreeing to forfeit one's protection under sections 26(1) and (3) of the Constitution.[560] It held further that an "agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution in bad faith".[561]

Most significantly, Froneman J concluded that "the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of *Jaftha*".[562] He held that judicial oversight is still essential in each of such cases prior to declaring hypothecated property constituting a person's home specially executable.[563]

The judgment in *Gundwana* is significant in that it extended the requirement for judicial oversight to include mortgaged properties in instances where the property sought to be declared specially executable is the primary residence of the debtor. It ensured that only the court, and not the court registrar, has the authority to declare immovable property which constituted a defendant's primary residence specially executable, upon consideration of all relevant factors. Subsequent to *Gundwana* significant amendments were made to court rules and forms including High Court rules 31, 46, new rule 46A plus form 21 and corresponding Magistrates' Courts rules and forms, as discussed in the preceding chapter. These rule amendments are geared towards the advancement of protections enshrined in section 26 of the Constitution and bode well for any suggested eviction rules.

3.3.4.5 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[564]

The case analysed the requirements to be complied with in the process of the relocation of a large community from an informal settlement area so that better housing could be built thereon.[565] It emanated from an application for leave to

[560] *Gundwana* [46].
[561] *Gundwana* [48].
[562] *Guadiana* [49].
[563] *Guadiana* [49].
[564] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (hereinafter *Joe Slovo*). See generally Pienaar *Land reform* 691–699.
[565] *Joe Slovo* [8].

appeal against a judgment and order of the Western Cape High Court[566] for the relocation of 4 386 households, consisting of around 20 000 residents, from a large informal settlement known as Joe Slovo, situated ten kilometres to the east of Cape Town, in order to facilitate the development of better quality housing.[567] The City of Cape Town (the city) owned the land on which the Joe Slovo settlement was situated, although the eviction and relocation of the community was being sought by Thubelisha Homes Ltd, a public company established by the government to undertake several of its housing functions as a national public entity and agency.[568] Two key legal questions had to be answered. First, whether the main respondents had made out a case for eviction of the applicants in terms of the PIE provisions, and, secondly, whether the respondents had acted reasonably within the meaning of section 26 of the Constitution in seeking the eviction of the applicants.[569]

All five judgments prepared by the different judges in this case agreed, for different reasons, that the respondents, particularly the Minister of Housing and the MEC of Local Government and Housing in the Western Cape, responsible for the promotion of the right of access to adequate housing in terms of sections 26(1) and (2) of the Constitution, had acted reasonably in seeking the eviction of the applicants in this instance.[570]

Yacoob J's reasoning was that the applicants were being evicted and relocated in order to facilitate housing development and, in the circumstances, their eviction constituted a reasonable measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution.[571] Furthermore, there had been reasonable engagement[572] almost all the way [573] between the city

[566] *Thubelisha Homes and Others v Various Occupants and Others* [2008] ZAWCHC 14 (10 March 2008).
[567] *Joe Slovo* [8].
[568] *Joe Slovo* [126].
[569] *Joe Slovo* [3].
[570] *Joe Slovo* [1] and [6].
[571] *Joe Slovo* [115].
[572] Reasonable engagement of the nature described in *Occupiers of 51 Olivia Road* [10]–[21]; *Port Elizabeth Municipality* [39] and [43]–[47]; and *Grootboom* [82]–[83].
[573] *Joe Slovo* [117].

officials and the community through its representatives during the period 2004 to the time when proceedings were instituted.[574]

Moseneke DCJ observed that even though evictions may still take place legally in the new constitutional dispensation, their consequences can be just as devastating as they had been in the past for many poor South Africans.[575] He indicated that our courts had correctly held that the government's obligations in terms of section 26(2) mean that eviction sought by the state should not occur without the provision of alternative housing.[576] He added that when the government seeks to evict a community in pursuit of commendable housing plans, those plans must guarantee that those who are evicted and relocated have a reasonable opportunity of accessing adequate housing.[577]

Ngcobo J noted that the government's response to the housing crisis, including "the informal settlements with all their hazardous conditions", had been, amongst others, to enact the Housing Act, adopt the Housing Code, develop a comprehensive plan for integrated sustainable human settlement and to implement these legislative and policy measures.[578] He pointed out that the Housing Act was specifically enacted to give effect to the right of access to adequate housing guaranteed in section 26, its declared purpose being to facilitate "a sustainable housing development process".[579] To Ngcobo J it seemed that when people are sought to be relocated the proper question to ask is whether it is in the public interest and thus just and equitable to relocate them.[580] Amongst other cases, he reiterated that in *Occupiers of 51 Olivia Road*[581] the Constitutional Court held that "every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2)".[582] In the circumstances, and relying on other Constitutional Court judgments such as *Grootboom* and *Port Elizabeth Municipality* Ngcobo J ultimately agreed with Yacoob J that the eviction and relocation of Joe Slovo settlement residents was a reasonable measure to

[574] *Joe Slovo* [117].
[575] *Joe Slovo* [170].
[576] *Joe Slovo* [170].
[577] *Joe Slovo* [172].
[578] *Joe Slovo* [203]–[207].
[579] *Joe Slovo* [199].
[580] *Joe Slovo* [217].
[581] *Occupiers of 51 Olivia Road* [17].
[582] *Joe Slovo* [210].

facilitate the housing development programme, and held that neither the Constitution nor PIE precluded the relocation sought by the government.[583]

For O'Regan J, the two important aspects relating to reasonableness were: first, whether the N2 Gateway Housing Project was reasonable within the meaning of section 26 of the Constitution; and secondly whether the processes to implement the plan were reasonable, and thus just and equitable.[584]

Sachs J also held that the government programme, which required the Joe Slovo community to relocate, "constituted a reasonable measure undertaken with the view to fulfilling the governmental authorities' responsibilities to enable the residents to have access to adequate housing".[585]

Lastly, the Constitutional Court's ultimate order differed from the High Court decision in three main respects: first, it imposed an obligation upon the respondents to ensure that 70% of the homes to be built on the site of the Joe Slovo informal settlement were allocated to those people currently resident there or who were resident there but moved away after the launching of the N2 Gateway Housing Project; secondly, it specified the quality of the temporary accommodation in which the occupiers would be housed after the eviction; and thirdly, the Constitutional Court required an ongoing process of engagement between the residents and the respondents concerning the relocation process.[586]

3.3.5 Summary

From what has been discussed above, the essence of section 26 is best encapsulated in the following words by Mogoeng CJ:[587]

> This … is about homelessness and vulnerability. One of the many painful and demeaning experiences that the overwhelming majority of our people had to contend with during the apartheid era was not having a place they could truly call home, and their vulnerability to the system's ever-abiding readiness to evict arbitrarily … A catalyst in the liberalisation of home-ownership has been section 26 of the Constitution which provides for access to adequate housing and its progressive realisation. This section is also a damper on the rampant evictions from residential property.

[583] *Joe Slovo* [229].
[584] *Joe Slovo* [294].
[585] *Joe Slovo* [368].
[586] *Joe Slovo* [5].
[587] *Sarrahwitz v Martiz N.O. and Another* 2015 (4) SA 491 (CC) (hereinafter *Sarrahwitz*) [1]–[2].

3.4 Conclusion

Van der Walt and Viljoen contend that access-to-housing rights and the protection of existing housing rights generally depend on section 26, further bolstered by the right to human dignity as enshrined in section 10, and not section 25.[588] Section 26, in the stated context, is a strong constitutional foundation for the promotion of housing rights (both in the form of tenure security and anti-eviction strategies), and it is not hampered by any perceived structural or hierarchical weakness *vis-à-vis* property.[589] They argue further that section 26 should be seen and developed as the primary constitutional foundation of housing rights. To the extent that it is the duty of the state to accommodate unlawful occupiers on a permanent basis, and it is the state that has the power to legislate and implement programmes to that effect they contend that there is very limited reason or scope, if any, for promoting or strengthening housing rights via the property framework of section 25.[590] A careful reading of section 26 and observation of the reasoning informing various judgments such as *Jaftha, Port Elizabeth Municipality*, *Gundwana* and so forth reflects that the provisions of section 26 are primarily aimed at alleviating homelessness by prescribing the right of access to adequate housing, at the state's expense, and prohibiting arbitrary evictions. As correctly indicated by Muller, the inclusion of the right of access to adequate housing in the Constitution marked a decisive break with the past evil practices, and the eviction laws experienced a paradigm shift to a position where factors pertaining to personal circumstances of unlawful occupiers and potential hardships that may be triggered by evictions now stand at the forefront of the enquiry into the justice and equity of the eviction.[591]

The discussion in this chapter also confirms that the Constitution recognises the intricate relationship between land rights, the right of access to housing and of not being arbitrarily evicted, through both sections 25 and 26. Sachs J's articulation that the stronger the right to land, the greater the prospect of a secure home, remains significantly relevant to this day.[592] The significant aspect for this study is

[588] Van der Walt and Viljoen 2015 *PER/PELJ* 1070.
[589] Van der Walt and Viljoen 2015 *PER/PELJ* 1070.
[590] Van der Walt and Viljoen 2015 *PER/PELJ* 1071.
[591] Muller *The impact of section 26 of the Constitution* 154.
[592] *Port Elizabeth Municipality* [19].

that the endeavour to protect and advance secure land tenure rights, the right of access to adequate housing and the right against arbitrary eviction from one's home enshrined in both sections 25 and 26 of the Constitution resulted in various pieces of legislation subsequently being enacted, which are extensively dealt with in the next chapters. Any envisaged eviction rules ought to take cognisance of and seek to advance those laws or their values and objectives.

Chapter 4: Substantive laws impacting on the evictions regulatory framework: Evictions in the pre-constitutional era

4.1 Introduction

In chapters 4 and 5 an analysis of substantive laws concerning evictions in South Africa will be conducted, and the extent to which aspects thereof have or have not been included in the existing civil court rules will be examined. Any uniform rules envisaged for evictions will have to embody and advance the values enshrined in some of these laws, or in certain instances even derive their authority therefrom. Therefore, to facilitate an easy flowing discussion the eviction regulatory framework is grouped under two broad themes: (1) evictions in the pre-constitutional era (chapter 4); and (2) evictions in democratic South Africa (chapter 5).

Under the pre-constitutional period eviction remedies will be analysed from two perspectives, namely: the common-law *rei vindicatio*; and the legislative framework, comprising the Group Areas Acts; PISA; NBRBSA and so forth. Chapter 4 will thus focus on the pre-democratic eviction-law remedies, as they provide valuable historical background on the present framework.

In the democratic era PIE and various other laws were promulgated, based particularly on the provisions of sections 25 and 26 of the Constitution, which resulted in a major shift in the evictions regulatory dispensation. PIE was geared at entrenching the right to non-arbitrary and court ordained evictions, and therefore aimed at regulating evictions in the constitutional dispensation.[593] PIE replaced both pre-constitutional eviction remedies modelled on the *rei vindicatio* and PISA, as concerns residential property.[594] Chapter 5 will concentrate on laws in the democratic South Africa which prescribe certain procedures and requirements applicable to eviction processes. Post-democracy laws that will be given greater focus in the next chapter are the following: (1) LTA and ESTA (rural and land tenure evictions); (2) PIE and REHA (urban evictions); and (3) incidental

[593] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 80.
[594] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 80. See section 4(1) of PIE.

legislation, such as the Interim Protection of Informal Land Rights Act.[595] This study focuses on these laws as they prescribe certain procedures and requirements applicable to eviction processes.

The diagram below sets out the regulatory framework on evictions in the pre-and post-constitutional contexts. The pre-constitutional era legislative framework segment does not cite the various pieces of legislation as these are voluminous and are discussed comprehensively in the text.

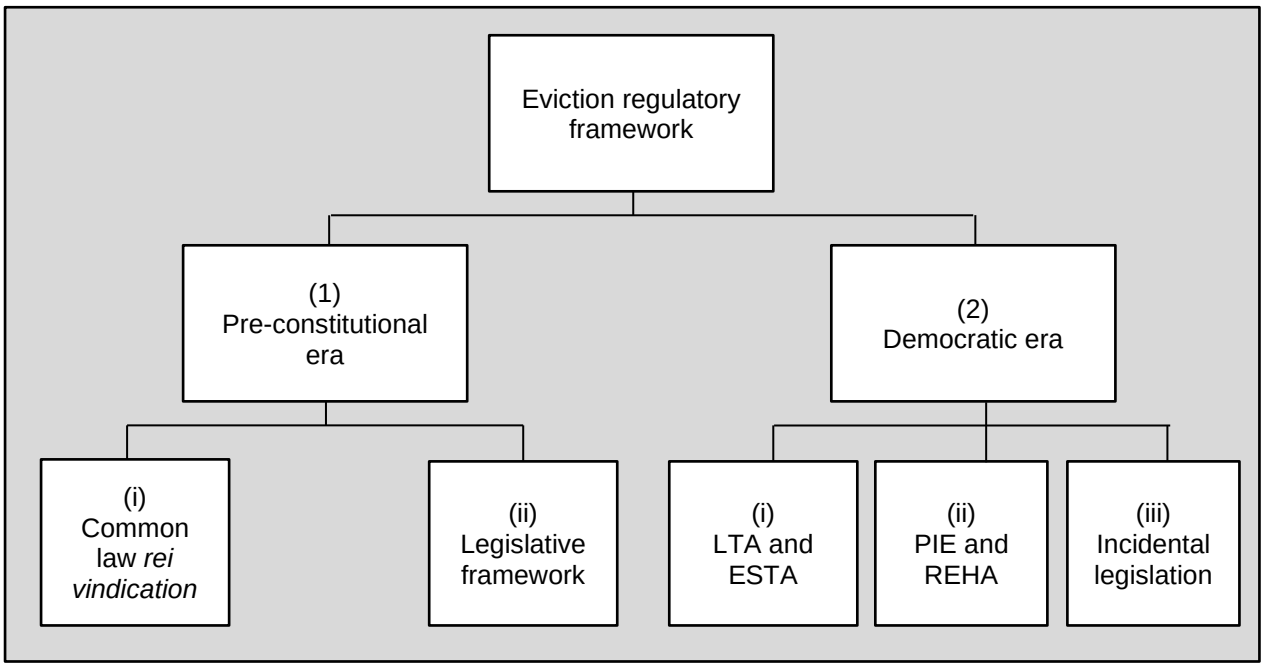

Diagram 4.1: Evictions regulatory framework

The main consideration throughout chapters 4 and 5 will be to determine whether any procedural court rules for eviction emanated from both common-law principles or remedies and the legislative framework of a particular era, or whether prospects for such rules exist. Pertinent case law will also be discussed under the different groupings or sub-divisions.

I will now switch the focus onto the position pertinent to evictions in the pre-constitutional era, which forms the basis of this chapter.

[595] The Interim Protection of Informal Land Rights Act 31 of 1996 (hereinafter referred to as IPILRA).

South Africa became a Union in 1910, developed into a Republic on 31 May 1961, and was transformed into a constitutional democracy through the first free general elections of 27 April 1994.[596] As will be illustrated below, Pienaar mentions that between 1910 and the early 1990s the cumulative effect of legislative measures promulgated "in alignment with influx control, group areas and unlawful occupation of land had a devastating impact on land-related matters".[597] Unlawful land occupation outside the framework of those legislative measures was a crime and prosecuted draconically.[598] As Muller *et al* put it:[599]

> Until 1991 the land tenure system in South Africa was based on race. Legislation made inroads on common law as well as on communal tenure rights. A vast and complex system of land control consisting of a profusion of legislative measures emerged.

In this old dispensation courts could adjudicate eviction matters through either one of two distinct legal remedies available to the owner of an immovable property: first, the common-law *rei vindicatio*; secondly and in the alternative, certain legislative provisions regulating evictions.[600] Both remedies gave the owner procedural and substantive frameworks to effectively vindicate and recover occupation.[601] However, as will be fully discussed below, the legislative option was not available *only* to private owners, but in addition also allowed the *state* to (forcefully) evict unlawful occupiers.[602] Legislative instruments such as the War Measures Act,[603] PISA and the Prevention of Illegal Squatting Amendment Act[604] bear testimony.

Evictions in the *apartheid* era were not concerned with the personal circumstances of unlawful occupiers, due to the absence of legislative imperatives such as those stipulated in sections 25 and 26 of the Constitution advocating for access to

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[596] See Pienaar *Land reform* 75–79.
[597] Pienaar *Land reform* 113.
[598] Pienaar *Land reform* 113.
[599] Muller *et al* S*ilberberg & Schoeman's law of property* 675.
[600] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 10. See also Pienaar *Land reform* 667 and Cloete and Boggenpoel 2018 *SALJ* 433.
[601] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 10.
[602] See Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 52–53.
[603] War Measures Act 13 of 1940 (hereinafter referred to as WMA). Enacted through Proclamation 76 in *Government Gazette Extraordinary* 3325 dated 6 April 1944. See Muller *The Impact of section 26 of the Constitution* 54.
[604] Prevention of Illegal Squatting Amendment Act 92 of 1976 (hereinafter referred to as PISA Amendment Act).

adequate housing and obliging courts to regard all relevant circumstances before issuing an eviction order.[605] A landowner could therefore evict an occupier through the *rei vindicatio* by simply proving ownership and the absence of consent or some other right in law to occupy.[606] An eviction order could thus be granted despite the hardship such an ejectment might cause, and notwithstanding the number of people in occupation of the land in question, or their reason for occupying it.[607] Pienaar asserts that:[608]

> Unlawful occupation of land in South Africa was previously characterised by a high-handed, draconic approach involving the conventional response in the form of eviction. In this regard the regulation of unlawful occupation was much more than a planning tool only.

The pre-constitutional era was therefore characterised by the existence of a plethora of remedies (legislative and common law) that enabled the state and private owners to evict unlawful occupiers. The requirements of the respective remedies, together with the unique facts of each case, steered the courts in deciding whether an eviction order should be granted. However, these were not the only factors that influenced the outcome of eviction cases. The legal culture within which the courts applied eviction remedies in the pre-constitutional period will therefore also be evaluated.

4.2 Common-law remedy: *Rei vindicatio*

The common law is a system of law characterised by case law, which is law developed by judges through decisions of courts over time.[609] South African common law includes elements of Roman-Dutch law as well as the legal rules and

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[605] See Muller GM "The legal-historical context of urban forced evictions in South Africa" 2013 *Fundamina*, Vol. 19, 367–396 369.

[606] "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

[607] "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

[608] Pienaar JM "Reflections on the South African land reform programme: characteristics, dichotomies and tensions (part 1)" 2014 *TSAR*, Vol. 3, 425–446 444.

[609] "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

practices developed by the courts.[610] In the pre-constitutional era property relations in South Africa were predominantly regulated by the common law.[611]

In the South African common law, ownership is described as the real right that confers the most complete control over a thing, is viewed as having an individualistic nature and is an absolute right that can be enforced against anyone.[612] In this context the common-law *rei vindicatio*, based on the entitlement to recover (*ius vindicandi*), has over the years been the remedy available to a landowner to re-claim the property and evict unlawful occupiers occupying same without his or her consent or another right in law.[613] However, the few instances in which an owner cannot vindicate his or her property are in the case of: (1) stolen money; and (2) judicial sales.[614] Concerning the first exception, if movable property consists of cash or negotiable instruments payable to bearer which have been stolen, the owner of such items cannot reclaim them from a *bona fide* possessor for value.[615] In the second instance, the owner cannot vindicate movable or immovable property sold in execution (judicial sale), if knowing of the sale he or she had allowed it to proceed without protesting, unless the purchaser was acting in bad faith.[616] Public sales of property forming part of an estate by trustees in insolvent estates also have a similar effect as judicial sales.[617]

As such, and save for the exceptions stated above, the *rei vindicatio* is the most important real action available to an owner, and to succeed with it the owner must merely allege and prove that he or she is the owner of the property in the

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610 "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

611 "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

612 Muller 2013 *Fundamina* 367.

613 Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 1; Muller 2013 *Fundamina* 368; Van der Merwe CG "Property and succession" in Hutchison D *et al Wille's Principles of South African law* 8th ed (Juta Cape Town 1991) 249–406 270; and Boggenpoel ZT *Property remedies* (Juta Cape Town 2017) 41–43.

614 Van der Merwe *Property* 271.

615 Van der Merwe *Property* 271; Voet 6.1.8; Van der Keesel *Th* 525; and *Kahn v Volschenk* 1986 (3) SA 84 (A). In South Africa there are no public markets (and therefore no law similar to Dutch law) corresponding to old free markets like those in Holland (*vrje markte*) in which stolen property that had been sold therein could be vindicated by the owner if he refunded to the purchaser the price paid therefor (Grotius 2.3.6; Voet 6.1.8; Van Leeuwen *RHR* 273, cf 1.2.11.3; *Van der Merwe v Webb* (1883–1884) 3 EDC 97.

616 Van der Merwe *Property* 271–272; Voet 6.1.13; 42.5.3; Mattheus *De Auct* 1.11.18, 30; *Modelay v Zeeman* 1968 (4) SA 639 (A); *Van der Walt v Kollektor (Edms) Bpk & Andere* 1989 (4) SA 690 (T); and section 70 of the Magistrates' Courts Act.

617 *Lange v Liesching* (1880) Foord 55 60; section 36(5) of the Insolvency Act 24 of 1936.

defendant's possession.[618] Once the owner satisfies these requirements, the court has no discretion to refuse the eviction order on the grounds of the social and economic circumstances of the unlawful occupiers or any other general policy considerations.[619] In *Chetty v Naidoo*[620] the court held that once it had been established that the plaintiff is owner of the property and the defendant is in possession, then the *onus* is on the defendant to prove that she has the right to occupy the property. In essence therefore, the action is an action *in rem* whereby the plaintiff must allege and prove:[621]

(1) ownership of the thing (movable or immovable);[622]
(2) that the property still exists and is identifiable;[623] and
(3) that the defendant was in possession of this property at the time of instituting the action.[624]

In turn, the defendant can raise various defences, including that:[625]

(1) a third party is the owner;
(2) the property is destroyed;
(3) he has a right to possession; or that

(4) he can show that he is no longer in control of the property.[626]

Under the common law much emphasis was placed on advancing and protecting ownership (*dominium*) and the entitlements flowing therefrom. Jansen JA remarked in *Chetty* that although it may not be easy to define *dominium* comprehensively, there can nevertheless be little doubt that one of its incidents is

[618] Muller 2013 *Fundamina* 368; *Chetty v Naidoo* 1974 (3) SA 13 (A) 14 and 20; Van der Merwe *Property* 270; *Van der Merwe and Another v Taylor* 2008 (1) SA 1 (CC) (hereinafter *Van der Merwe*) [22] and [114]; Boggenpoel *Property remedies* 43–46; and Muller *et al* S*ilberberg & Schoeman's law of property* 269-–291.

[619] Muller 2013 *Fundamina* 368; and Van der Walt AJ *Property in the margins* (Hart Publishing: Oxford 2009) 54.

[620] *Chetty v Naidoo* 1974 (3) SA 13 (A) (hereinafter *Chetty*) 14 and 20. Subsequently confirmed in *Akbar v Patel* 1974 (4) SA 104 (T) 109FH and *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) 528H–529A.

[621] Harms LTC *Amler's Precedents of pleadings* 6th ed (LexisNexis Butterworths Durban 2003) 350; *Van der Merwe* [22] and [114]; Boggenpoel *Property remedies* 43–46; and Muller *et al* S*ilberberg & Schoeman's law of property* 269-–291.

[622] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) 82; and *Concor Construction (Cape) (Pty) Ltd v Santam Bank Ltd* 1993 (3) SA 930 (A).

[623] Maass S *Tenure security in urban rental housing* (Unpublished LLD thesis, Stellenbosch University 2010) 35.

[624] *Graham v Ridley* 1931 TPD 476; and *Chetty*.

[625] Van der Merwe CG and De Waal MJ *The law of things and servitudes* (Butterworths Durban 1993) 183; Boggenpoel *Property remedies* 74–85; and Muller *et al* S*ilberberg & Schoeman's law of property* 269-–291.

[626] Boggenpoel *Property remedies* 74.

the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his (or her) property wherever found, from whomsoever holding it.[627] In the judge's own words:[628]

> It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at … 382E, 383).

The element of exclusive use and possession (exclusivity) described in *Chetty* as a significant feature of ownership has its roots from the Roman maxim *ubi rem meam invenio ibi eam vindicio,*[629] meaning that an owner can vindicate his or her property wherever such owner finds it.[630] The maxim has become entrenched in the South African common law,[631] and is manifested practically through the application of the *rei vindicatio*. According to Van der Walt[632] the protection afforded by the *rei vindicatio* is very strong, as it is based on the 'normality' assumption that the owner is entitled to exclusive possession of his or her property – and this 'normal state of affairs' would most likely be upheld in the absence of good reason for not doing so. As such, the courts found stable legal meaning in the South African doctrinal tradition that entitled a private owner to exclude others from his or her property and enforce this right through the *rei vindicatio*.[633] Thus, with the common law skewed towards strong property rights, evictions occurred without any regard to personal circumstances or needs of unlawful occupiers,

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627 *Chetty* 20.

628 *Chetty* 20.

629 D 6.1.49; D 44.7.25; Van der Merwe CG *Sakereg* 2nd ed (Butterworths Durban 1989) 347; Milton JRL "Ownership" in Zimmerman R and Visser D (eds) *Southern cross: civil law and common law in South Africa* (Clarendon Press Oxford 1996) 657-699 686; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The law of property* 5th ed (LexisNexis Durban 2006) 243; Van der Merwe CG and Pope A "Property" in F du Bois (eds) *Wille's principles of South African law* 9th ed (Juta 2007) 405-729 539; *Morum Bros Ltd v Nepgen* 1916 CPD 392; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 406; *Chetty* at 20; *Hefer v Van Greuning* 1979 (4) SA 952 (A) 959; and *Kahn v Volschenk* 1986 (3) SA 84 (A) 92.

630 Van der Merwe and Pope *Property* 539; Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 45.

631 Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 46.

632 Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: a model to evaluate South African land reform legislation" 2002 *TSAR* 254–289 257.

633 Muller 2013 *Fundamina* 369.

more so in the absence of any constitutional guarantees and imperatives for human rights.[634] This position even extended to the landlord-tenant sphere. Under common law a tenant was obliged to vacate the leased property on termination of the lease. Upon expiry of the tenant's temporary right of use of the rented property, the landlord's strong right to exclusive possession entitled him to reclaim his property.[635] In instances where a tenant remained in occupation after the lease terminated and was thus effectively holding over, he could be ejected through a court order in addition to being held liable in damages if the landlord sued in delict for violation of his ownership rights.[636] Ownership was regarded as being inherently unrestricted,[637] therefore arming the owner with a powerful right to reclaim his property.[638] At some stage academic scholars such as Savigny and Windscheid went so far as to describe private ownership as the "unrestricted and exclusive domain over property", which could nevertheless "tolerate" restrictions.[639] Wessels J endorsed this notion in *Johannesburg Municipal Council v Rand Townships Registrar and Others*,[640] and the Appellate Division, through Steyn CJ, confirmed it in *Regal v African Superslate (Pty) Ltd*.[641]

In the pre-constitutional era courts tended to be guided by and advanced the characteristics of ownership when they adjudicated eviction cases in terms of the *rei vindicatio* in order to give full force to an owner's right to exclude.[642] The individualistic, exclusive and absolute nature of ownership was seemingly the cornerstone around which the courts' rationale revolved when adjudicating on *rei vindicatio*-driven eviction matters, at the expense of the competing interests of

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634 Muller 2013 *Fundamina* 369; Strauss M and Liebenberg S "Contested spaces: housing rights and evictions law in post-apartheid South Africa" 2014 *Planning Theory*, Vol. 13 no. 4, 428–448; and Dugard J *et al* "The right to housing in South Africa" 2016 *Foundation for Human Rights (FHR)* (Position Paper) 2–60, : http://www.fhr-mirror.org.za/files/8515/1247/1750/Housing.pdf (Date of use: 2 February 2021).

635 Maass *Tenure security* 33.

636 Wille G *Landlord and tenant in South Africa* 2nd ed (Juta Cape Town 1927) 248.

637 Visser DP "The Absoluteness of ownership: the South African common law in perspective" 1985 *Acta Juridica 39*–52 47.

638 Maass *Tenure Security* 33.

639 Visser 1985 *Acta Juridica* 47.

640 *Johannesburg Municipal Council v Rand Townships Registrar and Others* 1910 TS 1314 at 1319.

641 *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 106. In Steyn CJ's words: "As algemene beginsel kan iedereen met sy eiendom doen wat hy wil, al strek dit tot nadeel of misnoeë van 'n ander, maar by aangrensende vasgoed spreek dit haas vanself dat daar minder ruimte is vir onbeperkte regsuitoefening".

642 Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 48.

unlawful occupiers. One of the earliest cases concerning *rei vindicatio* was that of *Van der Merwe v Webb,*[643] although it concerned movables (oxen). There the plaintiff had initiated proceedings against the defendant to recover three oxen, or the payment of the sum of £38 as their value, and for £20 damages for wrongful detention of the said oxen.[644] These oxen had earlier been stolen from the plaintiff by one Van Niekerk, and were subsequently bought by the defendant at a public market.[645] After considering numerous authorities the court eventually held that the defendant could not have a better title to the oxen in suit than was possessed by the thief from whom he bought them, and consequently he could not resist the plaintiff's demand for the restitution of his property.[646] The court noted that the Roman-Dutch civil law – as pronounced by authorities such as Voet, Grotius, and Van Leeuwen had developed to a point where ownership consisted in the right to recover lost possession even where the present possessor held *bonâ fide* and for value, for the owner could exercise his right even without returning the possessor his money.[647] Theft did not deprive a man of his title to property, and the action of *rei vindicatio* was in effect given against the *bona fide* purchaser.[648]

In a judgment that was subsequently endorsed in various cases, including *Mayaka v Havemann and Another*[649] and *Jeena v Minister of Lands*,[650] the court in *Graham v Ridley*[651] accepted that:[652]

> One of the rights arising out of ownership is the right to possession; indeed *Grotius* (Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. *Prima facie,* therefore, proof that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession, i.e., to an order for ejectment.

Lastly, in *Gien v Gien*[653] Spoelstra AJ confirmed that ownership is the most complete right that an individual can have in relation to a thing, and the starting

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643 *Van der Merwe v Webb* (1883–1884) 3 EDC 97 (hereinafter *Webb*).
644 *Webb* 97.
645 *Webb* 97.
646 *Webb* 114.
647 *Webb* 113; Van der Merwe *Property* 270; Grotius 2.3.5; Voet 6.1.7; *Wainwright & Co v Trustee Assigned Estate S Hassan Mahomed* (1908) 29 NLR 619 626–7; and *Mngadi v Ntuli* 1981 (3) SA 478 (D).
648 *Webb* 101–102; and Van der Merwe *Property* 270.
649 *Mayaka v Havemann and Another* 1948 (3) SA 457 (A) at 465.
650 *Jeena v Minister of Lands* 1955 (2) SA 380 (A) (hereinafter *Jeena*) 382.
651 *Graham v Ridley* 1931 TPD 476 (hereinafter *Ridley*).
652 *Ridley* 479.
653 *Gien v Gien* 1979 (2) SA 1113 (T) 1120C (hereinafter *Gien*).

point in any dispute relating to the right of the owner is that the owner of land can do on his property whatever he likes, although he is still required to exercise his rights in accordance with the law. As such, in the *apartheid* era landowners could rely not only on the *rei vindicatio* to protect and advance their ownership rights but also on the available oppressive legislative instruments to evict occupants and reclaim property.

In fact, Muller points out that the operation of the *rei vindicatio*, in conjunction with rural and urban land tenure legislative measures, saw Black people settling only in demarcated group areas or official townships.[654] It was a period in which two separate legal eviction remedies existed, based on two distinct *modi operandi* and applicable to two different race groups respectively.[655] In essence courts adjudicated eviction cases based on either the *rei vindicatio* or PISA and related laws, depending on the race of the occupier(s). The *rei vindicatio* was mainly relied on and applied in the event of unlawful occupation by a white occupier, with PISA being generally applied where an eviction order was sought against a Black unlawful occupier coupled with a possible criminal conviction.[656] An in-depth evaluation of pertinent legislation of that time and its impact would therefore be appropriate at this stage.

4.3 Laws pertinent to evictions in the pre-democratic era

In the pre-democratic era the South African land control system was race-based, characterised by the distinctive *apartheid* land law which co-existed alongside the country's common law.[657] During *apartheid* the minority white population owned and had access to the vast majority of the land, living in formal houses or flats, whilst the Black majority population was relegated to ethnically-based 'homelands' or dormitory townships on the outskirts of cities and towns, residing in huts, shacks or rudimentary houses.[658] Such segregation was made possible through a host of repressive legislation including the Natives Land Act,[659] Group Areas Act[660] and

[654] Muller *The impact of section 26 of the Constitution* 11.
[655] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 55; Van der Walt 2002 *TSAR* 258.
[656] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 55.
[657] Muller *et al* S*ilberberg & Schoeman's law of property* 673.
[658] Dugard http://www.fhr-mirror.org.za/files/8515/1247/1750/Housing.pdf (Date of use: 2 February 2021).
[659] Natives Land Act 27 of 1913.

PISA.[661] *Apartheid* land and planning legislation systematically deprived the Black population of formal access to land and housing in urban areas, thereby entrenching socio-economic and spatial inequality and creating conditions for the unlawful occupation of land and property.[662]

The old South Africa was characterised by institutionalised racial and gender discrimination and the exclusion of persons, groups and communities from secure land tenure.[663] Land tenure therefore became criminalised for certain racial groups, in a system enforced through stringent, draconian group areas and anti-squatting measures.[664] However, as people steadily flocked into the demarcated group areas or official townships areas the supply of residential space for Black people dwindled, thereby forcing them to occupy land close to employment opportunities in contravention of the Group Areas Act.[665] To control such an unlawful influx the government responded by forcefully evicting people for health, safety and public interest reasons[666] invoking legislation such as PISA alone, or in conjunction with the 1966 Group Areas Act, the Slums Act,[667] the Trespass Act,[668] the Physical Planning Act[669] or the Health Act.[670]

Even before the advent of institutionalised *apartheid* by the National Party in 1948 segregation and forced removals existed, driven by a variety of legislation existing at that time.[671] Such laws restricted the movements of all people not classified as white, limiting their power to own land or businesses and exploiting their labour to

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[660] Group Areas Act 41 of 1950.

[661] Muller *et al* S*ilberberg & Schoeman's law of property* 673–676; and Dugard http://www.fhr-mirror.org.za/files/8515/1247/1750/Housing.pdf (Date of use: 2 February 2021).

[662] Muller *et al* S*ilberberg & Schoeman's law of property* 673–676; and Dugard http://www.fhr-mirror.org.za/files/8515/1247/1750/Housing.pdf (Date of use: 2 February 2021).

[663] Pienaar G "Aspects of land administration in the context of good governance" PER/PELJ 2009, Vol. 12, No.2, 15–55 17.

[664] Pienaar 2009 *PER/PELJ* 17; and Dugard http://www.fhr-mirror.org.za/files/8515/1247/1750/Housing.pdf (Date of use: 2 February 2021).

[665] Group Areas Act 36 of 1966. Muller *The Impact of section 26 of the Constitution* 11.

[666] Muller *The impact of section 26 of the Constitution* 11.

[667] Slums Act 53 of 1934.

[668] Trespass Act 6 of 1959.

[669] Physical Planning Act 88 of 1967.

[670] Health Act 63 of 1977.

[671] Legislation such as the 1906 and 1908 Asiatic Law Amendment Ordinance 29, the Natives Land Act 27 of 1913, the 1925 Areas Reservation Bill, the Black (Urban Areas) Act 21 of 1923, the Black Administration Act 38 of 1927, the Black Service Contract Act 24 of 1932, the Slums Act 53 of 1934, the Development Trust and Land Act 18 of 1936, the Unbeneficial Occupation of Farms Act 29 of 1937, the WMA, the Black (Urban Areas) Consolidation Act 25 of 1945, the Coloured Persons Settlement Act 7 of 1946, and the Asiatic Land Tenure Act 28 of 1946.

benefit whites.[672] These were the foundations upon which some of *apartheid's* most oppressive legislation, like the 1950 Group Areas Act, was built upon. In turn, the 1950 Group Areas Act formalised and rigorously implemented forced removals on an enormous scale from its promulgation on 7 July 1950 until its repeal in 1991[673] under the Abolition of Racially Based Land Measures Act.[674] And then, three years after the National Party achieved election victory in 1948, the powerful PISA was enacted with the aim of protecting the wellbeing and property interests of whites from Blacks.[675] PISA, in an eviction context, had far-reaching consequences for Blacks living in the era under discussion. Some of the significant laws amongst those described above, including PISA, are therefore worth dissecting.

4.3.1 Natives[676] Land Act 27 of 1913

This Act was assented to on 16 June 1913 and commenced on 19 June 1913. In its Preamble the Act states its purpose as being to provide for the purchase and leasing of land – and for other purposes in connection with the ownership and occupation of land – by Natives (Blacks) and other persons in the several parts of the Union (of South Africa). It was effectively passed to allocate only about 7–8% of arable land to Blacks and leave the more fertile land for whites, and in the process incorporated territorial segregation into legislation for the first time since the Union in 1910.[677] It created reserves for Black people and forbade the sale of

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[672] Pienaar *Land reform* 104–113; Muller *et al Silberberg & Schoeman's law of property* 673–676; and https://www.sahistory.org.za › article › forced-removals-south-africa (Date of use: 2 January 2020).

[673] Pienaar *Land reform* 104–113; Muller *et al Silberberg & Schoeman's law of property* 673–676; and https://www.sahistory.org.za › article › forced-removals-south-africa (Date of use: 2 January 2020).

[674] Abolition of Racially Based Land Measures Act 108 of 1991.

[675] Muller *The impact of section 26 of the Constitution* 54.

[676] The Act defined a 'native' as "any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives." See South African History Online (SAHO) https://www.sahistory.org.za/article/natives-land-act-1913 (Date of use: 23 March 2021).

[677] Davenport TRH *South Africa: a modern history* 4th ed (Macmillan London 1991); Muller CFJ (ed) *Five Hundred years: a history of South Africa* 3rd rev. ed (Academica Pretoria 1981) 393–396; Pienaar *Land reform* 80–84; Reader's Digest *Illustrated history of South Africa: the real story* (New York: Reader's Digest Association 1988) 29–-292; and https://www.sahistory.org.za › dated-event › native-land-act-passed (Date of use: 3 January 2020).

land in white areas to Black people and vice versa.[678] Black South Africans could no longer own, or even rent, land outside of designated reserves.[679] This Act essentially allocated over 80% of the territory to white people, who made up less than 20% of the population, and provided that Black people could live outside the reserves only if they could prove that they were in employment.[680] Any person found to be occupying land in contravention of section 1 would be guilty of an offence,[681] punishable with a fine, imprisonment for six months (with or without hard labour) upon non-payment of the fine or a further fine for a continuation of the offence after release from prison.[682] Black people could, however, avoid fines and possible imprisonment if they worked as labour tenants on white farms.[683] Bundy maintains that in essence the 1913 Act attempted to legislate out of existence the more independent forms of tenure and instead perpetuate the most dependent.[684]

Although it was applicable to the whole of South Africa, in practice this Act applied only to the Transvaal and Natal provinces.[685] In the Free State, such legislation was already in force since 1876, while a law forbidding Black people to own property in the Cape would have been in conflict with the Constitution of the Union of South Africa, as Cape property-ownership was one of the qualifications for Black franchise.[686] The Act legally established the idea that Black people did not belong in much of South Africa, and became one of the foundations upon which

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[678] Pienaar *Land reform* 80–84; *https://www.sahistory.org.za › dated-event › native-land-act-passed* (Date of use: 3 January 2020).

[679] Boddy-Evans A "Pre-Apartheid era laws: Natives (or Black) Land Act No. 27 of 1913." ThoughtCo, updated 17 June 2018 https://www.thoughtco.com/pre-apartheid-era-laws-43472 (Date of use: 3 January 2020).

[680] Davenport *South Africa: A modern history*; Muller (ed) *Five Hundred years: a history of South Africa* 393-396; Pienaar *Land reform* 80–84; Reader's Digest *illustrated history of South Africa* 291-292; and https://www.sahistory.org.za › dated-event › native-land-act-passed (Date of use: 3 January 2020).

[681] Section 5 of the Natives Land Act.27 of 1913.

[682] Muller *The impact of section 26 of the Constitution* 37.

[683] Muller *The impact of section 26 of the Constitution* 37.

[684] Bundy C "Land, law and power" in Murray C and O'Regan C (eds) *No place to rest – forced removals and the law in South Africa* (Oxford University Press 1990) 3–12 6. Bundy further shows that the intention of the Natives Land Act was to outlaw cash-paying tenants, and in the Orange Free-State to forbid all sharecropping agreements. It was intended to reduce cash tenants and sharecroppers to the status of labour tenants or wage labourers.

[685] https://www.sahistory.org.za › dated-event › native-land-act-passed (Date of use: 3 January 2020). See also Braun LF *Colonial survey and native landscapes in rural South Africa, 1850–1913: the politics of divided space in the Cape and Transvaal* (Leiden: Brill 2015).

[686] https://www.sahistory.org.za › dated-event › native-land-act-passed (Date of use: 3 January 2020). See also Braun LF *Colonial survey and native landscapes in rural South Africa, 1850–1913: the politics of divided space in the Cape and Transvaal* (Leiden: Brill 2015).

subsequent racial legislation and policies around land were built.[687] In 1959, these reserves were converted into Bantustans, and in 1976, four of them were actually declared 'independent' states within South Africa,[688] a move that stripped those born in those four territories of their South African citizenship.[689] This Act was eventually repealed by section 1 of the Abolition of Racially Based Land Measures Act.

4.3.2 Natives (Urban Areas) Act 21 of 1923

This Act regulated the presence of Black people in urban areas, policed their communities, giving local authorities various powers in respect of Black people.[690] The powers given to local authorities included the power to demarcate and establish African locations on the outskirts of white urban and industrial areas; to determine access to these areas, to control movement through the Pass system and to provide housing.[691] Most importantly, Black people living in white areas could be forced to move to the locations. Local authorities had to administer tougher Pass laws: Black people deemed surplus to the labour needs of white households, commerce and industry, or those leading an "idle, dissolute or disorderly life", could be deported to the reserves.[692]

All Black people who were employed within the jurisdiction of an urban local authority were further prohibited from obtaining residence anywhere else than in locations, native villages or native hostels.[693] A Black labourer could be brought before a magistrate or native commissioner to "provide good and satisfactory account of himself" where there was reason to believe that he was: (1) habitually unemployed; (2) "by reason of his own default" not in a position to lead a honest livelihood; (3) leading an idle, dissolute or disorderly life; or (4) had been ordered

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[687] Pienaar *Land reform* 80–84; and Boddy-Evans https://www.thoughtco.com/pre-apartheid-era-laws-43472 (Date of use: 3 January 2020).

[688] These homelands were Bophuthatswana; Ciskei; Transkei; and Venda.

[689] Boddy-Evans https://www.thoughtco.com/pre-apartheid-era-laws-43472 (Date of use: 3 January 2020).

[690] Pienaar *Land reform* 95, 105 and 662–663; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020). See also Muller *The impact of section 26 of the Constitution* 44.

[691] Pienaar *Land reform* 95, 105 and 662–663; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020). See also Muller *The impact of section 26 of the Constitution* 44.

[692] Pienaar *Land reform* 94–95 and 105; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[693] In terms of section 5(1) of the Act. See Muller *The impact of section 26 of the Constitution* 45.

to leave the proclaimed area in terms of section 12(1)(h) of the Act. [694] If the labourer failed to provide a good and satisfactory account of himself a magistrate or native commissioner could order his eviction; his return to his place of origin and enforce a time limitation on his return to the proclaimed area, or impose detention for a maximum period of two years "in a farm colony, work colony, refuge, rescue home, or similar institution established or approved in terms of section [50] of the Prisons and Reformations Act (13 of 1911)".[695] According to Muller, these provisions were copied verbatim in the Black (Urban Areas) Consolidation Act,[696] which in turn led to the proclamation of the *Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters*.[697] Various forms of urban tenure (leasehold) for Black people were institutionalised through these regulations conforming to the policy whereby the presence of Black people in urban areas was considered to be of a temporary nature, administered through the issuing or withdrawal of residential and site permits.[698] It was only in the late 1980's and early 1990's through legislative measures such as the Conversion of Certain Rights into Leasehold or Ownership Act[699] and others[700] that the government began the process aimed at dismantling *apartheid* land law.[701] The long title of the Conversion of Certain Rights into Leasehold or Ownership Act described its purpose as being to provide for the conversion of certain rights of occupation into leasehold or ownership, a process that paved the way for the issuing of title deeds to Black people in respect of the municipal houses they had been residing in.

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[694] Section 17(1) of the Act.

[695] Sections 17(1) and (2) of the Natives (Urban Areas) Act No 21 of 1923. Muller *The impact of Section 26 of the Constitution* 47.

[696] Black (Urban Areas) Consolidation Act 25 of 1945.

[697] Muller *The impact of section 26 of the Constitution* 47. Proclamation R1036 of 1968 in *Government Gazette* Extraordinary 2096 dated 14 June 1968.

[698] Muller *The impact of section 26 of the Constitution* 47–51.

[699] Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

[700] Other laws promulgated in this regard included the Abolition of Influx Control Act 68 of 1986, the Land Affairs Act 101 of 1987, the Abolition of Development Bodies Amendment Act 81 of 1990, the Abolition of Racially Based Land Measures Act 108 of 1991, the Abolition of Racially Based Land Measures Amendment Act 133 of 1992, the Regional and Land Affairs General Amendment Act 89 of 1993 and the Land Reform: Provision of Land and Assistance Act 126 of 1993.

[701] Muller *The impact of section 26 of the Constitution* 51–52.

4.3.3 Native Service Contract Act 24 of 1932

The Act extended existing controls over labour tenancy and also drew Black people outside of the reserves into the agricultural economy.[702] Tenants or members of their family could be expelled by farmers from the land if any one member defaulted on his or her labour obligations.[703] In addition, farmers were given powers to whip tenants, as well as compel farm tenants to carry passes.[704] Muller points out that this Act was the first comprehensive attempt to regulate labour tenancy in the Union.[705] The term 'labour tenant' was defined to mean "a native who is bound to 'render any' services in terms of any labour tenant contract or who has, in terms of any such contract, permission to occupy or use any land".[706] The Act described 'native' to include "any person who is a member of any aboriginal race or tribe of Africa".[707] In a nutshell, 'labour tenant contract' meant "a contract whereby a native binds himself … to render any services of whatever nature as a consideration for permission granted to such native or any member of his family … to occupy or use any land, by any person who has the right to grant such permission".[708] According to Muller upon termination of the labour tenancy contract a labour tenant was entitled to demolish and remove or destroy any building or structure erected on the land that he was entitled to occupy and use in terms of the labour tenant contract if that building or structure was not erected with building materials that the farmer provided free of charge.[709] In the event of failing to vacate the farm within a month of the termination of the labour tenant contract, and after having been ordered by the landowner to vacate, the former labour tenant would be guilty of an offence.[710]

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[702] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[703] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[704] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[705] Muller *The impact of section 26 of the Constitution* 37.
[706] Section 1.
[707] Section 1.
[708] Section 1. See also Muller *The impact of section 26 of the Constitution* 37, in which he discusses this Act.
[709] Muller *The impact of section 26 of the Constitution* 38; and Section 5(8) of the Act.
[710] Muller *The impact of section 26 of the Constitution* 38; and Section 5(12) of the Act.

4.3.4 Slums Act 53 of 1934

The expressed objective of the Slums Act was the improvement of conditions in locations and sanitation, but the Act was actually enforced to demolish and expropriate with the ultimate aim of segregation.[711] A medical officer of health could file a report with the local authority whenever he was of the view that a nuisance existed in or upon any premises, land or part thereof by virtue of various reasons.[712] These included that the premises were so dirty or constructed in such a manner as to make them injurious or dangerous to health or favourable to the spreading of infectious diseases; that the land was so congested with buildings as to pose a health hazard; or that the premises had no proper, adequate or wholesome water supply available within a reasonable distance.[713] The local authority could then declare such an area to be a slum.[714] Thereafter, the local authority could serve notice to the owner of the affected premises or land:[715]

(a) directing him to remove the nuisance, including through taking steps to reduce the number of occupiers of the slum and do all things necessary to effect such removal; or
(b) directing him to demolish such dwelling (the slum); or
(c) notifying him that the local authority intended to acquire such property by expropriation and to apply to the Minister for his approval in terms of the Act.

Section 28 of the Act was an important provision. It dealt with the eviction of persons convicted of occupying, entering or being within the slum premises or land in contravention of provisions of the Act.[716] The court convicting such an offender was obliged, in addition to passing any sentence on him, to order his eviction from the slum premises or land. When convicting the owner of the slum of contravening provisions of section 12 of the Act by allowing any person to occupy, enter or be within the slum dwelling the court could also order such person (occupier) to appear before it[717] to show cause why he should not be evicted therefrom.[718] Any eviction order so granted had to be executed in all respects as if it were a civil

[711] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[712] In terms of section 1(2).
[713] Section 1(2).
[714] After complying with various processes or notices, in accordance with section 4(7)(a) or 4(8).
[715] Section 5.
[716] For example, sections 10, 11 and 26.
[717] In terms of section 28(2).
[718] As prescribed in section 28(3).

court judgment.[719] Moreover, that eviction order was not subject to any review or appeal whatsoever.[720]

In *De Jager and Others v Farah and Nestadt*[721] the court interdicted an owner of a slum building from executing a demolition thereof as ordered by the local authority in circumstances whereby he had failed to have the occupants prosecuted in terms of section 28 of the Act. These occupants (building owner's tenants) had remained in the building and refused to leave, despite having been also served with the local authority's notice declaring the building a slum and ordering its demolition.[722] The occupants were liable to prosecution and conviction for remaining in the slum building, and the court convicting them could simultaneously order their eviction. Yet, they were not prosecuted and no eviction order had been granted against them. Instead, the owner had asked the occupants to vacate and when they defied him he engaged a contractor to demolish their dwellings, at which point the occupants obtained an interim interdict.[723] On the return day, Millin J confirmed the interim interdict (rule nisi) against the demolition on the ground that the building owner and his contractor (respondents), by their conduct in proceeding to demolish the premises without legal process to secure the eviction of the occupiers, had committed acts of spoliation and thus ought to be restrained.[724]

4.3.5 Asiatic Land Tenure Amendment Act 30 of 1936

This Act empowered the Minister of Interior to exempt further areas for Indian occupation with the possibility of freehold title.[725] It also accepted and advanced the policy of segregation, upholding that Indians were to be confined to separate areas.[726]

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[719] Section 28(5).
[720] Section 28(7).
[721] *De Jager and Others v Farah and Nestadt* 1947 (4) SA 28 (W) (hereinafter *De Jager*).
[722] *De Jager* 30.
[723] *De Jager* 30.
[724] *De Jager* 36. In other words, the building owner and his contractor ought to be restrained from demolishing the slum building as they were taking the law unto their hands.
[725] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[726] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

The Act is another attestation of the bleak circumstances which prevailed during the *apartheid* years, and through which discriminatory land demarcations were carried out in a racially exclusive manner.

4.3.6 Native Trust and Land Act 18 of 1936 (later known as the Development Trust and Land Act 18 of 1936)[727]

The Native Trust and Land Act 18 of 1936 contained the following key provisions: it integrated land identified by the Natives Land Act of 1913 into African reserves, and thereby formalised the separation of white and Black rural areas; it established a South African Native Trust (SANT) (which became the Bantu Trust and then later the Development Trust), which purchased all reserve land not yet owned by the state, and had responsibility for administering Blacks' reserve areas, thus ensuring that Black people were not permitted to own land in their own right.[728] The Trust imposed systems of control over livestock, introduced the division of arable and grazing land, and enforced residential planning and villagisation (called 'betterment') under the guise of modernizing Black people's agricultural systems.[729] With these provisions, any Black person unlawfully resident on white-owned land could be evicted; and areas in white South Africa where Blacks owned land were declared 'Black Spots', resulting in the state implementing measures to remove the owners of such land to the reserves.[730]

Muller contends that the DTLA was essentially the legislative embodiment of the government's growing concern with the large number of Black people who were living and working on white farms as labour tenants.[731] Chapter 4 of the Act contained a number of provisions that sought to regulate the tenure of Black people who resided on land other than the traditional and 'released' areas.[732]

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[727] Development Trust and Land Act 18 of 1936 (hereinafter referred to as the DTLA).
[728] Pienaar *Land reform* 84–93; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[729] Pienaar *Land reform* 84–93; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[730] Pienaar *Land reform* 84–93; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[731] Muller *The impact of section 26 of the Constitution* 39.
[732] Section 25(1). See Muller *The impact of section 26 of the Constitution* 39.

Black men were prohibited from occupying certain land unless exempted by the Act.[733]

Any Black person who occupied land in contravention of these prohibitions would be guilty of an offence.[734] According to Muller section 37(5) deemed Black people to be in unlawful occupation of the land if they failed to vacate the land after the notice of termination period expired.[735] As such, all Black people who unlawfully occupied land outside the traditional and released areas could be served with a notice in writing requesting them to show cause why they should not be evicted.[736] In the event that the native commissioner could not be persuaded that a right of occupation existed a warrant would be issued which authorised the police to evict the unlawful occupiers,[737] directing the police to use reasonable force if necessary.[738] The Department of Native Affairs was then obliged to accommodate such evictees in traditional or released areas.[739] Muller states that these provisions resulted in the massive eviction of labour tenants from farms during the 1960s and 1970s as part of an elaborate scheme to replace labour tenancy in South Africa with fulltime wage earning farm labourers.[740] In Morris's analysis, between 1960 and 1970, 340 000 labour tenants, 656 000 squatters and 97 000 squatters in 'Black Spots' were estimated to have been removed.[741] Furthermore, an estimated 400 000 labour tenants were removed between 1971 and 1974, and by 1976 labour tenancy in South African agriculture had, for all intents and purposes, been abolished and farm labour was stabilised.[742] The Act became the basis for

[733] Section 26(1). See Muller *The impact of section 26 of the Constitution* 39. In terms of section 26(1) Black men were prohibited from occupying certain land unless they were: (a) the registered owner of that land; (b) a servant of the owner of that land; (c) a registered labour tenant; (d) a registered squatter; or (e) otherwise exempted from the prohibitions contained in Chapter 4 of the DTLA.

[734] Section 26(4). See Muller *The impact of section 26 of the Constitution* 39.

[735] See Muller *The impact of section 26 of the Constitution* 40–41.

[736] Section 37(1). See Muller *the impact of section 26 of the Constitution* 41.

[737] Section 37(3). See Muller *The impact of section 26 of the Constitution* 41.

[738] Section 37(4). See Muller *The impact of section 26 of the Constitution* 41.

[739] Section 38. See Muller *The impact of section 26 of the Constitution* 41.

[740] Muller *The impact of section 26 of the Constitution* 41.

[741] Morris M "State intervention and the agricultural labour supply post-1948" in Wilson F, Kooy A and Hendrie D (eds) *Farm labour in South Africa* (David Phillips Cape Town 1977) 62-71 71.

[742] Morris *State intervention* 71. On the other hand, Platzky L and Walker C *The surplus people: forced removals in South Africa* (Ravan Press Johannesburg 1985) 138 estimate that between 1960 and 1983 1.13 million people were evicted from farms and a further 614 000 people were evicted from Black Spots and consolidation areas.

formalizing Black reserve areas, as well as the eviction of tenants from farms for the next fifty years.[743]

As an illustration of the implementation of this Act, in *S v Mafora and Others*[744] the court found that where a Black person wrongfully and unlawfully occupies land to which Chapter 4 applies, such land being owned by the state, a criminal prosecution of contravening section 26(1)*(b)*[745] is not appropriate. Instead, Hiemstra J held that in such instances eviction procedures in sections 36 and 37 should be followed.[746] Sections 36 and 37 contained provisions for the eviction of Black people who occupied Trust land or state-owned land.[747]

4.3.7 War Measures Act 13 of 1940 (WMA)

Parliament enacted a War Measure in 1944 acting in terms of the WMA.[748] According to Muller this War Measure enabled a magistrate to issue an order first, for the immediate removal of people living on land or in buildings without the permission of the owner or lawful occupier; and secondly, for the demolition of any buildings or structures that threatened the health and safety of the general public or the maintenance of peace and good order.[749] Muller asserts that the War Measure proved inadequate as it was premised on the hope that, once evicted, the evictees "would go back to where they came from". Instead, the evictees merely moved to another piece of land nearby and waited for the process to start all over again, as they had nowhere else to return to. As the city councils failed to stem the influx of Black people who flocked to the cities in search of employment opportunities, it was soon realised that a single measure would not solve the problem of urban squatting and that a co-ordinated legislative framework was required, thus eventually paving the way for the introduction of PISA.[750] PISA is discussed below, after the segment dealing with the Group Areas Acts.

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[743] Pienaar *Land reform* 92–93; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).
[744] *S v Mafora and Others* 1970 (3) SA 190 (T) (hereinafter *Mafora*).
[745] As substituted by section 19 of Act 42 of 1964.
[746] *Mafora* 191–192.
[747] *Mafora* 191.
[748] Muller *The impact of section 26 of the Constitution* 54. See Muller 2013 *Fundamina* 382. Proclamation 76 in *Government Gazette Extraordinary* 3325 dated 6 April 1944.
[749] Muller *The impact of section 26 of the Constitution* 54. See Muller 2013 *Fundamina* 382.
[750] Muller *The impact of section 26 of the Constitution* 54. See Muller 2013 *Fundamina* 382.

4.3.8 Group Areas Acts (41 of 1950; 77 of 1957; and 36 of 1936)

4.3.8.1 Introduction

After its election victory in 1948 the National Party regime institutionalised and consolidated existing racially discriminatory policies and laws, and strengthened the Group Areas Act.[751] The term 'Group Areas Act' is an alternative title of the three Acts under the reign of the *apartheid* government. The first in this category, the Group Areas Act 41 of 1950 was promulgated on 7 July 1950, repealed and re-enacted in consolidated form as the Group Areas Act 77 of 1957, which was also repealed and re-enacted as the Group Areas Act 36 of 1966.[752] It was ultimately repealed on 30 June 1991 by section 48 of the Abolition of Racially Based Land Measures Act.

The Acts assigned racial groups to different residential and business sections in urban areas, effectively excluding non-whites from living in the most developed areas, which were restricted to whites (such as Sea Point and Claremont in Cape Town).[753] Instead, non-whites were demarcated much smaller and distant areas in which to live (such as Grassy Park outside Cape Town and Chesterville outside Durban). The primary aim was to curb the movements of the non-whites, in particular Black people from rural areas into the big cities and whites-only areas.[754] To restrict the influx into big cities caused by the booming economy, the government set up semi-urban townships for Black, Indian and Coloured population groups, also in an attempt to control possible riots or threats by non-whites on the white population group.[755] According to Muller *et al,* from 1950 onwards settlement in urban areas and towns "was regulated by confining racial

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[751] Pienaar *Land reform* 106–110; Muller *et al* S*ilberberg & Schoeman's law of property* 673; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[752] See Pienaar *Land reform* 106–110; Muller *et al* S*ilberberg & Schoeman's law of property* 673; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[753] Pienaar *Land reform* 106–110; and "Women's anti-pass law campaigns in South Africa" http://africanhistory.about.com/od/ apartheid/a/WomensAntiPass.htm (Date of use: 4 January 2020).

[754] Pienaar *Land reform* 106–110; Muller *et al* S*ilberberg & Schoeman's law of property* 673–676; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[755] Pienaar *Land reform* 106–110; Muller *et al* S*ilberberg & Schoeman's law of property* 673–676; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

groups to settle in corresponding group areas demarcated and proclaimed under the Group Areas Act 41 of 1950 and its successive versions, including the Group Areas Act 77 of 1957 and the Group Areas Act 36 of 1966".[756] This law resulted in many non-whites having to commute long distances from their allocated residences to work. Most significantly the Acts also cut across all traditional property rights, leading to evictions of thousands of Blacks, Coloureds and Indians,[757] who had to be forcibly removed for living in the 'wrong' areas.[758] Indeed, the Group Areas Acts reinforced the philosophy of racial separation through the enforcement of mass evictions in favour of occupancy by whites.[759] The Indian community was the most affected as its members were forced out of the central city areas where they had previously operated their businesses.[760] These Acts were so contentious and led to numerous cases being brought to court. Relevant provisions of the Acts will be set out, followed by brief discussions of the most significant cases.

4.3.8.2 The Acts

The common thread running through the respective Group Areas Acts and pronounced objectives were to consolidate the law relating to the establishment of group areas, the control of the acquisition of immovable property, the occupation of land and premises, and related matters.[761] As stated in *Minister of Land Affairs and Another v Slamdien and Others*[762] the Acts were central to the racial zoning of

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[756] Muller *et al Silberberg & Schoeman's law of property* 673–676; and Pienaar *Land reform* 106–110.

[757] Muller *et al Silberberg & Schoeman's law of property* 673–676; Pienaar *Land reform* 106–110; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[758] Muller *et al Silberberg & Schoeman's law of property* 673–676; Pienaar *Land reform* 106–110; and "Women's anti-pass law campaigns in South Africa" http://africanhistory.about.com/od/apartheid /a/WomensAntiPass.htm (Date of use: 4 January 2020).

[759] Johnson A *Post-Apartheid citizenship and the politics of evictions in inner city Johannesburg* (PhD thesis City University of New York 2016) 48 (Published in CUNY Academic Works https://academicworks.cuny.edu/gc_etds/1566/).

[760] Muller *et al Silberberg & Schoeman's law of property* 673–676; Pienaar *Land reform* 106–110; and https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[761] As expressed in the long title of the Group Areas Act 36 of 1966, published in *Government Gazette* 1576 dated 26 October 1966.

[762] *Minister of Land Affairs of the Republic of South Africa and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC) (hereinafter *Slamdien*).

primarily urban areas of South Africa.[763] The Acts caused enormous social upheaval, infringed on human rights and resulted in people being relocated against their will.[764]

Various provisions of the 1966 version of the Acts are indicative of the manner in which racially divisive zonings were legislatively sanctioned, with the prospect of racially segregated evictions perpetually present.[765] Most significantly, the Act allowed the State President to establish group areas via a proclamation declaring that from a certain date a defined area was indicated as being for occupation or ownership by members of a specified racial group only.[766] People who became disqualified from living in such defined areas were given some grace period (of twelve months or so) before being officially prohibited[767] from occupying land or premises in the proclaimed group areas without a permit.[768] Certain categories of people were exempted from the Act's provisions, such as: *bona fide* state employees or servants; *bona fide* hotel guests; domestic servants; or *bona fide* hospital patients.[769] Ngcukaitobi informs that the Group Areas Act was re-enacted in 1966 to "consolidate the laws related to the establishment of group areas and to regulate control over the acquisition of immovable property and the occupation of land and premises".[770]

Magistrates' courts of the districts in which the proclaimed group land or premises were situated were granted jurisdiction to hear actions for the eviction of disqualified persons and to make orders for their eviction.[771] Courts convicting people for occupying land or premises in contravention of various provisions of the Act[772] could also make eviction orders, at state expense, against those offenders and persons of the same racial group proved to be living with the transgressors,

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[763] *Slamdien* [31].
[764] *Slamdien* [31]. See also Muller *et al* *Silberberg & Schoeman's law of property* 730–731.
[765] For instance: sections 13(1) and 20(1) imposed restrictions on the acquisition or occupation of land or premises in a controlled area; section 20(1) specifically stipulated that no disqualified person or company shall acquire any immovable property situate in a controlled area, except with a permit; and section 17(1) also disallowed members of certain racial groups from occupying specified areas.
[766] Sections 23(1)(a) and (b).
[767] In terms of section 26(1).
[768] Section 23(2) read with section 26.
[769] Sections 26(2) and (3).
[770] Ngcukaitobi *Land matters* 23.
[771] Section 23(4).
[772] For instance, sections 17(1), 20(1) and 26(1).

thereby sanctioning their removal from such defined land or premises.[773] In addition, those courts could also make orders, give instructions, and confer such authority as deemed reasonably necessary to give effect to the stated eviction orders and for the removal of possessions of affected people from such land or premises.[774] The 1966 Act allowed any court order to be made against any person proved to be living with the convicted person in the prohibited land or premises without prior notice having been given to such first-mentioned person.[775]

So drastic were the provisions of the Act that fronting became one of the undesirable outcomes thereof: Black people wishing to live or trade in white group areas found themselves compelled, due to racial segregation, to resort to the mechanism of a white person fronting as the registered owner or occupier of immovable property.[776] Through this arrangement the white owner or occupier would thus in effect be a nominee for the Black beneficial owner or occupier in order to circumvent the effects of those racially based laws that precluded Black people from owning or occupying immovable property in areas designated for ownership and occupation by white people.[777] However, since 1991 remedial legislation has been passed to address these situations of nominee ownership.[778] For instance, the Abolition of Racially Based Land Measures Act provides that from the commencement of this provision any transaction whereby a person, referred to as ‘a nominee owner’, acquired property contrary to section 40 of the 1966 Group Areas Act, on behalf of another person, referred to as ‘the principal’, shall be deemed not to be an illegal transaction or a transaction which constitutes an offence.[779] It is therefore appropriate at this stage to conclude by analysing the manner in which the Act in its various formats was practically implemented, by looking into some judicial pronouncements.

[773] Section 46(2)(a)(i).
[774] Section 46(2)(a)(ii).
[775] Section 46(2)(a)(iii).
[776] *Rajah v Balduzzi* (076/2017) [2018] ZASCA 57 (16 May 2018) (hereinafter *Rajah*) [1].
[777] *Rajah* [1].
[778] *Rajah* [1].
[779] Section 48(2) of the Abolition of Racially Based Land Measures Act.

4.3.8.3 *Minister of the Interior v Lockhat and Others*[780]

In this case the respondents had initially challenged and obtained an order in the court *a quo* setting aside a proclamation issued under the Group Areas Act. The 19 respondents were all members of the Indian group and owners or occupiers of properties in areas that were being allocated for occupation by members of the white group as from the date of publication of the disputed proclamation.[781] The Minister of Interior subsequently appealed against the findings of the court *a quo* successfully so, for reasons described below.

Two important aspects were decided with regard to the connotations of the 1957 Group Areas Act. First, the court effectively decided that when proclaiming or demarcating an area in favour of a specific race group government was not required to give due consideration to the effect of the proclamation upon members of other racial groups affected thereby, and in particular to the question of the availability of suitable alternative accommodation.[782] Therefore, a Group Areas Proclamation which failed to consider those factors would not be declared null and void.[783] Secondly, Holmes JA ruled that the Group Areas Act impliedly empowers discrimination to the extent of partial and unequal treatment between different race groups.[784] For him, the Group Areas Act represented a colossal social experiment and a long-term policy which necessitated the national departure of numerous people from the defined areas. Parliament must have thus envisaged the resultant substantial racial inequalities. The implications of such consequences on the inhabitants were not for the court to decide. The court therefore affirmed that the Group Areas Act impliedly authorised the more immediate and foreseeable discriminatory results complained of in that case.[785]

4.3.8.4 *S v Govender*[786]

The appellant, an Indian female had been convicted on 23 March 1982 in the Johannesburg Magistrate's Court for having contravened the provisions of section

[780] *Minister of the Interior v Lockhat and Others* 1961 (2) SA 587 (A) (hereinafter *Lockhat*).
[781] *Lockhat* 593.
[782] *Lockhat* 599.
[783] *Lockhat* 600.
[784] *Lockhat* 602.
[785] *Lockhat* 602.
[786] *S v Govender* 1986 (3) SA 969 (T) (hereinafter *Govender*).

26(1) of the 1966 Group Areas Act by unlawfully occupying premises in Mayfair, a then white group area.[787] She had subsequently been sentenced to a fine of R50 or 15 days' imprisonment, which sentence had been suspended for three years on condition that she was not convicted of a similar offence.[788] In addition, the magistrate, of his own accord, made an order of eviction in terms of section 46 of the 1966 Act, at state expense, against the appellant and all persons living with her from the land in question.[789] On appeal against this eviction order, Goldstone J observed that the predecessor of section 46(2) was section 34(2) of the 1950 Group Areas Act, which had provided that on conviction the court "shall" order an eviction.[790] However, "shall" had been replaced with "may" in section 42(2) of the 1966 Act, thus giving the court a discretion on whether to order an eviction or not.[791] In Goldstone J's view the power to make such an eviction order was wide, would in most instances seriously affect people's lives, and would frequently interfere with the normal landlord-tenant contractual relationship.[792] The eviction order should thus not be easily made by the court *mero motu* without the fullest enquiry.[793] In this case the court therefore held that the eviction order had been made irregularly and should be set aside, particularly as the prosecutor in the court *a quo* had not requested it nor advanced any justification therefor.[794]

4.3.9 Prevention of Illegal Squatting Act 52 of 1951 (PISA)

4.3.9.1 Introduction

Whatever the common law missed could be dealt with in terms of PISA, which gave (white) landowners and the state wide-ranging powers to evict and destroy the homes of (Black) unlawful occupiers.[795] This Act was assented to on 21 June

[787] *Govender* 970A–D.
[788] *Govender* 970C.
[789] *Govender* 970C–D.
[790] *Govender* 970I.
[791] *Govender* 970I–J and 971A.
[792] *Govender* 971F.
[793] *Govender* 971F–H.
[794] *Govender* 972C.
[795] Pienaar *Land reform* 110–112 and 687–688; and "Evictions and alternative accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020). PISA allowed the forced removal and destruction of homes of land occupiers by owners, local authorities and government officials. Succinctly captured in Liebenberg S *Socio-Economic rights: adjudication under a transformative constitution* (Juta Claremont 2010) 268–269.

1951, and was published in an *Extra-ordinary Union Gazette* dated 6 July 1951.[796] Its stated objective was to provide for the prevention and control of illegal squatting on public or private land. It was a harsh law, through which landowners, local authorities and government officials were armed with various ways of evicting people or demolishing their houses to get them off the land.[797] It prohibited persons[798] from occupying any land or building without the permission of the owner or the lawful occupier thereof, or without lawful reason.[799] PISA further prevented anyone[800] from staying or being in any native location, native village or other such demarcated area without the permission of the local authority or authorised person.[801] Contravention carried a sanction of a criminal conviction or a fine or both.[802]

The Act was also directly concerned with evictions and demolition of buildings or dwelling structures erected on the land in question. In addition to criminal convictions and fines a court could order the summary eviction of a guilty person.[803] The court could also effect the transfer of such person, his family and dependants to such other place within or outside its jurisdiction.[804] Courts were also authorised to order the demolition and removal of all buildings or structures wrongfully erected on the premises concerned.[805] Muller contends that the peremptory nature of these PISA provisions obliged owners to evict unlawful occupiers under *apartheid* land law.[806]

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[796] *Government Gazette* 4653 dated 6 July 1951.

[797] Pienaar *Land reform* 110–112 and 687–688; and *https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s* (Date of use: 4 January 2020).

[798] Other than government servants or local authorities' employees.

[799] Section 1(a).

[800] Except government or municipal officials.

[801] Section 1(b).

[802] Section 2. More specifically, sub-section 2(1) stipulated that any person contravening the provisions of section 1 shall be guilty of an offence and liable to a fine not exceeding twenty-five pounds, or to imprisonment for a period not exceeding three months, or to both such fine and such imprisonment. Sub-section 2(2) further provided that anyone convicted of an offence in terms of sub-section 2(1), who persists after such conviction in the conduct in respect of which he has been so convicted shall be guilty of a continuing offence and liable to a fine not exceeding twenty shillings or to imprisonment for a period not exceeding seven days in respect of every day that he so persists, or to both such fine and such imprisonment.

[803] Section 3(1)(a). The guilty person could be ordered to vacate the land, building, native location, village or area concerned.

[804] Section 3(1)(b)(ii).

[805] Section 3(1)(b)(iii).

[806] Muller *The impact of section 26 of the Constitution* 55. See Muller 2013 *Fundamina* 383.

4.3.9.2 PISA amendments and cases

The Act underwent various amendments, notably in 1976, 1977 and 1988, mainly as a result of judicial pronouncements and governmental policy developments.[807] For instance, in the case of *S v Peter*[808] the court re-affirmed that if a squatter had permission to occupy land[809] that occupation did not constitute a contravention of PISA, and the burden therefore remained with the state to establish wrongfulness on the part of the accused squatter. In other words, the state had to prove that the accused squatter lacked the necessary consent to remain on the land in question. In the *Peter* case a Bantu Affairs Administration Board had invoked PISA provisions to obtain a conviction against the appellant in the lower court and an order to evict her from and demolish a shanty she had erected in an area of 'Nyanga Extension 3', also known as 'the Cross Roads', in Cape Town.[810] On appeal the High Court found that the land in question was in fact owned by the Divisional Council of the Cape and not by the Administration Board.[811] In the end the court held that the state had failed to prove that the appellant lacked the permission[812] to remain on the land. The appeal accordingly succeeded, and the conviction, sentence, eviction and demolition orders were set aside.[813]

4.3.9.2.1 1976 developments

Following the decision in *Peter* the state promulgated the Prevention of Illegal Squatting Amendment Act.[814] Government wanted to firmly deal with the continuous influx of (Black) people into urban areas accompanied by the widespread erection of shacks. This phenomenon necessitated a departure from normal legal procedures to demonstrate that effective prohibitive action was being implemented.[815] Amongst the amendments was the insertion of section 3B, which allowed landowners, local authorities or officials of the Department of Community

[807] See Pienaar *Land reform* 110–112 and 687–688.
[808] *S v Peter* 1976 (2) SA 513 (C) (hereinafter *Peter*) 515–516.
[809] Permission of either the owner or the lawful occupier of land.
[810] *Peter* 513.
[811] *Peter* 516–517.
[812] As contemplated by section 1(*a)*.
[813] *Peter* 518.
[814] Prevention of Illegal Squatting Amendment Act 92 of 1976. Published in *Government Gazette* 5182 dated 30 June 1976.
[815] O'Regan C "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" 1989 *South African Journal on Human Rights* (*SAJHR*), Vol. 5, No.30, 361–394 370 – 371; and Muller *The impact of section 26 of the Constitution* 56.

Development to effect summary demolition of squatter shacks or buildings after a seven-day written notice period, but without an order of court.[816]

Landowners were also prohibited from erecting buildings or structures on land without the approval of local authorities, or allowing the occupation of such structures, or even permitting the presence therein of persons in circumstances which might endanger the health or safety of the public generally or of a particular group or class of persons.[817]

4.3.9.2.2 1977 developments

1977 saw the introduction of further amendments to PISA, subsequent to the judgment in *Fredericks and Another v Stellenbosch Divisional Council.*[818] The court in that case had not only granted a *mandament van spolie* against a council that had unlawfully demolished applicant squatters' houses (built with sheets of corrugated iron) on its land without having first given them the seven days' written notice. It also punitively ordered the council to re-erect the applicants' houses. Diemont J remarked that PISA's requirement to grant seven days' written notice prior to demolition at least gave some measure of protection to "these unfortunate people who are without homes".[819] However, after this ruling the government changed all of this through the enactment of another Prevention of Illegal Squatting Amendment Act.[820]

Through this Amendment Act section 3B of PISA was amended accordingly to provide for the demolition of buildings or structures on land and removal of materials and contents thereof *without any prior notice of whatever nature to any*

[816] Sections 3B(1) and (2) of the Prevention of Illegal Squatting Amendment Act 92 of 1976. See Muller *The impact of section 26 of the Constitution* 56.
[817] Sections 3A(1)(a)(i) and (ii) of the Prevention of Illegal Squatting Amendment Act 92 of 1976.
[818] *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) (hereinafter *Fredericks*).
[819] *Fredericks* 116.
[820] Prevention of Illegal Squatting Amendment Act 72 of 1977. Published in *Government Gazette* 5573 dated 3 June 1977. The long title to this amending Act stated its objectives as follows: "To amend the Prevention of Illegal Squatting Act, 1951, so as to extend the power, under section 3B, of an owner of land to demolish any building or structure erected on the land without his consent, to a building or structure occupied on the land without his consent; to do away with the requirement that notice shall be given of an intention to demolish such building or structure; to provide that a litigant under section 3B shall first prove his title or right to the land as a prerequisite to litigation; to define more closely the meaning of a building or structure in section 3B; and to provide for incidental matters".

person (emphasis added).[821] A new section 3B(4) was added, introducing far-reaching draconian measures.[822] People without any title in land (such as squatters) were now prohibited from obtaining remedies such as the *mandament van spolie*, in civil proceedings involving the demolition or removal of structures or buildings in or from the land in question.[823] Squatters' 'shacks, huts or tents' were directly brought within the ambit of PISA and targeted.[824]

Blecher argues that the seven days' notice period in terms of the 1976 section 3B(2) (a safety device) was scrapped by government's rapid and harsh 1977 legislative response to the *Fredericks* decision which resulted in severe hardship for squatters who were no longer afforded the opportunity to remove their valuables or to find alternative accommodation.[825] Muller correctly contends that the seven days' notice period was removed and substituted with an ouster clause,[826] the aim of which was to prevent squatters from approaching the court and obtaining an order that would prevent their removal, unless they could show that they had title or a right to the land.[827]

4.3.9.2.3 1988 developments

Amendments were again introduced to PISA through an additional Prevention of Illegal Squatting Amendment Act.[828] Some of its objectives[829] included: the

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[821] Section 1(b).

[822] Contained in section 1(c).

[823] New sub-section 3B(4)(a) of PISA subsequent to the Prevention of Illegal Squatting Amendment Act 72 of 1977.The section provided that it shall not be "competent for any person to ask for any order, judgment or other relief in any civil proceedings of whatever nature in any court that are founded on the demolition or intended demolition or the prevention of the demolition under this section of any building or structure, or on the removal or intended removal or the prevention of the removal of any material or contents thereof from the land on which the building or structure was or is situated, and it shall not be competent for any court to grant or give such order, judgment or other relief, unless such person first satisfies the court on a balance of probabilities that he has a title or right to the land on which the building or structure was or is situated, by virtue of which right he may lawfully occupy the land".

[824] In terms of the new sub-section 3B(5) of PISA subsequent to the Prevention of Illegal Squatting Amendment Act 72 of 1977. The section modified the phrase "building or structure", without restricting the meaning thereof, to include "any shack, hut, tent or similar structure".

[825] Blecher MD "Spoliation and the demolition of legal rights" 1978 *SALJ*, Vol. 97, 8–16.

[826] The ouster clause refers to the new sub-section 3B(4) of PISA subsequent to the Prevention of Illegal Squatting Amendment Act 72 of 1977. It successfully ousted the courts' jurisdiction to grant relief. See also Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 56–57.

[827] Muller *The impact of section 26 of the Constitution* 56.

[828] Prevention of Illegal Squatting Amendment Act 104 of 1988. Published in *Government Gazette* 11688 dated 8 February 1989.

creation of certain presumptions in connection with the prohibition of illegal squatting; the eviction of certain persons from land situated outside the area of jurisdiction of a local authority, and the regulation of administrative powers of a magistrate to effect the removal of squatters.

The amended PISA provided that if in the prosecution of an alleged squatter it was proved: (1) that he entered the land or building of any other person, then the presumption would be that the alleged squatter acted without lawful reason; and *(*2) that he remained on or in any land or building of any other person, he would then be presumed to have so remained without the requisite permission, unless the contrary could be proved.[830] Clearly, here the aim was to make it easy for the state to achieve a conviction against squatters and shift the burden of proof to them, as the onus was on them to rebut these presumptions. Also, some earlier measure of discretion was taken away from the courts, which were then compelled when convicting persons for squatting to simultaneously make orders summarily evicting squatters from the land or buildings concerned.[831] As such, the expulsion of squatters from land was then increasingly accomplished through the criminal and not the civil courts, and as a matter of public rather than of private law.[832] In the words of Sachs J this process was deliberately made as swift as possible: conviction first followed by eviction.[833]

The harshness of this Act is borne-out by the fact that it was deemed to criminalise even the conduct of persons who remained in the land in which they had been born and permanently lived notwithstanding the landowner having revoked permission for them to occupy such land.[834] For instance, the question to be decided in *R v Zulu*[835] was whether the appellant, who was born on the farm Onverwacht and had lived there all his life, contravened PISA provisions when he remained and stayed on the farm after the owner, i.e. the government, had

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[829] The objectives as outlined in the amending Act's long title.
[830] New sub-section 1(2) of PISA after the Prevention of Illegal Squatting Amendment Act 104 of 1988.
[831] New sub-section 3(1)(a) of PISA subsequent to the Prevention of Illegal Squatting Amendment Act 104 of 1988.
[832] *Port Elizabeth Municipality* [8].
[833] In *Port Elizabeth Municipality* [8].
[834] As in the case of *R v Zulu* 1959 (1) SA 263 (A). See *Port Elizabeth Municipality* [8].
[835] *R v Zulu* 1959 (1) SA 263 (A) (hereinafter *Zulu*).

withdrawn from him its permission to reside there.[836] The Appellate Division held that it was an offence to enter upon or into the land of another without lawful reason, and that it was also an offence to remain on the land without the permission of the owner.[837] PISA accordingly applied to a squatter who remained without the required permission on the land in which he has had his home since his birth.[838]

In 1988 a new section 11B of PISA provided for the execution of the eviction notwithstanding the launching of appeal proceedings.[839] The full text of section 11B is instructive.[840] So, in essence the amendments bolstered the powers of local authorities to remove squatters and summarily demolish their homes, and also eroded judicial powers and common-law principles pertaining to the rights of accused.[841] Furthermore, as Muller points out, these 1988 amendments not only extended PISA's operational ambit to rural areas, but also introduced comprehensive provisions to regulate rural squatting.[842] For purposes of this study, other amendments to PISA such as those of 1980[843] and 1990[844] will not be discussed, particularly as they were not substantial.

4.3.10 Natives Resettlement Act 19 of 1954

Amongst others, the objectives of this Act were to cater for the removal of 'natives'[845] from any area in the magisterial district of Johannesburg or any

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[836] *Zulu* 265.
[837] *Zulu* 263, 269–271. This was then the clear meaning given to section 1(a) of PISA by the court.
[838] *Zulu* 263, 269–271.
[839] Muller *The impact of section 26 of the Constitution* 57.
[840] New section 11B of PISA, inserted following the Prevention of Illegal Squatting Amendment Act 104 of 1988. It provided that notwithstanding anything to the contrary contained in any other law, any order, instruction or authority referred to in this Act shall, notwithstanding the noting of an appeal against or review proceedings concerning any conviction, punishment or order by virtue of the provisions of this Act, apply.
[841] O'Regan 1989 *SAJHR* 376; and Muller *The impact of section 26 of the Constitution* 57.
[842] Muller *The impact of section 26 of the Constitution* 57.
[843] Prevention of Illegal Squatting Amendment Act 33 of 1980.
[844] Prevention of Illegal Squatting Amendment Act 80 of 1990.
[845] According to the *Dictionary of South African English,* 'native' was used in the past as an official term in various systems of race-classification. "Although all of the country's ethnic groups (including the majority of whites) are South African 'natives' in the general sense, the word came to be used exclusively of black Africans. The sense-change from 'indigenous' to 'black' is not easy to discern in the earlier quotations, but they are included as evidence of early local usage": Dictionary of South African English https://dsae.co.za/entry/native/e05095 (Date of use: 23 March 2021). It further mentions that as an ethnic label the word depicts: 1**.** A member of one of the Sintu-speaking (Bantu-speaking) peoples of southern Africa; and 2**.** any black African. The Natives Land Act 27 of 1913 defined a 'native' as "any

adjoining magisterial district and their resettlement elsewhere.[846] In essence this Act aimed to effect the removal of non-whites from Sophiatown to Soweto, southwest of Johannesburg.[847] It was used to violently remove Blacks, Coloureds and Indians living in Sophiatown, in a process whereby the then Nationalist Party government deployed security police to Sophiatown in January 1955 in anticipation of major resistance.[848] People were manhandled onto trucks, their belongings haphazardly loaded and driven to remote locations where they were forced to live.[849] Non-white residents of Johannesburg's western suburbs of Sophiatown, Martindale and Newclare were moved to a new government settlement at Meadowlands later on in 1957.[850] Government officials hailed this move as a triumph of social engineering, and the new white suburb which arose from the rubble was named Triomf.[851]

4.3.11 Trespass Act 6 of 1959

This Act prohibited the entry or presence of anyone upon land and the entry of or presence in buildings without the permission of the lawful occupier, owner or person in charge or without lawful reason.[852] It criminalised such behaviour with a sanction of a fine or imprisonment.[853] Keightley correctly indicates that although this Act lacked many of the alarming features of other statutes concerned with

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person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives." See South African History Online (SAHO) https://www.sahistory.org.za/article/natives-land-act-1913 (Date of use: 23 March 2021).

[846] *disa.ukzn.ac.za › leg19540609028020019* (Date of use: 22 March 2020).

[847] https://www.sahistory.org.za › article › apartheid-legislation-1850s-1970s (Date of use: 4 January 2020).

[848] northcliffmelvilletimes.co.za › 64-years-since-apartheid-government-passed-the-Natives-Resettlement-Act (Date of use: 22 March 2020).

[849] northcliffmelvilletimes.co.za › 64-years-since-apartheid-government-passed-the-Natives-Resettlement-Act (Date of use: 22 March 2020).

[850] omalley.nelsonmandela.org › omalley › index.php › site (Date of use 22 March 2020.

[851] omalley.nelsonmandela.org › omalley › index.php › site (Date of use 22 March 2020.

[852] Section 1(1).

[853] Sections 1(1) and 2. Illustrative cases of criminal sanctions in this regard include the following: *R v Maduma* 1959 (4) SA 204 (N); *R v Ramakakau* 1959 (4) SA 642 (O); *R v Badenhorst* 1960 (3) SA 563 (A); *R v Mcunu* 1960 (4) SA 544 (N); *R v Mgwali* 1961 (1) SA 51 (E); *R v Venter* 1961 (1) SA 363 (T); *The State v Mdunge* 1962 (2) SA 500 (N); *Die Staat v Nkopane* 1962 (4) SA 279 (O); *S v Lekwena and Others* 1965 (1) SA 527 (C); *S v Ziki* 1965 (4) SA 14 (E); and *S v Brown* 1978 (1) SA 305 (NC).

control over access to land, nevertheless its role within the context of land disputes should not be underestimated.[854]

4.3.12 National Building Regulations and Building Standards Act 103 of 1977 (NBRBSA)

4.3.12.1 Introduction

The Act seeks to codify the law relating to the erection of buildings in the areas of jurisdiction of local authorities and to prescribe building standards (for the improvement of building conditions).[855] It allows local authorities to approve plans for building constructions[856] and impose conditions or prohibitions on the erection of buildings.[857] But it also deals with the conditions of existing buildings or earthworks. Section 12 is the most pertinent for the purposes of this study and will therefore be discussed in detail together with cases relevant thereto. The cases include *City of Johannesburg v Rand Properties (Pty) Ltd and Others*[858] and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*.

4.3.12.2 Section 12 provisions

If the local authority is of the opinion that: (1) any building is dilapidated or in a state of disrepair; or (2) any building or the land on which a building was or is being erected is potentially dangerous to life or property, it may order the owner of such building or land via written notice to, amongst others, demolish or repair that building within a specified period.[859] However, if the local authority is of the opinion that the condition of any building or land is such that steps should forthwith be taken to protect life or property, it may take such steps without notice to the

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[854] Keightley R "The Trespass Act" in Murray C and O'Regan C (eds) *No place to rest – forced removals and the law in South Africa* (Oxford University Press Cape Town 1990) 180–193 192.

[855] The Act's long title describes its objectives.

[856] For instance in terms of section 7(1)(ii) of the NBRBSA a local authority should not approve any application for the erection of a building if it is satisfied that such building will probably be unsightly or objectionable or dangerous to life or property. See also Muller G "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" 2015 *SALJ*, Vol. 132, 616–638 626.

[857] Muller 2015 *SALJ* 626. See sections 10(1) and (2) for instance.

[858] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W).

[859] Section 12(1). See also discussion in Pienaar *Land reform* 485–489.

owner.[860] Where the local authority deems it necessary for the safety of any person, it may by written notice: (1) order a building-owner to remove therefrom all persons occupying, working or present in such building, and to ensure that no unauthorised person enters such building; and (2) order any person occupying or working or present in any building, to vacate such building immediately or within a specified period.[861] Further, any person is prohibited from occupying or using any building in respect of which a notice has been served or delivered in terms of section 12 unless the local authority has granted permission in writing that the building may again be occupied or used.[862] In conclusion, a contravention of or non-compliance with section 12 provisions or notices constitutes an offence.[863] A contravention of the provisions of section 12(5) renders a person liable on conviction to a fine.[864]

However, the provisions of section 12(4)(b), which allow the local authority to order an immediate eviction of occupants from a building relying on safety concerns,[865] came under judicial scrutiny in some cases concerned with inner-city evictions, and are worth considering.

4.3.12.3 Court decisions concerning sections 12(4)(b), (5) and (6)

In the first case, *City of Johannesburg v Rand Properties (Pty) Ltd and Others,*[866] the applicant sought to evict the respondents from several properties in the inner city of Johannesburg by invoking the provisions of section 12(4)(b) that entitled it to evict the occupiers of properties within its area of jurisdiction where the properties or buildings on the properties were "dangerous to life or property".[867] The City Council maintained that the buildings on the properties occupied by the respondents were unfit for human habitation, were not only dangerous but also

[860] Proviso to sub-section 12(1) of the NBRBSA. The local authority may recover the costs of such steps from the land or building owner.
[861] Section 12(4).
[862] Section 12(5).
[863] Section 12(6).
[864] Section 12(6).
[865] The provisions of section 12(4)(b) read with section 12(6) contraventions.
[866] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) (hereinafter *Rand Properties*).
[867] *Rand Properties* 78.

unhygienic and that evicting them from the premises would promote public health and safety and reverse inner city decay.[868]

In their counter-application one of the reliefs sought by the respondents was an order declaring sections 12(4)(b), 12(5) and 12(6) of the NBRBSA unconstitutional because they violated sections 9 and 26(3) of the Constitution.[869] Jajbhay J held that it was not necessary for the court to deal with the constitutionality of section 12(4)(b) of the NBRBSA, given the circumstances of the case.[870] However, the judge stated that section 12(4)(b) must be read as if "subject to section 26(3) of the Constitution".[871] In other words, the City Council could not be allowed to arbitrarily 'evacuate' occupiers without engaging in due process. Accordingly, the court interdicted the City of Johannesburg from evicting or seeking to evict the respondents.[872] The interdict was granted pending the implementation of a programme to progressively realise the right to adequate housing for people in the inner city in desperate need of accommodation, alternatively, until suitable adequate accommodation was provided.[873]

The City Council then appealed to the SCA[874] where Harms ADP dealt extensively with the constitutional attack on section 12(4)(b) of the NBRBSA.[875] He first pointed out that even the respondents themselves correctly accepted that a prohibition on the occupation of unsafe buildings contained in an Act of general application is in principle not unconstitutional.[876] As such, if a local authority deems it "necessary for the safety of any person" to have a building vacated and accordingly issues the necessary section 12(4)(b) notice, that does not make any

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[868] *Rand Properties* 78. In turn, the respondents opposed the application on various grounds, such as: that (1) their right of access to adequate housing in terms of section 26 of the Constitution would be unjustifiably violated if they were evicted from the properties; and (2) the applicant had failed to fulfil its positive obligations towards the respondents in terms of sections 26(1) and (2) of the Constitution to achieve the progressive realisation of the right of access to adequate housing, and was thus precluded from securing the respondents' eviction.

[869] *Rand Properties* [12.3].

[870] *Rand Properties* [36].

[871] *Rand Properties* [36].

[872] *Rand Properties* orders 3 and 4.

[873] *Rand Properties* orders 3 and 4.

[874] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) (hereinafter *Rand Properties (SCA)*).

[875] *Rand Properties (SCA)* [51]–[56].

[876] *Rand Properties (SCA)* [51].

subsequent eviction by virtue of a court order arbitrary.[877] The jurisdictional basis for the section 12(4)(b) notice is necessity on the ground of the safety of persons, and the decision to issue such notice must be rational, after having exhausted all reasonable alternatives.[878] The judge disagreed with the contention that section 12(4)(b) allows for eviction without a court order and is thus unconstitutional.[879] He maintained that all that the Act permits is the issuing of an *administrative* order to vacate and, in the event of non-compliance, for a criminal sanction but not self-help.[880] A duty on the local authority to consider all circumstances relevant to the safety of the building before issuing a section 12(4)(b) notice is an administrative justice requirement and does not flow from the provisions of section 26(3) of the Constitution.[881] Administrative notices and orders such as those envisaged by section 12(4)(b) do not require prior court orders for their validity, and voluntary compliance therewith by law-abiding citizens does not amount to a proscribed eviction.[882] The need for a court order only arises if such administrative notices are not complied with.[883] The constitutional challenges to the Act thus failed eventually.

The matter then came for adjudication by the Constitutional Court in *Occupiers of 51 Olivia Road*. Yacoob J first held that the SCA should not have granted the eviction order in the circumstances of this case, in the absence of prior meaningful engagement between the City Council and the occupiers.[884] Although the majority of issues eventually became settled through meaningful engagement at the Constitutional Court's behest, some aspects pertaining to section 12 remained for consideration. The one aspect concerned the occupiers' claim for a review of the city's decision to issue the section 12(4)(b) notices, whilst the other revolved around the constitutionality of section 12(4)(b).[885] Yacoob J did not think that the review aspect was still relevant as the eviction proceedings had effectively become settled. However, he was of the view that in the interests of justice it was

[877] *Rand Properties* (SCA) [51].
[878] *Rand Properties* (SCA) [52].
[879] *Rand Properties* (SCA) [53].
[880] *Rand Properties* (SCA) [53].
[881] *Rand Properties* (SCA) [54].
[882] *Rand Properties* (SCA) [55].
[883] *Rand Properties* (SCA) [55].
[884] *Occupiers of 51 Olivia Road* [23].
[885] *Occupiers of 51 Olivia Road* [39].

necessary to investigate the narrower question of the considerations relevant to the issuing of the section 12(4)(b) notice, and also the question of the constitutionality of section 12(6).[886] The reason for this was that the section 12 procedure was likely to be applied by municipalities in the future, and it was thus appropriate that some guidance be given to them. He agreed with the SCA in the conclusion that the right to act under section 12(4)(b) and the right of access to adequate housing are not reciprocal and that the former is neither dependent nor conditional on the latter.[887] However, the SCA had failed to wholly embrace the inter-relationship between section 12(4)(b) and section 26(2) of the Constitution.[888] For Yacoob J the relationship between the eviction of people by the local authority pursuant to a section 12(4)(b) notice and the possibility of their being subsequently rendered homeless could not be gainsaid.[889] As such, the local authority must consider the possible homelessness factor consequent upon a section 12(4)(b) eviction when deciding whether or not to proceed with such eviction.[890]

Furthermore, the Constitutional Court took issue with the SCA finding that there is nothing objectionable about a legislative provision that permits "the issuing of an administrative order to vacate and, in the event of non-compliance, for a criminal sanction".[891] It found that any legislative provision, such as section 12(6), that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution, and therefore not consistent with the Constitution.[892] It reasoned though that it is neither just nor equitable to set section 12(6) aside, as it provides an additional incentive for occupiers to leave unhealthy and unsafe buildings and reduces the need for a forced eviction at the instance of the state.[893] Instead, Yacoob J's view was that a 'reading-in order' that provides for a criminal sanction only after a court order for eviction has already been made would be appropriate to save section

[886] *Occupiers of 51 Olivia Road* [39].
[887] *Occupiers of 51 Olivia Road* [43].
[888] *Occupiers of 51 Olivia Road* [45].
[889] *Occupiers of 51 Olivia Road* [46].
[890] *Occupiers of 51 Olivia Road* [46].
[891] *Occupiers of 51 Olivia Road* [48].
[892] *Occupiers of 51 Olivia Road* [49] and [54].
[893] *Occupiers of 51 Olivia Road* [50]. See also Muller 2015 *SALJ* 627.

12(6).[894] In the premises, the Constitutional Court ordered that, for future purposes, section 12(6) should be read as if the following proviso has been added:[895]

> 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.

Pienaar asserts that the effect of this proviso was to "underline the fact that the provisions of section 12(4) did not permit a local authority to resort to self-help and expel persons who failed to comply with notices issued in terms of the subsection".[896] Thus, a court order is necessary where an eviction is required to enforce compliance.[897] However, in Muller's analysis this proviso, which was read into section 12(6), only applies when the unlawful occupiers fail to vacate the building immediately and therefore does not ensure judicial oversight of the decision that precedes the notice to vacate the buildings.[898]

In *City of Cape Town v Hoosain*[899] the court held that section 12(5) could be used for enforcement purposes only where reasonably possible, but not in a manner that effectively defeated section 26 of the Constitution.[900]

Muller's critique of the NBRBSA is that it does not promote the spirit, purport and objects of the Bill of Rights optimally in that it falls short on promoting the inherent human dignity of people, access to administrative justice and access to courts. Moreover it fails to strike an appropriate balance between the individual interests of the unlawful occupiers and the public interest of the community, as well as avoid landlessness and homelessness.[901] In conclusion, he posts a strong argument that the NBRBSA should be used in conjunction with PIE where a dilapidated building poses a threat to the lives and well-being of unlawful occupiers.[902] This would infuse any decision on the demolition or repair of such a building with the right of

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[894] *Occupiers of 51 Olivia Road* [50].
[895] *Occupiers of 51 Olivia Road* [51]–[52] and [54].
[896] Pienaar *Land reform* 486–487.
[897] Pienaar *Land reform* 487.
[898] Muller 2015 *SALJ* 629.
[899] *City of Cape Town v Hoosain* (Unreported) (10334/2011) [2012] ZAWCHC 180 (24 October 2012) (hereinafter *Hoosain*).
[900] *Hoosain* [36]. See Pienaar *Land Reform* 487.
[901] Muller 2015 *SALJ* 629.
[902] Muller 2015 *SALJ* 638.

those unlawful occupiers to be provided with appropriate temporary alternative accommodation.[903]

4.3.13 Various other legislative instruments

Generally, the *apartheid* regime invoked wider state powers in the form of legislation, which empowered police to evict, to advance the political objective of introducing and sustaining an unequal and unjust land-use system that was segregated along racial lines.[904] Besides the legislation already discussed examples of other legislation include:

- the Asiatic Land Tenure and Indian Representation Act 28 of 1946, which prohibited Indians from purchasing land from non-Indians except in specified areas, and also prevented Indians from occupying property from the exempted areas;[905]

- the Black Laws Amendment Act No 7 of 1973 that speeded up the planning for partial consolidation of homelands;[906] and

- the 1927 Black Administration Act that was amended so that a removal order might be served on a Black community as well as on a tribe or portion thereof. If a tribe refused to move, and Parliament approved the plan, the tribe was unable to appeal to Parliament.[907]

Muller cites various other pieces of *apartheid l*egislation that were also enacted to advance this absolute right of the government to evict and displace people irrespective of their personal circumstances or housing needs.[908]

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[903] Muller 2015 *SALJ* 638.

[904] Van der Walt *Constitutional property law* 414. See also Muller *The impact of section 26 of the Constitution* 34.

[905] Pienaar *Land Reform* 126–127; and https://www.sahistory.org.za › article › apartheid-legislation-1850s–1970s (Date of use: 4 January 2020).

[906] https://www.sahistory.org.za › article › apartheid-legislation-1850s–1970s (Date of use: 4 January 2020).

[907] Pienaar *Land Reform* 230; and https://www.sahistory.org.za › article › apartheid-legislation-1850s–1970s (Date of use: 4 January 2020). It was later repealed by the Abolition of Influx Control Act No 68 of 1986.

[908] Muller *The impact of section 26 of the Constitution* 33-34. Legislation such as the Asiatic Land Tenure Amendment Act 15 of 1950, the Black Authorities Act 68 of 1951, the Land Settlement Amendment Act 22 of 1952, the Reservation of Separate Amenities Act 49 of 1953, the Blacks (Abolition of Passes and Coordination of Documents) Act 67 of 1952, the

4.4 Conclusion

The analysis of the common-law eviction principles in the pre-democratic dispensation attests to the fact that by legislatively restricting Black landownership, the then government managed to allow the *rei vindicatio* to do a great deal of the work of racial segregation through a process whereby evictions of Black people could be painted as the enforcement of race-neutral common law.[909] Legislation, including PISA and the Group Areas Act, demonstrated that differentiation on the basis of race was not only a source of grave assault on the dignity of Black people, but also resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure Black areas.[910] Evictions were governed arbitrarily through draconian laws, without consideration of all relevant circumstances or appropriate judicial oversight. Prevailing socio-economic and political systems dictated and guaranteed that landownership remained largely vested in the white population, whilst only a small portion of land (about 13% and in rural smallholdings) vested in the hands of all other races. Most Black people were labourers in various spheres of life, living in white-owned land or dwellings for a permitted duration at the beck and call of their masters.

The draconian political atmosphere of the time encouraged an environment in which pre-democratic laws dealing with land tenure and evictions thrived. Cold and ruthless *apartheid*-era eviction laws, where the consideration of relevant human

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Public Safety Act 3 of 1953, the Black Administration Amendment Act 13 of 1955, the Land Settlement Amendment Act 31 of 1955, the Group Areas Development Act 69 of 1955, the Coloured People in Towns and Villages Amendment Act 6 of 1956, the Land Settlement Act 21 of 1956, the Blacks (Prohibition of Interdicts) Act 64 of 1956, the Housing Act 10 of 1957, the Black Taxation and Development Amendment Act 38 of 1958, the Black Affairs Act 55 of 1959, the Coloured Persons Communal Reserves Act 3 of 1961, the Preservation of Coloured Areas Act 31 of 1961, the Urban Black Councils Act 79 of 1961, the Rural Coloured Areas Act 24 of 1963, the Removal of Restrictions in Townships Amendment Act 32 of 1963, the Better Administration of Designated Areas Act 51 of 1963, the Residence in the Republic Regulation Act 23 of 1964, the Black States Development Corporations Act 86 of 1965, the Community Development Act 3 of 1966, the Housing Act 4 of 1966, the Land Tenure Act 32 of 1966, the Black Affairs Administration Act 45 of 1971, the Promotion of the Economic Development of National States Amendment Act 80 of 1977, the Designated Areas Development Act 87 of 1979, the Black Local Authorities Act 102 of 1982 and the National Policy for General Housing Matters Act 102 of 1984.

[909] "Evictions and alternative accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

[910] See *Port Elizabeth Municipality* [10]; and *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) [46].

and socio-economic circumstances was not a pre-requisite, triumphed over procedural fairness. As discussed in this segment and also indicated by Sachs J, under the *apartheid* regime once it was determined that the occupiers were not authorised to be on a particular land, they not only faced summary eviction, but were also liable for criminal prosecution.[911] As such, squatters were in most instances evicted through criminal procedures instead of civil courts or rules, and as a matter of public rather than private law, upon being convicted.[912] Conditions were therefore clearly not favourable or conducive to the introduction of uniform, non-discriminatory eviction rules in civil courts. As shown in the case of *Zulu,* even if they had been born, grew up and lived on that land throughout their lifetime, occupiers were deemed to have committed a crime and were vulnerable to summary eviction once the landowner withdrew their occupational permit. No eviction court rules or procedural laws were relied upon in this regard, a position sought to be highlighted and addressed through this study.

The Natives Land Act, Native Trust and Land Act (Development Trust and Land Act), PISA, Group Areas Acts and the others narrated here formed a powerful group of laws that authorised the "usurpation and forced removal of Black people from land and compelled them to live in racially designated locations".[913] The basis of *apartheid* land law revolved around the power to enforce politically motivated, legislatively sanctioned and state-sponsored evictions and forced removals.[914] Black people thus generally found themselves without any statutory or common law occupational protection, rendering them vulnerable to the mercy of the white minority government.[915]

As pointed out by Sachs J,[916] it was against this background and to deal with these injustices that pertinent constitutional provisions such as those contained in sections 25 and 26 were adopted and various new statutory arrangements were made in the South African democratic dispensation, to which (arrangements) I now turn.

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911 *Port Elizabeth Municipality* [8].
912 *Port Elizabeth Municipality* [8].
913 *Port Elizabeth Municipality* [9].
914 Van der Walt 2002 *TSAR* 260. See also *Port Elizabeth Municipality* [10].
915 Liebenberg *Socio-economic rights* 267.
916 *Port Elizabeth Municipality* [10].

Chapter 5: Substantive laws impacting on the evictions regulatory framework: Legislation in the democratic era

5.1 Introduction

At the beginning of South Africa's constitutional democracy the aftermath of *apartheid* had left the majority of the previously oppressed groups socially and economically marginalised.[917] The plight of the homeless, viewed against pertinent constitutional provisions such as those embodied in sections 25 and 26, constitutes one of the background factors leading to the enactment of various statutes such as LTA, ESTA, PIE, REHA and others. Horn J in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*[918] captures the position thus:[919]

> People squat because they have to, not because they want to. With the lifting of the racial restrictions as to where people could live and work, many of the unemployed in the former homelands migrated to the cities. The shortage of accommodation in the urban areas forced them to live in shack towns or squatter camps on open land. Their plight should be recognised and should be treated with awareness and understanding.

It is against this painful, racially divided, unequal socio-economic background that the Constitution was adopted in 1996. Some of its objectives as described in the Preamble were to: heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; and improve the quality of life of all citizens.

Two constitutional provisions stand out – sections 25 and 26, aspects of which have already been discussed.[920] Section 25 enjoins and empowers the state to enact laws aimed at improving access to land and enhancing security of tenure. The land reform provisions are pertinent, especially where the Constitution directs the state to adopt reasonable legislative and other measures to foster conditions

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[917] Cloete *A critical analysis of the approach of the courts in the application of eviction remedies* 79.

[918] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 (2) SA 1074 (SE) (hereinafter *Peoples Dialogue*).

[919] *Peoples Dialogue* 1079H–J.

[920] See chapter 3 in particular.

that enable citizens to gain access to land on an equitable basis.[921] The land reform provisions are also significant where persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to a legally secure tenure or to comparable redress.[922] Parliament is mandated to enact legislation giving effect to land tenure reform[923] and no provision of the property clause may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.[924]

On the related aspect of housing section 26 of the Constitution is also prescriptive on the nature of legislation introduced. The state is instructed to take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to adequate housing.[925] The all-important section 26(3) not only stipulates that no one may be evicted from their home, or have their home demolished, without an order of court to be made after considering all the relevant circumstances, it also simultaneously prohibits legislation that may permit arbitrary evictions. Therefore, any envisaged introduction of a uniform set of civil court rules regulating evictions should not be averse the spirit of the Constitution, and must instead also contribute towards enhancing the aspirations of sections 25 and 26.

As indicated previously,[926] in fulfilment of its constitutional mandate the South African government has, since the late 1990s, introduced various statutes to enhance access to land, secure land tenure, advance the right to adequate housing, curb arbitrary evictions and so forth. Laws promulgated to give effect to the tenure reform programme, in line with sections 25(6) and 25(9) of the Constitution, include the LTA, the Communal Property Associations Act,[927] IPILRA, ESTA and the Communal Land Rights Act.[928] IPILRA's long title describes

[921] Section 25(5).
[922] Section 25(6).
[923] Section 25(9).
[924] Section 25(8).
[925] Section 26(2).
[926] See chapter 1.
[927] Communal Property Associations Act 28 of 1996.
[928] Communal Land Rights Act 11 of 2004. Maass *Tenure security* 112. See Dhliwayo *Tenure security* 1. See also Maass *Tenure security* 106 footnote 22 where she states: "According to Badenhorst PJ, Pienaar JM & Mostert H Silberberg & Schoeman's *The Law of Property* (5th ed 2006) 594–607 the Land Reform (Labour Tenants) Act 3 of 1996, the Provision of Land and Assistance Act 126 of 1993 and the Transformation of Certain Rural Areas Act

its main objective as being the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law. Maass clarifies that even though these 'informal land rights' were never registered, they nevertheless receive protection as if they were property rights because of the low status they enjoyed during the *apartheid* era.[929] Although the protection of these rights is not permanent, IPILRA's validity has nevertheless always been extended annually since its inception to date.[930]

Statutes enacted in compliance with the mandate embodied in sections 26(1) and (2) of the Constitution to promote the right of access to adequate housing (in urban areas) include the Housing Act, REHA and Social Housing Act.[931] PIE forms part of the anti-eviction measures under section 26(3) of the Constitution.[932]

This chapter focuses mainly on the LTA, ESTA, PIE and REHA which respectively constitute legislation practically more relevant to the four spheres of evictions with which this study is concerned. These spheres of evictions are the following:

- Civil procedure – following sale in execution proceedings, where PIE is mainly applicable;

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94 of 1998 fall under the land redistribution programme, while Carey Miller DL (with Pope A) Land Title in South Africa (2000) 398–455 add the Development Facilitation Act 67 of 1995. Carey Miller DL (with Pope A) Land Title in South Africa (2000) 525–551 and Van der Walt AJ Constitutional Property Law (2005) 312–315 include the Land Reform (Labour Tenants) Act 3 of 1996 under the tenure reform programme. This illustrates how diverse some of the legislation is to the extent that it serves two programmes even though it may have been promulgated initially to give effect to only one programme". Land reform is also discussed extensively in Muller *et al* S*ilberberg & Schoeman's law of property* 673–764. As concerns the Communal Land Rights Act, it was found to be unconstitutional in the judgment of *Tongoane v National Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC). See also Muller *et al* S*ilberberg & Schoeman's law of property* 719–720.

[929] Maass *Tenure security* 112. According to Van der Walt *Constitutional property law* (2005) 311, this Act covers occupiers in various land holdings and stipulates that they may not be deprived of their land rights without their consent, although they may be deprived of their "right in communal land in accordance with the customs of the particular community".

[930] IPILRA's validity has been extended to 31 December 2022, as published under GN 1635 in *Government Gazette* 45687 dated 20 December 2021. In the preceding period the Act's validity had been extended for a further period of 12 months ending on 31 December 2021, as published under GN 1323 in *Government Gazette* 43981 dated 11 December 2020: https://www.gov.za/sites/default/files/gcis_document/202012/ 43981gon1323.pdf (Date of use: 3 February 2021). Prior to such notice IPILRA's validity had been extended for a period of 12 months ending on 31 December 2020, as published under GN 1572 in *Government Gazette* 42887 dated 6 December 2019.

[931] Social Housing Act 16 of 2008. See Maass *Tenure security* 120.

[932] Maass *Tenure security* 115. See also Van Wyk 2011 *PER/PELJ* 2.

- Landlord and tenant law – where former tenants hold over, in which REHA and PIE feature prominently;
- Property law – where people settle on property without any right, permission or licence to do so, and are commonly referred to as 'squatters', where PIE also dominates; and
- Rural land tenure, mainly regulated by LTA and ESTA.

It is important to reiterate that these laws are receiving focus because they prescribe certain procedures and requirements applicable to eviction processes. Values enshrined in these laws are also pertinent to any uniform rules envisaged for evictions. The history and background factors informing each of these laws will be discussed, as will pertinent case law. As concerns case law, some judicial pronouncements will be discussed simultaneously with certain legislative provisions, whilst other cases will be analysed separately but within the ambit of a particular Act to give broader context and understanding on the practical implementation of the specific legislation.

Working from a chronological point of view, an analysis of the LTA is the starting point.

5.2 Land Reform (Labour Tenants) Act 3 of 1996 (LTA)

5.2.1 Introduction

Processes pertinent to the eviction of labour tenants[933] are regulated by the LTA. The main objectives of the Act are to provide for security of tenure of labour tenants together with those persons occupying or using land as a result of their association with them, and to provide for the acquisition of land and rights in land by them.[934] It envisages the adequate protection of labour tenants, and the eradication of the systematic breach of human rights and prejudices brought about by past racially discriminatory laws and practices.[935] Tenure security effectively

[933] A 'labour tenant' as defined in the Act.
[934] As mentioned in the long title.
[935] See the Preamble. See also Maass *Tenure security* 113; Pienaar *Land reform* 305–319.

connotes the rights associated with the way in which a person can own or occupy land, thus guaranteeing protection from unlawful or arbitrary eviction.[936]

5.2.2 Discussion

Briefly, the LTA defines[937] 'labour tenant' as, amongst others, a person:[938]

> (a) who is residing or has the right to reside on a farm;
> (b) who has or has had the right to use cropping or grazing land on the farm of the owner, and in consideration of such right provides or has provided labour to the farm owner or lessee; and
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on a farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of the farm.

Simply put, "a labour tenant provides labour on a farm in exchange for the right to live there and work a portion of the farm for his or her own benefit".[939] In the words of Cameron J, in South Africa labour tenancy has been precarious as historical racial subordination and exclusion translated to labour tenants being overwhelmingly Black, and landowners on whose favour they relied being overwhelmingly white.[940] The definition also includes a person who has been appointed a successor to a labour tenant, but excluding a farmworker.[941] A 'farmworker**'** is also specifically defined in the LTA as a person who is employed on a farm in terms of a contract of employment which provides that:[942]

> (a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and
> (b) he or she is obliged to perform his or her services personally.

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[936] See Mahomed A *Understanding land tenure law: commentary and legislation* (Juta Cape Town 2009) 28. See also Dhliwayo *Tenure security* 13.

[937] See the full definition of 'labour tenant' in section 1.

[938] Section 1. Paragraphs (a), (b) and (c) of the definition of labour tenant are to be read (interpreted) conjunctively, as per *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) [11], which judgment was followed in various cases such as *Brown v Mbhense and Another* (2008 (5) SA 489 (SCA)[17]; and *Kubheka v Adendorf and Others* [2019] 3 All SA 566 (LCC) [8].

[939] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) (hereinafter *Mwelase and Others*) {5}. See also *Mvubu v Herbst* 1924 TPD 741 (hereinafter *Herbst*) 749 for a historical background to labour tenancy in South Africa.

[940] *Mwelase and Others* [5]; and *Herbst* 752.

[941] Section 1 of the Act, wherein 'labour tenant' is further defined as "including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker".

[942] See section 1, on the definition of a 'farmworker'.

In other words, labour tenants are differentiated from farm workers on the basis of them acquiring occupation rights on landowners' farms in exchange for providing labour.[943] The provision of labour should be in exchange for the right to reside in land.[944] According to Muller *et al* the value of the right to reside on the property and use grazing and cropping rights should outweigh any remuneration paid in cash for services rendered.[945]

The Act defines 'eviction' to include the deprivation of a right of occupation or use of land.[946] One of the reasons which may result in the termination of a labour tenant's right to occupy and use the farmland is when he or she gets evicted.[947] The eviction of a labour tenant from a farm is regulated in a particular manner, the process and procedures of which are stipulated in Chapter 2 of the Act, sections 5–15A, on which the emphasis is now placed.

In general, a farm owner may institute proceedings for the eviction of a labour tenant or his or her associate in the Land Claims Court.[948] Although the heading given to section 6 is titled "Application of eviction" the Act itself does not clearly specify in Chapter 2 whether proceedings should be launched via the action or motion procedure or interchangeably, opting instead to use the phrase "institute proceedings" variably. However, in section 9(3) "may apply to the Court" is used and the phrase "may make urgent application" is used in section 15, thus seemingly tilting in favour of motion proceedings. The 'applications' procedure is the sole preferred method throughout Chapter 3 of the Act.[949]

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[943] Van der Walt *Constitutional property law* (2005) 312; and Maass *Tenure security* 113–114; and Muller *et al Silberberg & Schoeman's law of property* 686–688.

[944] Muller *et al Silberberg & Schoeman's law of property* 687; and *Deo Volente Rusoord Bk v Shongwe and Others* 2006(2) SA 5 (LCC).

[945] Muller *et al Silberberg & Schoeman's law of property* 688: in other words "if the tenant is paid predominantly in cash or in another form of remuneration, but not predominantly by making use of the property, then that person is not a labour tenant".

[946] See section 1 on the definition of 'eviction'.

[947] Section 3(2)(c). Other reasons listed in sections 3(2)(a), (b) and (d) are that the right of a labour tenant to occupation and use of part of a farm shall terminate by the waiver of his or her rights; on his or her death; and on acquisition by the labour tenant of ownership or other rights to land or compensation.

[948] Section 6(1) read with section 7(1). Section 7(1) states that the court shall have the power to grant an order for such an eviction. Section 1 defines 'Court' as "the Land Claims Court" established by section 22 of the Restitution of Land Rights Act 22 of 1994.

[949] In Chapter 3 sections 17, 18, 19, 24 and 34 all advocate the usage of motion proceedings in the Land Claims Court.

A central provision is section 7(2), stipulating that the eviction order can only be granted if it is just and equitable, under either of two instances. The first instance is where the labour tenant fails or refuses to provide labour to the farm owner or lessee in violation of the parties' agreement, despite one month's written notice having been given to him or her.[950] However, the exception here is that a labour tenant who has attained the age of sixty years or who is disabled and unable to provide labour to the landowner or lessee, and has not nominated an alternate person to work, shall not be evicted.[951] The second alternative instance is where the labour tenant or his or her associate has committed a major breach of the parties' relationship to the extent whereby it is no longer practically or reasonably possible to remedy or restore.[952]

The court granting an eviction must also order the farm owner to pay compensation "to the extent that it is just and equitable".[953] Factors for consideration by the court to determine a just and equitable compensation include the replacement value of structures and improvements to be demolished by the labour tenant, the value of materials which may be removed, circumstances giving rise to the eviction and so forth.[954] The farm owner is prohibited from carrying-out the eviction order until he or she has paid-out the compensation due.[955] The court may also order the farm owner to allow the labour tenant being evicted a fair opportunity to, amongst others, tend a crop to which he or she is entitled, and thereafter reap and remove it upon ripening.[956]

Another unique procedural requirement in the Act is that a farm owner intending to evict must give the labour tenant and the Director-General of the DALRRD not less than two months' written notice.[957] This therefore triggers a compulsory mediation

[950] Section 7(2)(a).
[951] Section 9(1). However, on the death of such a labour tenant all this or her associates may, in terms of section 9(2) be given twelve months' notice to vacate the farm. A farm owner whose rights are unfairly prejudiced by the operation of section 9 provisions may apply to the court for equitable relief in terms of section 9(3).
[952] Section 7(2)(b).
[953] Section 10(1)(a).
[954] Sections 10(2)(a)–(e) list all factors to be considered by the court.
[955] Section 10(3).
[956] Section 10(1)(b(ii)). In terms of section 10(1)(b)(i) the court may order the farm owner to allow the labour tenant being evicted a fair chance to "demolish such structures and improvements as were erected by the labour tenant and his or her associates or predecessors, and to remove materials so salvaged".
[957] Section 11(1).

mechanism, whereby the Director-General is obliged to convene a meeting during this period aimed at attaining some settlement. [958]

Section 15 allows for an urgent application to be launched by either the farm owner or lessee for the removal of a person from the farm pending the outcome of proceedings for a final order. This procedure is for instances where:[959]

(1) there is real or imminent danger to the farm owner or lessee or their property;
(2) there is no other effective remedy;
(3) the likely harm to the farm owner or lessee is greater than to the respondent if the order is not granted; and
(4) there are adequate arrangements in place for the reinstatement of such a person (respondent) if the final order is not granted eventually.

Lastly, the Act criminalises any removal or eviction of a labour tenant or an associate without a court order.[960] A contravention in this regard carries a sanction of a fine or imprisonment up to a maximum of two years, or both.[961] As such, the LTA now effectively puts brakes on the landowners' longstanding power to evict labour tenants without reason or notice, and simultaneously gives labour tenants both substantive and procedural anti-eviction protections.[962]

5.2.3 Summary and conclusion

In conclusion, several procedural components and requirements in the LTA introduce new features not hitherto contained in the current civil court rules. As such, the Act itself, instead of the rules, becomes a reference point whenever eviction proceedings are sought to be launched or opposed. It would have been easier to regulate the process if a uniform set of eviction rules existed, infusing elements of the different procedures contained in the four main Acts under consideration.

[958] Section 11(3).
[959] See section 15(a)–(d).
[960] Sections 15A(1) and (3).
[961] Section 15A(3).
[962] *Mwelase and Others* [8].

To a limited extent though, the LTA does refer to the Magistrates' Courts and High Court as well as applicable procedures, legislation or rules. For instance, section 17(3) provides that a notice[963] may be given by way of "registered mail or through service in the manner provided for the service of summons in the Rules of Court made in terms of the Magistrates' Courts Act 32 of 1944, read with section 6(3) of the Rules Board for Courts of Law Act 107 of 1985". This is a notice whereby the Director-General informs a landowner of an application by a labour tenant to acquire ownership of the portion of land he is entitled to occupy.[964] The section 17(3) provision itself seems to be a bit long-winded, with a potential to confuse, a position which could otherwise be avoided. Also, reference to the Magistrates' Courts Act in section 17(3) seems a bit misplaced in so far as the Land Clams Court is equivalent to the High Court in stature, as is also confirmed by the provisions of the LTA itself. For instance, section 29 provides that the Land Claims Court has jurisdiction throughout the Republic and has all such powers in relation to matters falling within its ambit as those of a provincial division of the Supreme Court in civil proceedings. Similarly, section 32 accords the court the same review powers as the Supreme Court. Lastly, section 35 stipulates that an order of the Land Claims Court has the same force as an order of the Supreme Court. For several reasons, therefore, section 17(3) could have just stipulated that the envisaged notice may be given by registered mail or via any of the applicable manners of service provided for in rule 4 of the High Court Rules.

Similar to the LTA is ESTA, whose provisions are also worth considering.

5.3 Extension of Security of Tenure Act 62 of 1997 (ESTA)

5.3.1 Introduction

Whereas the LTA was enacted to give *labour tenants* more secure tenure on and protection against unlawful eviction from rural land, ESTA is intended to similarly safeguard a different group of people, *occupiers*, occupying land in rural and peri-urban areas.[965] This grouping includes: farm workers occupying such land as part

[963] In terms of sub-section (2)(a) or (d).
[964] In terms of section 16.
[965] Section 2(1) essentially provides that the Act shall apply to all land other than land in an established or proclaimed township or encircled by such a township or townships, but including -– "(a) any land within such a township which has been designated for agricultural

of their employment; people living on land with the owner's consent; and those inhabiting land that is occupied on a tribal or communal basis.[966] The gist of the Act was succinctly captured by Matojane AJ in *Klaase and Another v van der Merwe N.O. and Others*,[967] quoting from its Preamble. In line with the protection envisaged for labour tenants articulated in the opening sentence of this paragraph, the Preamble confirms that ESTA seeks, amongst others, to regulate the eviction of vulnerable occupiers from land while recognising the right of landowners to apply to court for eviction in appropriate circumstances. Therefore, the objective is to advance security of tenure for occupiers of land and to extend their rights while giving due recognition to the rights, duties and legitimate interests of owners. There are certain envisaged amendments to the Act in terms of the Extension of Security of Tenure Amendment Act[968] which will be touched upon in the discussion.

The Act does not protect the following categories of people:

- land invaders;[969]
- people living on land that is part of a township, unless such land has been designated for agricultural purposes;[970]
- persons using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes, unless they work the land themselves and employ only family members;[971] and

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purposes in terms of any law; and (b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition".

966 Department of Land Affairs *Explanatory Guide to the Extension of Security of Tenure Act, 62 of 1997* ISBN 0-621-27829-7 7. See also Pienaar *Land reform* 395–432.

967 *Klaase and Another v van der Merwe N.O. and Others* 2016 (9) BCLR 1187 (CC) (hereinafter *Klaase*) [2]. See also *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) [1], where Nkabinde J crisply articulated ESTA's purpose thus: "to promote the achievement of long-term security of tenure and regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the rights of landowners".

968 Extension of Security of Tenure Amendment Act 2 of 2018. This Amendment Act was published in *Government Gazette* 42046 dated 20 November 2018 and will come into operation on a date to be determined by the President by proclamation.

969 Department of Land Affairs *Explanatory Guide to the Extension of Security of Tenure Act, 62 of 1997* ISBN 0-621-27829-7 12.

970 Section 2(1)(a), or unless, per section 2(1)(b), it is land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.

- people whose gross cash wage or salary (income) is in excess of R13 625 per month.[972]

In the Act[973] 'evict' means to "deprive a person against his or her will of residence[974] on land or the use of land or access to water which is linked to a right of residence in terms of this Act", and 'eviction' has a corresponding meaning. The eviction processes are regulated in Chapter 4 of the Act, sections 8 to 15.

5.3.2 Discussion

As will be noted, the eviction process is basically broken down into three separate stages, namely: termination of the occupier's residence by the owner or the person in charge; the eviction itself; and the execution of the eviction order.

An occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors.[975] Two of those factors relate to: (1) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, plus any other occupier if the right of residence is or is not terminated;[976] and (2) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.[977]

If an occupier who is an employee whose right of residence emanates solely from an employment agreement resigns or is dismissed per the provisions of the

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[971] Section 1(1)(b) under the definition of 'occupier'. Section 1 of the Extension of Security of Tenure Amendment Act (not yet in operation) amends ESTA by, amongst others, inserting a definition of 'family', which means the occupier's spouse, and includes: "(i) a spouse in a customary marriage, whether or not the marriage is registered; (ii) a child, including an adopted child, or foster care child; (iii) a grandchild; (iv) a parent; and (v) a grandparent, who are dependants of the occupier and who reside on the land with the occupier".

[972] Section 1(1)(c) under the definition of 'occupier', read with GN 72, *Government Gazette* 41447 dated 16 February 2018 which amended regulations under ESTA (substituting the initial gross monthly income amount of R5000 with R13 625).

[973] Section 1.

[974] Section 1 of the Extension of Security of Tenure Amendment Act (not yet in operation) amends ESTA by, amongst others, inserting a definition of 'reside', which means "to live at a place permanently, and "residence" has a corresponding meaning".

[975] Section 8(1)(a)–(e).

[976] Section 8(1)(c).

[977] Section 8(1)(e).

Labour Relations Act,[978] his or her right of residence may be terminated.[979] With regard to an occupier who has resided on the land in question or any other land belonging to the owner for 10 years and:

- is aged 60 years (or more); or
- is an employee or former employee of the owner or person in charge who is unable to supply labour any more due to ill health, injury or disability,

such person's right of residence may not be terminated unless he or she has committed a material breach as contemplated in the Act.[980] However, if such an occupier dies the right of residence of an occupier who was his or her spouse or dependant may be terminated only on 12 months' written notice to leave the land, unless such a spouse or dependant has committed a serious breach[981] contemplated in the Act.[982]

Section 9 prescribes some restrictions concerning evictions, the first one being that an occupier can only be evicted through a court order.[983] The eviction order can also only be granted subsequent to the termination of the occupier's right of residence,[984] and the failure of the occupier to vacate the land within the notice period given by the owner or person in charge.[985] Upon termination of the right of residence the owner or person in charge should have first given not less than two months' written notice of the intention to obtain an eviction order to the occupier and municipality within which the land in question is situated. This notice must

[978] Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA).
[979] Section 8(2). However, section 8(3) stipulates that any dispute over whether an occupier's employment has indeed ended must first be resolved according to the provisions of the LRA before the termination of residence can be effective.
[980] Section 8(4). A material breach would be that contemplated in section 10(1)(a), (b) or (c), excluding the mere refusal or failure to provide labour.
[981] Section 8(5).
[982] A serious breach as contemplated in section 10(1).
[983] Section 9(1). Section 4 of the Extension of Security of Tenure Amendment Act (not yet in operation) amends this sub-section by placing an additional requirement that the occupier being evicted should have been legally represented at the court proceedings wherein an eviction order was issued unless if (i) such occupier expressly waived the right to state funded legal representation; and (ii) the court determined that the interests of justice would not be harmed by lack of legal representation.
[984] In terms of section 8.
[985] Sections 9(2)(a) and (b).

contain the prescribed particulars and the grounds for the eviction.[986] However, such notification can be dispensed with by giving the occupier, the municipality and the head of the relevant provincial office of the DALRRD a notice of application to court instead, after the termination of the right of residence. Such notice of application should be given at least two months before the date of the commencement of the hearing of the application.[987] Furthermore, the conditions for an order for eviction in terms of section 10 or 11 must have been complied with.[988]

Now, section 10 gives protection to people who were occupiers on 4 February 1997[989] (also known as *effective-date occupiers*), whilst section 11 provides persons who became occupiers after the aforementioned date slightly less protection. Effective-date occupiers can be evicted if they are seriously in the wrong or have committed a material breach in the contract or relationship between them and the owner or person in charge and it is not practically possible to remedy the situation or to reasonably restore it.[990] The transgressions are indicated in ESTA and include: (1) wrongfully and intentionally harming or intimidating other occupants; (2) unlawfully inflicting material damage to the property of the owner or

[986] Sections 9(2)(d)(i) and (ii). In addition, sub-section 9(2)(d)(iii) requires that such notice should also have been sent to the head of the relevant provincial office of the DALRRD for information purposes.

[987] Proviso to section 9(2)(d).

[988] Sub-section 9(2)(c). For the purposes of this subsection the Act stipulates in section 9(3) that the court must request a probation officer or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period: (a) on the availability of suitable alternative accommodation to the occupier; (b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education; (c) pointing out any undue hardships which an eviction would cause the occupier; and (d) on any other matter as may be prescribed.

[989] The significance of this date is explained comprehensively in the Department of Land Affairs *Explanatory Guide to the Extension of Security of Tenure Act, 62 of 1997* ISBN 0-621-27829-7 5. On 4 February 1997 the Minister of Land Affairs published the Bill forming the basis of ESTA for public information and comment. The importance of this date is that, now that ESTA has become law, people covered by this Act who were unfairly evicted after 4 February 1997 can apply to the court for an order allowing them to return to the land they were occupying. This was done in an endeavour to stop people from being evicted before ESTA became law.

[990] Section 10(1)(a)–(c). The owner or person in charge should be in the clear, and the court should be satisfied that the occupier has failed to remedy the breach despite having been given a month's written notice to do so. The material breach in this regard would include transgressions cited in section 6(3).

person in charge; and (3) assisting unauthorised persons to establish new dwellings on the land.[991]

Effective-date occupiers who derive their right of residence solely from their employment can also be evicted if they voluntarily resign from work.[992] Otherwise, the category of effective-date occupiers who have not committed serious offences or voluntarily resigned from work can generally be evicted on condition that suitable alternative accommodation is available, save in exceptional circumstances described in section 10(3).[993]

Persons who became occupiers after 4 February 1997 (the so called *future occupiers*) can also be grouped into two. The first category would be that of occupiers whose consent to reside in the land is terminable upon a fixed or determinable date may be evicted on termination of such consent by effluxion of time if it is just and equitable to do so.[994] The second category would be for the general category of future occupiers, without a time-fixed consent, whose eviction can be granted if in the court's opinion it is just and equitable so to do.[995] Factors to be taken into consideration by the court in this regard include the following:[996] (1) the time-span of the occupier's stay on the land; (2) reasons for the proposed eviction; and (3) whether suitable alternative accommodation is available.

In *First Reality (Krugersdorp) (Pty) Ltd v G Mitchell and Others*[997] the applicant failed to distinguish between those respondents who were section 10 occupiers and those who were section 11 occupiers (occupier after 4 February 1997).[998] Instead, the applicant relied on section 10(1)(b) and 10(1)(c) in seeking the

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[991] Section 6(3).

[992] Section 10(1)(d). The resignation should not amount to constructive dismissal in terms of the LRA.

[993] Section 10(2). The exceptional circumstances are described in section 10(3), and include instances where suitable alternative accommodation cannot be found despite the efforts of the owner or person in charge, and the interests of the respective parties such as the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an eviction order is or is not granted.

[994] Section 11(1).

[995] Section 11(2).

[996] Section 11(3) comprehensively describes factors to consider in determining whether it is just and equitable to grant an eviction order.

[997] *First Reality (Krugersdorp) (Pty) Ltd v G Mitchell and Others* (LCC 123/2018) [2021] ZALCC 6 (13 April 2021) (hereinafter *First Reality*).

[998] *First Reality* [57].

eviction.[999] The court categorically held that applicants cannot simply rely on similar provisions of ESTA or on the same line of reasoning even when seeking eviction in terms of section 11.[1000] Carelse J emphasised that "the requirements for eviction in each section are particular and must be met even if overlapping considerations may arise in… given cases".[1001] There cannot thus be a 'one-size-fits-all' approach when seeking eviction under section 10 and section 11 respectively.[1002]

Although not yet in operation, the Extension of Security of Tenure Amendment Act has inserted another clause, in respect of both sections 10(1) and 11(2), whereby the court can also grant an eviction order where mediation or arbitration efforts have failed.[1003] In terms of these projected amendments this would specifically be the case if the court is satisfied that the circumstances surrounding the order for eviction are of such a nature that it could not be settled by way of mediation or arbitration after the owner or person in charge or the occupier has attempted mediation to settle the dispute[1004] or referred the dispute for arbitration.[1005]

When awarding an eviction order the court must also fix a just and equitable date on which the occupier must vacate the land, and determine the final date on which the eviction order can be executed if the occupier fails to vacate on his or her own.[1006] The court making the eviction order is also compelled to prescribe compensation to the occupier payable by the owner or person in charge, in appropriate circumstances, for both structures erected, improvements made and any standing crops planted on the land, to the extent just and equitable.[1007] It may also call on the owner or person in charge to allow the occupier a fair opportunity to demolish the structures and improvements erected, and to tend standing crops

[999] *First Reality* [57].
[1000] *First Reality* [58].
[1001] *First Reality* [58].
[1002] *First Reality* [58].
[1003] Sections 5 and 6 of the Extension of Security of Tenure Amendment Act (not yet in operation).
[1004] In terms of section 21.
[1005] In terms of section 22.
[1006] Section 12(1)(a)–(b). In determining a just and equitable date the court must consider various factors listed in section 12(2), including the period that the occupier has resided on the land.
[1007] Section 13(1)(a). Section 13(2) sets out aspects to be considered when determining a just and equitable compensation, including the value of materials and crops.

until they are ready for harvesting and removal.[1008] Furthermore, section 13(1)(b) of ESTA stipulates that a court is obliged to order the owner or person in charge to pay outstanding wages and benefits which may be due in accordance with provisions of the LRA, the Basic Conditions of Employment Act[1009] or the Wages Act.[1010] The eviction order cannot be executed until compensation due has been paid, except if satisfactory guarantees for such payment have been made.[1011]

Urgent eviction applications are also catered for in ESTA,[1012] almost along similar instances discussed under the LTA segment above. The additional requirement is that both the relevant municipality and provincial office of the DALRRD must be given reasonable notice of such applications.[1013] Eviction without a court order is also made a criminal offence, which can be prosecuted privately as well.[1014]

There have been numerous judicial pronouncements involving ESTA provisions, some of which are worth analysing, particularly as they assist in illustrating the practical implementation or interpretation of the Act's provisions discussed above, and can guide the content of any envisaged uniform eviction rules. Against that background the cases that are discussed are: *Klaase and Another v van der Merwe N.O. and Others,* specifically because it confirms that a spouse can be an occupier in her own right distinct from her husband*; Molusi and Others v Voges N.O and Others* which points out that the provisions of sections 8, 9, 10 and 11 mean that the landowner's common-law action based merely on ownership and possession is no longer applicable, but is instead subject to ESTA requirements; *Hattingh and Others v Juta* wherein the Constitutional Court held that section 6(2) of ESTA calls for the striking of a balance between the rights of the occupier and those of the landowner in a just and equitable manner, and also interrogates the meaning of 'family' and 'family life'; and *Monde v Viljoen N.O. and Others* since it deals with a scenario in which eviction from the farm was sought solely on the basis of valid termination of an employment contract from which the occupier allegedly derived his residential rights on the property.

[1008] Section 13(1)(c).
[1009] Basic Conditions of Employment Act 3 of 1983.
[1010] Wages Act 5 of 1957.
[1011] Section 13(3).
[1012] In section 15.
[1013] Section 15(2).
[1014] Section 23.

5.3.3 Court decisions

5.3.3.1 *Klaase and Another v Van der Merwe N.O. and Others*

Mr. Klaase and his wife had lived on the farm land in question for 30 years or more, and he had been employed as general labourer by the owner.[1015] He was evicted on 14 January 2014, his relationship with the owner (respondents) having ended on 19 January 2010 following a disciplinary hearing initiated against him on a charge of absconding and absence from work.[1016] His workers' union had initially taken the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) where the matter was referred for arbitration.[1017] The dispute between the parties was settled before the arbitration could be finalised. Mr. Klaase agreed to a monetary settlement of R15 000 and undertook to vacate the premises by not later than 30 June 2010.[1018] Upon his failure to vacate, the respondents informed Mr. Klaase in writing around October 2010 that his right to occupy the premises was terminated as it was dependent on his continued employment, and demanded that he vacate the farm within 30 days, failing which an application for eviction would be brought against him.[1019] The matter came before the Constitutional Court when he appealed the decision of the Land Claims Court that had confirmed the eviction order. Mrs. Klaase in turn resisted being evicted as part of her husband's family, and was allowed to join in the proceedings as a party in her own right.[1020]

Mr. Klaase did not deny having: (1) absconded from work and remained absent; (2) had a long history of inappropriate conduct; (3) failed to attend his disciplinary hearing; (4) failed to vacate the premises as agreed; and (5) continued to live on the premises rent-free whilst being gainfully employed elsewhere.[1021] As such, the Constitutional Court's view was that there was no possibility that the relationship between the parties could be salvaged. It, therefore, held that the Land Claims

[1015] *Klaase* [4].
[1016] *Klaase* [5].
[1017] *Klaase* [5].
[1018] *Klaase* [6].
[1019] *Klaase* [6].
[1020] *Klaase* [47]. Matojane AJ held that Mrs. Klaase should have been cited as a party or joined in the eviction proceedings against Mr. Klaase. Separate substantive grounds for her eviction should have been alleged and eviction should have been sought specifically against her. That did not happen.
[1021] *Klaase* [43].

Court was correct in concluding that the relevant provisions of ESTA[1022] had been complied with, and the eviction order against him could not be faulted.[1023]

Regarding Mrs. Klaase, the Constitutional Court was persuaded to deal with her case separately from her husband's, finding that she was an *occupier* in her own right. Amongst others, it relied in this regard on section 3 of ESTA, particularly sections 3(1) and 3(5). In terms of section 3(5), for purposes of civil proceedings, a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge. Section 3(1) in turn provides that consent to an occupier to reside on or use land shall only be terminated in accordance with the provisions of section 8. The court therefore found that it was undisputed that Mrs. Klaase had lived on the premises continuously for many years with the knowledge of the landowner, and there was no evidence to rebut the presumption that the owner consented to her residing on the farm.[1024] In fact, the respondents' failure to object to Mrs. Klaase's residing on the farm for decades, or to take steps to evict her, implied that they consented to her occupancy.[1025] Upon determining that she was indeed an occupier, the court held that her right of residence should have been terminated on lawful grounds in accordance with factors listed in section 8(1).[1026] So long as her right of residence had not been terminated accordingly, she could still stay on as an occupier in the land in question. In the result, the court deemed it unnecessary to consider, amongst others, whether her consent to reside on the property was subject to conditions like the continuation of her marriage or Mr. Klaase's continued employment. Further, the court held that the Land Claims Court's finding that Mrs. Klaase occupied the premises "under her husband" subordinates her rights to those of Mr. Klaase, and that such a phrase is demeaning as it is not what is contemplated by section 10(3).[1027] Instead, it demeans her rights of equality and

[1022] Sections 9(1) and (2)(a), (b) and (d).
[1023] *Klaase* [43]–[44].
[1024] *Klaase* [60].
[1025] *Klaase* [60].
[1026] *Klaase* [65].
[1027] *Klaase* [66]. Section 10(3) provides: If-

(a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
(b) the owner or person in charge provided the dwelling occupied by the occupier; and

human dignity to describe her occupation in those terms, and such a construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured.[1028]

5.3.3.2 *Molusi and Others v Voges N.O. and Others*[1029]

At issue before the Constitutional Court was whether the termination of the right of residence and eviction of the applicants complied with the pertinent provisions of ESTA, as had been pronounced by the SCA. The applicants were occupiers in accordance with ESTA, who leased homes on Boschfontein farm, which is located in a peri-urban area outside Rustenburg and owned by a trust of which the first and second respondents were trustees. The third respondent, the Head of the North West Provincial Office of the then Department of Rural Development and Land Reform, and the fourth respondent, Rustenburg Local Municipality, were cited by virtue of section 9 and had been served with the eviction application.[1030] Most of the applicants had been in occupation since around 2001, in terms of written leases (first and second applicants) that provided for payment of a monthly rental, and oral leases (for the four remaining applicants).[1031]

The applicants were allegedly served with notices, via the sheriff, in May 2009, purportedly terminating their rights of residence on the farm in terms of section 8(1), for having committed a "fundamental" breach of failing to pay monthly rental since May 2008 notwithstanding demand.[1032] The notice further demanded that the applicants vacate the premises within two months, failing which court

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(c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge, a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to -
   (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and
   (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted.

[1028] *Klaase* [66].
[1029] *Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC) (hereinafter *Molusi*).
[1030] *Molusi* [3].
[1031] *Molusi* [3].
[1032] *Molusi* [5].

proceedings would be instituted for their eviction, amongst others.[1033] However, when the eviction proceedings were initially launched in the Land Claims Court subsequent to their failure to vacate and during argument, the applicants alleged that during May 2009 the respondents refused to accept rental payment because they proposed to demolish the structures the applicants occupied.[1034] The applicants also denied having received notices of termination. Then the respondents changed tack more than once, no longer pursuing the reason for termination mentioned in the notice of termination.[1035] First, they alleged a need to develop the property as the reason for the eviction. Secondly, they relied on ownership and that under the common law a periodic lease can be terminated on reasonable notice. The Land Claims Court elected to accord the respondents' right of ownership greater weight than the rights of the applicants as occupiers, despite recognising that granting eviction would inescapably render the applicants homeless.[1036] It was satisfied that the respondents had shown that it was just and equitable to terminate the applicants' rights of residence and to evict them, in compliance with sections 8 and 9.[1037] It accepted the respondents' argument that under the common law a periodic lease may be terminated on reasonable notice by either the lessor or the lessee. It held that section 9(2) read with section 8 had been complied with as the principal reason for termination was that the respondents needed the land for further development.[1038] The Land Claims Court therefore granted an order evicting the applicants from the premises.

When the applicants took the matter on appeal to the SCA one of the issues for determination was whether non-payment of rentals constituted a material breach of the terms of the leases to the extent that the respondents could rely on the common law ground of termination by reasonable notice.[1039] In the SCA's view the respondents' case did not constitute trial-by-ambush. Instead, the leases had come to an end either because they had been validly cancelled for non-payment of rentals or alternatively, the respondents had given reasonable notice of termination of the lease agreements to the occupiers as they were entitled to do so

[1033] *Molusi* [5].
[1034] *Molusi* [11].
[1035] *Molusi* [11].
[1036] *Molusi* [12].
[1037] *Molusi* [13].
[1038] *Molusi* [13].
[1039] *Molusi* [14].

at common law.[1040] The SCA's take, therefore, was that in either event the result was termination of the lease agreements, obliging the occupiers to vacate the leased property.[1041] It agreed with the Land Claims Court that there was indeed compliance with section 8(1), concluding that the termination of the right of residence was just and equitable.[1042]

The matter then came for adjudication by the Constitutional Court. Nkabinde J effectively found that although section 9(2) requires that the written notice of intention to obtain an eviction must set out the grounds on which the eviction is based, nevertheless the ground relied on for the eviction did not include the common-law grounds on which the eviction was allegedly based.[1043] Respondents could therefore not rely on the common-law principles as bases for eviction when the grounds were not set out in the notice and properly pleaded.[1044] Even though at common law the landowner would "have been entitled to the relief sought" that common-law claim is nevertheless now subject to the provisions of ESTA.[1045] The judge maintained that the provisions of sections 8, 9, 10 and 11 mean that the common-law action based merely on ownership and possession, as in *Graham v Ridley,*[1046] is no longer applicable.[1047] For the eviction to be regarded as being fair all relevant factors would still have to be considered, which had not been done prior to the Constitutional Court proceedings.[1048]

Significantly, Nkabinde J remarked that land reform legislation such as ESTA highlights the reformist view that common-law principles and practices of land law, which entrench unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases, need to change.[1049] She emphasised that section 9 read with section 8, as well as sections 10 and 11, also enjoin the courts when granting evictions to do so if it is 'just and equitable', having regard to certain

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[1040] *Molusi* [16].
[1041] *Molusi* [16].
[1042] *Molusi* [18].
[1043] *Molusi* [33].
[1044] *Molusi* [37].
[1045] *Molusi* [37].
[1046] *Graham v Ridley* 1931 TPD 476. This is the case on which the respondents and the SCA had relied, particularly at 749 where the owner's right of possession of the property was held to prevail in pleadings.
[1047] *Molusi* [37].
[1048] *Molusi* [38].
[1049] *Molusi* [39].

factors.[1050] Furthermore, she requested that the constitutional imperatives in section 26(3), given effect to by ESTA, must be borne in mind, as they demonstrate special regard for a person's place of abode.[1051] In conclusion the Constitutional Court held that the eviction of the applicants without adhering to ESTA provisions would not only render them homeless but would also frustrate their security of tenure and the aims of ESTA. It upheld the appeal.[1052]

5.3.3.3 *Hattingh and Others v Juta*[1053]

In this matter the Constitutional Court was called upon to interpret and apply the provisions of section 6(2)(d) of ESTA. It had to determine whether an occupier (Mrs. Hattingh)'s right to family life provided for in section 6(2)(d) would be infringed if her extended family members were evicted from the land in question (a smallholding called Fijnbosch in Stellenbosch).[1054] A proper construction of the provision was therefore necessary.[1055]

Briefly, the applicants were two adult working sons and one working daughter-in-law of the 67-year-old Mrs. Hattingh, who had lived with her for more than six years (since 2002) in a farm cottage (Fijnbosch) owned by Mr. Juta (respondent) and consisting of two units.[1056] Years later the respondent wanted to accommodate his farm manager in one of the cottage's units, and initiated negotiations for the applicants to vacate, even offering them financial assistance towards alternative accommodation. Ultimately the respondent had to institute eviction proceedings in the Stellenbosch Magistrate's Court. However, the applicants opposed the proceedings, their case being that Mrs. Hattingh was an occupier in terms of ESTA, that she had a right to family life in terms of ESTA and that this right entailed that she could live with them in the cottage.[1057] In response Mr. Juta adopted the position that he was not denying Mrs. Hattingh her right to family life, as the applicants could still visit her *but had no right to live on the farm*

[1050] *Molusi* [41].
[1051] *Molusi* [46].
[1052] *Molusi* [47].
[1053] *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) (hereinafter *Hattingh*).
[1054] *Hattingh* [30].
[1055] As defined in ESTA. *Hattingh* [30]. As Mrs. Hattingh's right to family life is a right that she had by virtue of her status as an occupier as defined in ESTA.
[1056] See background in *Hattingh* [2]–[10].
[1057] *Hattingh* [12].

(emphasis added).[1058] Although Mr. Juta was denied the eviction order by the Magistrate's Court, both the Land Claims Court and the SCA nevertheless granted and confirmed the eviction respectively, whereafter the applicants sought leave to appeal in the Constitutional Court. A brief assessment of the provisions of section 6 of ESTA will help in putting context to the position.

Section 6 specifically pertains to the rights and duties of occupiers. Section 6(1) accords occupiers the right to occupy and use land, and to access such services as may have been agreed between them and landowners or persons in charge. Balanced with the rights of the landowner or person in charge, section 6(2) accords certain fundamental rights to occupiers.[1059]

In *Hattingh* the Constitutional Court had to decide whether Mrs. Hattingh's right to family life provided for in section 6(2)(d) would be infringed if the applicants were evicted from Fijnbosch.[1060] At the outset, Zondo J analysed the starting portion in section 6(2) which stipulates that the rights accorded to occupiers must be "balanced with the rights of the owner or person in charge".[1061] In his view this phrase calls for the striking of a balance between the rights of the occupier and those of the owner of the land in a just and equitable manner.[1062] The effect of this is to infuse justice and equity or fairness in the inquiry required by section 6(2)(d), as required by ESTA with regard to various other sections as well.[1063] He also observed that the relationship between the landowner and unlawful occupier has now statutorily also been infused with an element of justice and equity.[1064] For

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[1058] *Hattingh* [12].

[1059] Rights given to occupiers by section 6(2) consist of the following: (a) security of tenure; (b) to receive *bona fide* visitors at reasonable times and for reasonable periods; (c) to receive postal or other communication; (d) to family life in accordance with the culture of that family; (dA) to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists; (e) not to be denied or deprived of access to water; and (f) not to be denied or deprived of access to educational or health services.

[1060] *Hattingh* [30].

[1061] *Hattingh* [31]–[33].

[1062] *Hattingh* [32].

[1063] *Hattingh* [32]. Zondo J drew attention in this regard to the requirement in section 6(4) that the landowner's right to impose conditions for the exercise of the right by any person to visit and maintain his or her family graves must be exercised reasonably, and the requirement in section 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be "just and equitable, having regard to all relevant factors". He further remarked that the factors outlined in section 8(1) make it clear that fairness plays a very important role.

[1064] *Hattingh* [33].

instance, with PIE it is now a condition for the eviction of an unlawful occupier that such eviction be just and equitable.[1065]

Then the judge went on to analyse the meaning of the words 'family', 'family life' and 'in accordance with the culture of that family' as used in section 6(2)(d).[1066] With regard to 'family' his ultimate view was that whatever notion of family is contemplated will include the children of the occupier, as there is no need to attempt to define the word with any precision though it cannot be limited to the nuclear family.[1067] He did not think that the attainment of the age of majority or being independent of parents takes a person out of the ambit of his or her parents' family.[1068] Concerning 'family life' Zondo J stated that though the purpose of section 6(2)(d) was to ensure that, as far as possible, an occupier could enjoy a life that is as much of family life as is possible, the extent of that family life in any specific set of facts will depend upon striking a fair balance between enabling the occupier to enjoy family life and enabling the owner of the land to also enjoy his rights as owner of the land, which balancing act is also envisaged in ESTA's Preamble.[1069] As such, the occupier may not reside on the landowner's property with more family members than is justified by considerations of justice and equity when the occupier's right to family life is balanced with the rights of the landowner.[1070] Due to his ultimate finding on the question of whether it would be just and equitable that Mrs. Hattingh continued to live with the applicants on Mr. Juta's property, the judge deemed it unnecessary to proceed with the discussion of the phrase "in accordance with the culture of that family".[1071] The court then assessed various personal circumstances pertaining to the applicants, the occupier and the landowner, including the fact that the occupier and her other son were not being evicted, and that the landowner seriously needed usage of part of

[1065] *Hattingh* [33].
[1066] *Hattingh* [34]–[41].
[1067] *Hattingh* [34]. The Land Claims Court, in the *Hattingh* matter, had held that the 'family' contemplated in section 6(2)(d) is constituted by the occupier's spouse or partner and dependent children, which means the nuclear family.
[1068] *Hattingh* [34]. Zondo J concluded thus after also having observed the words of the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) [31] wherein it was stated that "families come in different shapes and sizes".
[1069] *Hattingh* [36].
[1070] *Hattingh* [39].
[1071] *Hattingh* [41].

the cottage and was willing to attend to the occupier's medical requirements. Having considered all relevant factors, the court determined that it would be just and equitable that Mrs. Hattingh did not live with the applicants.[1072] This meant that the exclusion or eviction of the applicants from Fijnbosch would not infringe Mrs. Hattingh's right to family life because, even though it limited that right, the limitation was just and equitable. The ruling therefore was that it would be just and equitable that the applicants be evicted.

5.3.3.4 *Monde v Viljoen N.O. and Others*[1073]

Circumstances in this case were virtually identical to those in *Klaase*, since there was no possibility that the relationship between the landowner and the occupier could be salvaged, eventually resulting in dismissal from work.[1074] The landowners had sought the appellant's eviction from the farm solely on the basis of valid termination of his employment contract from which he allegedly derived his residential rights on the property. However, Schippers JA found that the respondents (landowners) failed to negate appellant's claim that prior to the conclusion of the employment contract, he had consent to reside on the farm, living there with his mother who had also been an occupier. Neither was there any evidence to rebut the presumptions in sections 3(4) and 3(5)[1075] of ESTA that he had resided on the farm with the respondents' consent and knowledge.[1076] Respondents essentially failed to establish that the appellant's right of residence flowed exclusively from the employment contract, and on the termination of the employment his right to occupy a room on the farm was supposed to end. As such, the SCA held that the termination of the appellant's right of residence was

[1072] *Hattingh* [42].
[1073] *Monde v Viljoen NO and Others* 2019 (2) SA 205 (SCA) (hereinafter *Monde*).
[1074] *Monde* [9].
[1075] Sections 3(4) and 3(5) of ESTA respectively provide that: "(4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved" and "(5) … a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge".
[1076] *Monde* [21].

not just and equitable as required in terms of section 8(1), and the order for his eviction as envisaged in section 9(2)*(a)* was incompetent.[1077]

The court did not stop there though, as it deemed it appropriate to tackle the other basis on which the eviction order had been challenged namely, that it had been granted without a probation officer's report, required in terms of section 9(3). Although there was no longer any need to pronounce thereon, Schippers JA nevertheless held that this aspect had been the subject of conflicting judgments of the Land Claims Court and, in the interests of clarity and certainty, a determination was necessary.[1078] The judge commenced by confirming that ESTA is a remedial statute with its genesis in the Constitution.[1079] It seeks to protect those who do not have secure tenure of land and are therefore vulnerable to unfair evictions that lead to great hardship, conflict and social instability, while recognising the right of landowners to apply for an eviction order in appropriate circumstances.[1080] As such, section 9(3) is consistent with the overall purpose of ESTA, and is amongst provisions that impose limitations on eviction and prescribe the circumstances in which an eviction order may be made.[1081] The provision lists certain factors that must be contained in a probation officer's report, such as: the availability of suitable alternative accommodation; the effect of an eviction order on constitutional rights, including the rights of children; and any hardship that an eviction would cause. These factors are highly relevant to the question whether an eviction order would be just and equitable.[1082] Therefore, the initial interpretation of the Land Claims Court[1083] that a court is entitled to proceed with an eviction application in a case where a probation officer's report is not filed within a reasonable time was incorrect as it rendered the provisions of section 9(3)

[1077] *Monde* [23]. Section 9(2)(a) stipulates: "(2) A court may make an order for the eviction of an occupier if–
(a) the occupier's right of residence has been terminated in terms of section 8 ...".
[1078] *Monde* [24].
[1079] *Monde* [29].
[1080] *Monde* [29].
[1081] *Monde* [30].
[1082] Section 9(3)*(a)–(d).* See *Monde* [30].
[1083] In *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs en Andere* 2002 (3) SA 401 (LCC).

nugatory: the legislature could never have intended that an eviction order could be granted without such a report.[1084]

5.3.4 Summary and conclusion

ESTA introduces various unique concepts, procedures and/or processes to be complied with towards eviction. In addition to the features already discussed, it provides that proceedings may be instituted in a Magistrate's Court or Land Claims Court and only by consent of the parties in the High Court where the land in question is situated.[1085]

In terms of section 17(3) of ESTA the Rules Board can make rules governing the procedure in the High Court and the Magistrates' Courts. Further, the High Court rules of procedure applicable in civil actions and applications must apply in Magistrates' Courts proceedings, with appropriate variations, until such time as procedural rules are made for the Magistrates' Courts by the Rules Board.[1086] The President of the Land Claims Court may also make rules to govern the procedure in that court in terms of ESTA, plus the procedure for the automatic review of eviction orders.[1087] In *Snyders* the court ruled that once an eviction order of a Magistrate's Court has been confirmed by the Land Claims Court,[1088] an appeal lies to the SCA (as opposed to the Land Claims Court).[1089]

In summary, ESTA provides for tenure security in two ways. First, it aids occupiers living on rural or peri-urban land to obtain stronger rights to the land that they occupy. This will facilitate the acquisition of either ownership or other land rights in the designated areas. Secondly, it lays down procedures that owners or persons in charge of rural or peri-urban land must follow before they can evict these occupiers. Significantly, ESTA reinforces the nature of land rights enjoyed by occupiers and secures those rights against arbitrary evictions.[1090]

[1084] *Monde* [30].
[1085] Sections 17(1) and (2).
[1086] Section 17(4).
[1087] Section 20(4).
[1088] In terms of section 19(3).
[1089] *Snyders* [47]. Up until this pronouncement, the contrary view was that an appeal in such instances rested in the Land Claims Court.
[1090] Dhliwayo *Tenure security* 38.

5.4 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

5.4.1 Introduction

PIE was adopted with the manifest objective of overcoming historical injustices and abuses associated with land tenure in South Africa, and ensuring that evictions in future take place in a manner consistent with the values of the new constitutional dispensation.[1091] As can be deduced from the first two paragraphs of its Preamble[1092] PIE is geared towards the advancement of the Constitution, sections 25(1) and 26(3) in particular. It is primarily aimed at the prohibition of unlawful evictions; the formulation of procedures for the eviction of unlawful occupiers; and the repeal of PISA specifically together with other obsolete laws.[1093] In the words of Sachs J, although PIE repealed PISA it nevertheless, in a sense, inverted it, as squatting is now decriminalised and the eviction process is subject to a number of requirements, some of which are necessary to comply with the Bill of Rights.[1094] There is now a shift in thrust from prevention of illegal squatting to prevention of illegal eviction, and the common-law remedies are now being tempered with strong procedural and substantive protections that ensure that even homeless people are treated with dignity and respect.[1095] PIE provisions, particularly those concerned with procedures for eviction will be discussed in-depth in the study, with reference to related legislation and case law. It is possible that the PIE provisions for procedures for the eviction of unlawful occupiers can, with some variations, form the basis of any envisaged uniform eviction rules, especially because PIE permeates most of the spheres in which evictions occur.

[1091] See *Port Elizabeth Municipality* [11].

[1092] PIE: "Preamble. – WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
AND WHEREAS 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 WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners (*sic*) to apply to a court for an eviction order in appropriate circumstances;
AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered …".

[1093] As described in the long title of PIE.

[1094] *Port Elizabeth Municipality* [12].

[1095] *Port Elizabeth Municipality* [12]. See also Muller *The impact of section 26 of the Constitution* 318.

PIE applies to proceedings for eviction against unlawful occupiers in respect of land nationally,[1096] whereas ESTA and LTA give lawful rural, peri-urban occupiers and farm labour tenants respectively better tenure security by protecting them from unfair evictions.[1097] PIE "applies where none of the other statutes do".[1098] In PIE 'unlawful occupier' is basically a person who occupies land without the consent[1099] of the owner or person in charge, or without any other right in law to occupy such land, excluding the following persons: (a) a person who is an occupier in terms of ESTA and (b) a person whose informal right to land, but for the provisions of PIE, would be protected by the provisions of IPILRA. An 'owner' includes an organ of state, which in terms of section 239 of the Constitution, covers a municipal council.[1100] In turn, a 'person in charge' is one who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.[1101] This effectively means that in addition to owners of land, persons in charge also now have *locus standi* to launch eviction proceedings. However, the categories of people or the nature and extent of legal authority required to qualify such non-owners to be 'in charge' is not described in PIE.[1102] Case law has now established that persons in charge will include holders of limited rights[1103] registered against the land, which permit occupation or the right to control entrance into the land.[1104] Those with personal (contractual) rights to use and enjoy the land in question also qualify, such as a purchaser in terms of a valid contract of sale as held in *Motete v Mogorosi.*[1105]

[1096] Section 2 of PIE provides that the Act applies in respect of all land throughout the Republic.

[1097] See also Maass *Tenure security* 112, and Van Wyk 2011 *PER/PELJ* 3.

[1098] Van Wyk 2011 *PER/PELJ* 3.

[1099] Section 1. According to section 1 of PIE 'consent' is the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question.

[1100] See section 1 of PIE defining 'municipality', 'organ of state' plus 'owner'; and *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2001 (4) SA 759 (E) at 767E.

[1101] Section 1.

[1102] Parker J and Zaal FN ""Person in charge" in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: an assessment of some court interpretations" 2018 *THRHR*, Vol. 81, 288–298 289.

[1103] Such as personal servitudes, including *habitatio*, usufruct or *usus*, as held in *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA) and *October v Hendricks* 2016 (2) SA 600 (WCC).

[1104] Parker and Zaal 2018 *THRHR* 297.

[1105] *Motete v Mogorosi* (A20/2014) [2014] ZAFSHC 175 (18 September 2014) (hereinafter M*otete*). *Motete* contradicted an earlier ruling in *Red Stripe Trading 68 CC v Joseph* (31039/04) [2005] ZAGPHC 31 (23 March 2005), in which it had been held (para 9), that a mere

In *Ndlovu* the SCA concluded that PIE applies to all matters in which there is a lack of consent to occupy the property when proceedings are initiated and where the buildings or structures are used as a home or some form of shelter. However, PIE is not applicable where the property concerned is being used for business or commercial purposes.[1106] In this regard the SCA, after considering PIE's roots in section 26(3) of the Constitution and its Preamble, stated that since juristic persons do not have (home) dwellings, their unlawful possession is similarly not protected by PIE.[1107] Boggenpoel and Muller point out in this regard that the development in post-*apartheid* evictions pertaining the use of *rei vindicatio* in respect of immovable property is that "a distinction is drawn between property unlawfully occupied for residential purposes and unlawful occupation of property used for commercial purposes".[1108] They state that when commercial property is unlawfully occupied, "it is accepted that the owner of the land is still permitted to institute the *rei vindicatio* in order to regain ownership of the land".[1109] The Constitution thus has had a "significant impact on the use of the *rei vindicatio* in the context of immovable residential property".[1110]

Eviction proceedings can be launched in any division of the High Court or the Magistrate's Court in whose area of jurisdiction the land in question is situated, unlike a specialised court such as the Land Claims Court.[1111] In addition, section 9 specifically grants Magistrates' Courts jurisdiction to issue any order or instruction or to impose any penalty authorised by PIE, notwithstanding the provisions of any other law.[1112]

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purchase of the property by Red Stripe did not transfer ownership to it, or even result in the purchaser being in possession of the property. In *Motete* [19(1)] the case of *Khoete v Dimbaza* (A 448/07) [2009] ZAFSHC 129 (12 November 2009) was cited in which it was held that authority *ex officio* in government or as an agency from government could empower an entity as a person in charge.

[1106] *Ross v South Peninsula Municipality* 2000 (1) SA 569 (C) 596A-B; *Ndlovu* [20]; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) [14]; and *Mangaung v Local Municipality v Mashale and Another* 2006 (1) SA 269 (O) [6]–[7].

[1107] *Ndlovu* [20].

[1108] Boggenpoel *Property remedies* 48–50; and Muller 2013 *Fundamina* 369, 395. See also Pienaar *Land reform* 667–670.

[1109] Boggenpoel *Property remedies* 48–50; and Muller 2013 *Fundamina* 369, 395.

[1110] Boggenpoel *Property remedies* 49.

[1111] Section 1 of PIE defines 'court'.

[1112] Section 9 of PIE. Ordinarily, Magistrates' Courts are creatures of statute, and lack inherent jurisdiction, unlike the High Court.

However, it should be noted that PIE does not prescribe the usage specifically of either application or motion proceedings. This would mean that, in view of the definition of 'court', the rules of either the High Court or Magistrates' Courts are applicable. For instance, section 4(3) stipulates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.[1113]

Furthermore, a pertinent aspect is that of mediation in a broader context, by way of meaningful engagement between parties, especially where state organs are parties to the eviction proceedings.[1114] Section 7 provides for a voluntary mediation process that may be initiated either by a municipality under whose jurisdiction the land falls although not owned by it, or the relevant Member of the provincial Executive Council (MEC) if the land is owned by the municipality.[1115] In *Port Elizabeth Municipality* Sachs J found that in view of the special nature of the competing interests involved in eviction proceedings launched under section 6 it

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[1113] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) [13] the court was of the view that for purposes of an application in the High Court, such as the one under consideration, section 4(3) of PIE requires that a notice of motion as prescribed by rule 6 be served on the alleged unlawful occupier in the manner prescribed by rule 4 of the rules of court.

[1114] Mediation in the strictest sense is "different from and more formal than meaningful engagement", as a third party is "appointed to mediate and settle a dispute": Van Wyk 2011 *PER/PELJ* 9.

[1115] Section 7 of PIE provides: "**7. Mediation**

(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land 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 parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.

(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.

(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.

(4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.

(5) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary."

would ordinarily not be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.[1116]

Sections 4, 5, and 6 specifically deal with three types of eviction procedures and are worth analysing at length.[1117]

5.4.2 Section 4 evictions

Sections 4(1) to (5) are peremptory procedural requirements[1118] that must be complied with by parties instituting eviction proceedings. Section 4(5)(a)–(d) prescribes what must be contained in a section 4(2) notice of proceedings. These include:

- notice about the impeding proceedings;
- the anticipated date and time of the hearing;
- eviction grounds; and
- the unlawful occupier's right to defend the court application legally represented, even through legal aid where necessary.

Section 4(2) is the one that provides that the court must serve written and effective notice of eviction proceedings on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing of such contemplated proceedings. From a procedural perspective, Brand AJA found, in *Cape Killarney,* that although this provision could have been more clearly worded, it is obvious that the legislature did not intend physical service of the notice by the court in the person of a judge or magistrate, but mere issue of the notice by the registrar or clerk of the

[1116] Port Elizabeth Municipality [43].

[1117] Section 4(1) caters for eviction remedies available to private landowners or persons in charge "notwithstanding anything to the contrary contained in any law or the common law"; Urgent evictions are regulated by section 5; and under section 6(1) organs of state can institute eviction proceedings where land falling within their jurisdiction is being occupied unlawfully, when it is in the public interest or where a building or structure being occupied in the land in question has been erected without the consent of such state organ.

[1118] *Cape Killarney* [18]. However, in *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA1999 (SCA) the court held that this does not mean that any deviation from the provisions of section 4(2) is necessarily fatal. In the words of Brand JA at [22]: "…it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see e.g. *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 13)". See also Pienaar *Land reform* 720–731.

court would not suffice.[1119] Instead, he believed that what is intended is that the contents and the manner of service of the notice must be authorised and directed by an order of the court concerned.[1120] In practice, Brand AJA's articulation of the actual import of the provision is how section 4(2), read with section 4(3), has been interpreted and is implemented. In line with section 26(3) of the Constitution the purpose of section 4(2) is to afford respondents in eviction proceedings a better opportunity than they would have under the court rules to put all relevant circumstances before the court.[1121]

With regard to section 4(5) the SCA, in *Unlawful Occupiers of the School Site v City of Johannesburg,*[1122] clarified that the object of sections 4(5)(a) and (c)[1123] is to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case.

In terms of both sections 4(6) and (7) a court may authorise an order for eviction if it is of the opinion that it is 'just and equitable' to do so, after considering all the relevant circumstances. The nature of circumstances for consideration, as informed by the length of time the unlawful occupier has stayed in the land, distinguishes section 4(6) from section 4(7). If the land has been unlawfully occupied for less than six months at the time when eviction proceedings are commenced, then section 4(6) provisions kick in. In this case the relevant factors that the court must consider include the rights and needs of the elderly, children, disabled person and women-headed households.[1124] If, on the other hand, the unlawful occupation spans more than six months, the court is, in addition, obliged to consider, except where the land is sold in a sale of execution pursuant to a mortgage, whether suitable alternative land has been made available or can

[1119] *Cape Killarney* [11].
[1120] *Cape Killarney* [11].
[1121] *Cape Killarney* [21].
[1122] *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA1999 (SCA)
[1123] Sections 4(5)(a) and (c) provide that: "The notice of proceedings contemplated in subsection (2) must – (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier; and (c) set out the grounds for the proposed eviction".
[1124] Section 4(6).

reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier.[1125]

The 'suitable alternative land' aspect is also one of the factors for judicial consideration in terms of section 6(3)(c), discussed below. However, the availability of suitable alternative accommodation or land is not tantamount to a pre-condition for the granting of an eviction order.[1126] According to Sachs J, PIE's concern pertaining to the "six months occupation distinction" here is to make time an element of fairness.[1127] This means that the longer and more established the unlawful occupiers have been on the land and in the neighbourhood, the more well-settled their homes and the more integrated they are in terms of employment, schooling and enjoyment of social amenities.[1128] As a result their claim to the protection of the courts is greater. A court will, therefore, be far more cautious in evicting well-settled local families or individuals than persons who have recently moved in, and will endeavour to ensure that equitable arrangements are made to lessen the negative impact.[1129]

In *Peoples Dialogue* Horn AJ stated that what is 'just and equitable' is determined by considering the interests of both the unlawful occupier and the landowner.[1130] This phrase means that the court is compelled to break away from a purely legalistic approach and must weigh-up extraneous factors including morality, fairness, social values and any other circumstances necessary for the attainment

[1125] Section 4(7).

[1126] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2001 (4) SA 759 (E) 769C–E (hereinafter *Peoples Dialogue (Appeal))*. Smith AJ stated therein that: "The availability of suitable alternative accommodation or land is but one of the factors which has to be considered by the court. To interpret this section in such a manner that this one factor is elevated to a pre-condition for the granting of an eviction order would have far-reaching and chaotic consequences which could never have been contemplated by the Legislature. If this was in fact so, it would be open to any person to occupy land unlawfully in order to force an organ of State to provide him with suitable alternative land or accommodation. Similarly, in my view, within the context of an application brought in terms of the provisions of s(section) 4, the availability of land for the relocation of an unlawful occupier is but one of the factors that must be taken into account by the court in determining whether it is just and equitable to grant an eviction order".

[1127] *Port Elizabeth Municipality* [27].

[1128] *Port Elizabeth Municipality* [27].

[1129] *Port Elizabeth Municipality* [27].

[1130] *Peoples Dialogue* 1081E.

of an equitable principled judgment.[1131] Later on, in its endorsement of this approach, the Constitutional Court found that the emphasis on justice and equity underlines the central philosophical and strategic objective of PIE, and thus the necessary reconciliation of the competing interests can only be attempted through a close analysis of the actual specifics of each case.[1132] Guided by these considerations of equity and fairness, therefore, the court must, if satisfied that all the requirements of section 4 have been complied with and that the unlawful occupier has failed to offer a valid defence, accordingly grant an eviction order.[1133] In granting the eviction order the court must determine:[1134]

- a just and equitable date on which the unlawful occupier should vacate the land; and
- the date on which an eviction order may be executed if the unlawful occupier has failed to vacate.

Further, the court may also order the demolition and removal of the buildings or structures that were occupied on the land in question.[1135] In this regard the court in *South African Human Rights Commission and Others v City of Cape Town and Others*[1136] held that on a proper interpretation the provisions of PIE, including sections 4(10) and 8(1), require that if there is any doubt about whether a structure is occupied for residential purposes, or whether a structure is complete or fully built, an organ of state or private person must obtain a court order before it may evict a person from, or demolish that structure or building.[1137]

[1131] *Peoples Dialogue* 1081F–G. The Constitutional Court in *Port Elizabeth Municipality* [35] agreed with the judicial and academic description of this approach as being sensitive and balanced.

[1132] *Port Elizabeth Municipality* [35].

[1133] Section 4(8).

[1134] In terms of section 4(8)(a) and (b). Section 4(9) stipulates that in fixing a just and equitable date contemplated in section 4(8), the court must consider all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

[1135] Section 4(10).

[1136] *South African Human Rights Commission and Others v City of Cape Town and Others* 2021 (2) SA 565 (WCC) (hereinafter *South African Human Rights Commission*).

[1137] *South African Human Rights Commission* [46]–[47]. Judge Meer agreed at {47] that such an interpretation "promotes the rights in the Bill of Rights, in accordance with the provisions of section 39(2) of the Constitution including the right to have evictions and demolitions of homes subject to judicial oversight in terms of section 26(3) of the Constitution. It ensures that the occupier's constitutional rights to dignity, housing, safety and security of the person and life are protected".

A court may, at the sheriff's request, authorise any person to assist him or her to carry out an order for eviction, demolition or removal subject to conditions determined by the court, conditional on the sheriff being present at all times during such eviction, demolition or removal.[1138] This is a unique provision seemingly designed for those instances in which difficulties or resistance to eviction, demolition or removal may be anticipated. The Magistrates' Courts Rules also have a similar provision.[1139]

5.4.3 Section 5 evictions

PIE also allows the landowner or person in charge to bring an urgent application, in appropriate circumstances, for the eviction of an unlawful occupier pending the outcome of proceedings for a final order.[1140] If the court is satisfied that the matter is indeed urgent it may dispense with the ordinary forms and manners of service provided for in the High Court and Magistrates' Courts Rules.[1141] An application brought as a matter of urgency must be supported by an affidavit that sets out explicitly the circumstances which the applicant avers render the matter urgent and the reasons for claiming that he or she could not be accorded substantial redress at a hearing in due course.[1142]

Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others[1143] is a good example of an urgent eviction application in terms of section 5 of PIE. The occupants had unlawfully invaded an Elandsfontein farm owned by Groengras Eiendomme. What complicated matters were that Transnet Limited had a right of way over the land to access its railway line and reserve, as

[1138] In terms of section 4(11).

[1139] Rule 8(2) in the Magistrates' Courts Rules provides: "Service or execution of process of the court shall be effected without any unreasonable delay, and the sheriff shall, in any case where resistance to the due service or execution of the process of the court has been met with or is reasonably anticipated, have power to call upon any member of the South African Police Force, as established by the South African Police Service Act, 1995 (Act 68 of 1995), to render him or her aid."

[1140] In terms of section 5(1)(a)–(c). In circumstances where: "(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not immediately evicted from the land; (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and (c) there is no other effective remedy available".

[1141] High Court rule 6(12)(a) and Magistrates' Courts rule 55(5)(a).

[1142] High Court rule 6(12)(b) and Magistrates' Courts rule 55(5)(b).

[1143] *Groengras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T) (hereinafter *Groengras Eiendomme*).

well as a praedial servitude to run a fuel pipeline across the farm. Moreover, Eskom Limited also had a right to run high voltage electrical cables over the farm. The court found that the portion of land that was unlawfully occupied had no infrastructure, sanitary facilities, water and waste disposal facilities, and was thus unfit for human habitation.[1144] The probability of a disease breaking out in such a situation and contaminating people living downstream towards the Rietvlei dam in the farm was high.[1145] Rabie J observed that the occupants risked either igniting the highly inflammable fuel in the pipeline or contaminating the groundwater on the farm whilst digging trenches, and thus posed a very real and imminent threat to their health and safety.[1146] Their shacks could also serve as electricity conductors and result in the occupants getting electrocuted.[1147] The judge therefore held that the applicants were entitled to an eviction order as the requirements of section 5(1) had been met.[1148] It is a good judgment that illustrates factors constituting urgency as per the provisions of section 5 of PIE, and can also be a useful guide for urgent applications in terms of LTA and ESTA.

5.4.4 Section 6 evictions

An organ of state may initiate eviction proceedings where the land which is unlawfully occupied falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage.[1149] State organs are allowed an option to first afford a landowner or person in charge the opportunity to initiate the eviction proceedings.[1150] The owner or person in charge may then be ordered by the court to pay the legal costs if he or she fails to commence those eviction proceedings within the period stipulated in the aforementioned notice and the state organ proceeds with such proceedings instead.[1151]

[1144] *Groengras Eiendomme* 140H.
[1145] *Groengras Eiendomme* 140H–I.
[1146] *Groengras Eiendomme* 141B–C.
[1147] *Groengras Eiendomme* 141E–F.
[1148] *Groengras Eiendomme* 142G.
[1149] Section 6(1). See Pienaar *Land reform* 731–734.
[1150] Section 6(4). See also *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA) (hereinafter *Shorts Retreat*) [4].
[1151] Section 6(5).

Unlike section 4 section 6 makes no distinction regarding occupation for less than six months and occupation for longer.[1152] Instead, the court may grant the eviction order if it is just and equitable to do so, upon considering all the relevant circumstances, and if (a) the unlawful occupier has failed to obtain requisite consent from the state organ concerned for the erection of a building or structure on the land in question or for the occupation of such land, or (b) it is in the public interest to authorise the eviction.[1153] When determining whether it is just and equitable to grant an eviction order, the court must consider:[1154]

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

However, these three specifically identified circumstances are not intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive.[1155] The court must have the requisite information at its disposal, and has to be fully apprised of the circumstances (by the relevant parties) before it can have regard to them.[1156] In fact "a rather broad discretion exists for courts to find whether the granting of the eviction order would be just and equitable" with the aim of ensuring that both all other relevant factors and interests pertaining to the litigants' position are considered by the court.[1157] For Liebenberg one of the implications of the *Port Elizabeth Municipality* judgment is that it explains the particular constitutional responsibility on courts to strive for a just and equitable solution aimed at reconciling the interests of landowners and unlawful occupiers by way of a constitutional, historical and context-sensitive

[1152] As also observed by Sachs J in *Port Elizabeth Municipality* [27].
[1153] Section 6(1)(a)–(b) of PIE. Section 6(2) defines 'public interest' as including the interest of the health and safety of those occupying the land and the public in general.
[1154] Section 6(3)(a)–(c).
[1155] *Port Elizabeth Municipality* [30]. According to Cloete and Boggenpoel 2018 *SALJ* 438 this "generous interpretation of 'all relevant circumstances' has been followed in subsequent cases" including "*Transnet Ltd v Nyawuza & Others* 2006 (5) SA 100 (D) at 107; *Thutha v Thutha & Another* [2010] ZAECMHC 2 para 8; *Arendse v Arendse* 2013 (3) SA 347 (C) para 33; *Mahogany Ridge 2 Property Owners' Association v Unlawful Occupiers of Lot 13113 Pinetown & Others* [2013] 2 All SA 236 (KZD) paras 51–3". It has also been embraced by Liebenberg *Socio-Economic rights* 270 and Pienaar *Land reform* 773.
[1156] *Port Elizabeth Municipality* [32].
[1157] Pienaar *Land reform* 761.

analysis.[1158] So a court can "go beyond the facts established on the papers before it, and play a more inquisitorial role in procuring ways of establishing the true state of affairs, so as to enable it to 'have regard' to relevant circumstances''.[1159]

As regards the availability of suitable alternative accommodation mentioned in section 6(3)(c), Sachs J states that it is something to which regard must be had, but is not an inflexible requirement.[1160] As such, there is no unqualified constitutional duty on local authorities to ensure that in no circumstances should an eviction occur or a home be destroyed unless alternative accommodation or land is made available.[1161]

The above discussion concerning these three types of evictions under PIE clearly demonstrates that courts are required, when considering the granting of an eviction order, to strike a balance between two competing interests and constitutional rights, as articulated by Smith AJ in *Peoples Dialogue*.[1162] These are the right of an owner of land not to be arbitrarily deprived of the use of his or her property and the right of an occupant not to have his or her home demolished without an order of court. A brief discussion regarding some of the other judgments involving PIE will help reveal the courts' approach towards the balancing of these interests, particularly from a procedural perspective.

5.4.5 Court decisions

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in

[1158] Liebenberg *Socio-Economic rights* 278.
[1159] Liebenberg *Socio-Economic rights* 278. See also Cloete and Boggenpoel 2018 *SALJ* 437–438.
[1160] *Port Elizabeth Municipality* [28].
[1161] *Port Elizabeth Municipality* [28]–[29]. Sachs J went on to give his following views: "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." See also, Pienaar JM and Muller A "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" 1999 *Stellenbosch Law Review*, Vol. 10, 370–398 393.
[1162] *Peoples Dialogue (Appeal)* 770B–C.

a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.[1163]

In various judgments the courts have embraced the above-cited approach when dealing with matters involving PIE, with some exceptions, as will be noted in the discussion which follows. Over the years a large body of jurisprudence has developed around PIE, something that continues to this day. As such, the focus has been and will remain on those selected cases whereby the interpretation and decoding of respective PIE provisions have been advanced, especially from a procedural angle. The focal areas around which these court decisions are discussed include the following:

- definitions of concepts such as ’person in charge’; ’mediation and meaningful engagement’; ’suitable alternative accommodation’; and so forth;
- applicability of PIE to home dwellings and human beings as distinct from commercial buildings or juristic persons;
- the nature of and the procedure pertinent to section 4(2) applications, read with section 4(3);
- the distinction between sections 4(6) and 4(7) provisions and the relevance thereof;
- urgent evictions;
- the advancement, via PIE, of section 26 provisions of the Constitution; and
- the application of PIE to landlord-tenant evictions.

Some of these cases and others have already been discussed in the body of this work. Others will also be discussed in the segment dealing with REHA below.[1164]

[1163] *Port Elizabeth Municipality* at [37].

[1164] Cases discussed under REHA include the following: *Absa v Amod*; *Ross v South Peninsula Municipality*; *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*; *Ellis v Viljoen*; *Brisley v Drotsky*; *Ndlovu*; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*; *Kendall Property Investments v Rutgers*; *Jackpersad NO and Others v Mitha and Others*; *Blue Moonlight*; *Malan v City of Cape Town*; *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*; *Van der Westhuizen v Nxiweni*; and *Berman Brothers Property Holdings (Pty) Ltd v M and Others*.

The cases discussed are not exhaustive but reflect certain aspects relevant in the context of PIE, namely: what is just and equitable eviction as was dealt with in *Blue Moonlight;* the availability of alternative accommodation as tackled in *Mooiplaats and Skurveplaats* and *Shulana Court*; the imperative of mediation and or meaningful engagement as discussed in detail in *Joe Slovo* and dealt with in *Shulana Court* and *Occupiers of 51 Olivia Road*, and so forth.

5.4.5.1 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,[1165] which is discussed in detail under REHA below, the Constitutional Court dealt with the fate of 86 poor people (occupiers), who unlawfully occupied a property called 'Saratoga Avenue' in Berea in the City of Johannesburg. The case centred on the rights of the property owner, Blue Moonlight Properties 39 (Pty) Ltd, and with the obligation of the City of Johannesburg Metropolitan Municipality (city) to provide housing for the occupiers if they were evicted.[1166] The city's contention was that the eviction was sought at the instance of the property owner, not at its own instance, and therefore the city could not be held responsible for providing alternative accommodation to all people evicted by private landowners.[1167] Quoting from the *Port Elizabeth Municipality* judgment Van Der Westhuizen J reiterated that the Constitutional Court has recognised the concept of ubuntu as underlying the Constitution as well as PIE and that it is relevant to their interpretation.[1168] With reference to sections 4(6) and 4(7) the judge found that a court must consider an open list of factors in the determination of what is just and equitable.[1169] In that specific case before him the relevant factors he considered were that: the potential evictees had been in occupation for more than six months, some for a very long time; the occupation was once lawful (lease); Blue Moonlight was aware of the occupiers when it bought the property; eviction would render the occupiers homeless; and there was no competing risk of homelessness on the part of Blue Moonlight, as the eviction

[1165] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (hereinafter *Blue Moonlight*).
[1166] *Blue Moonlight* [1].
[1167] *Blue Moonlight* [32].
[1168] *Blue Moonlight* [38].
[1169] *Blue Moonlight* [39].

was not being sought to enable a family to move into a home.[1170] Thus, an owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.[1171]

Regarding the availability of alternative accommodation Van der Westhuizen J repeated the ruling in *Grootboom* wherein the Constitutional Court made it clear that:[1172]

> a co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other ... Each sphere of government must accept responsibility for the implementation of particular parts of the program.

In this instance the obligations of the city, as the main point of contact with the community, were crucial because the applicable constitutional and legal frameworks demonstrated that local government has an important role to play in the provision of housing.[1173] The court ultimately found that the city's housing policy was unconstitutional in that it excluded people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the city.[1174] Blue Moonlight could not be expected indefinitely to provide free housing to the occupiers, but its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable.[1175] Therefore, the eviction would be just and equitable under the circumstances, if it is linked to the provision of temporary accommodation by the city, which the court then ordered.[1176]

5.4.5.2 *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others and Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others*

The Constitutional Court subsequently affirmed its decision in *Blue Moonlight* in the cases of *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden*

[1170] *Blue Moonlight* [39].
[1171] *Blue Moonlight* [40].
[1172] *Blue Moonlight* [42].
[1173] *Blue Moonlight* [45]–[46]. See also Van Wyk 2011 *PER/PELJ* on the role of local government in general in evictions.
[1174] *Blue Moonlight* [97].
[1175] *Blue Moonlight* [97].
[1176] *Blue Moonlight* [97], and the court order at [104] sub-paragraph (e).

Thread Ltd and Others[1177] and *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others*.[1178] In both cases Yacoob J adopted the conclusion in *Blue Moonlight* to the effect that the owner's right to property could not be regarded as wholly unqualified in enquiries concerned with whether an eviction would be just and equitable.[1179] Further, the judgments proceeded on the basis established in *Blue Moonlight* that the city does indeed have the power and the obligation to make reasonable provision for emergency housing from its resources.[1180]

In both cases the Constitutional Court went a step further than *Blue Moonlight* and found that a somewhat neutral appellation like 'occupiers' might well be more appropriate than citing people as 'invaders of land' and so forth, which citations detract from the humanity of the occupiers, are emotive, judgmental, and come close to criminalising the occupiers.[1181] This is also instructive with regard to language usage or construction for suggested court rules, wherein words like 'squatters' should be avoided.

Furthermore, in *Mooiplaats* the court held that although the distinction between sections 4(6) and 4(7) is important, it is nevertheless not decisive to the justice and equity enquiry.[1182] If a court has before it a case in which the land occupation falls short of six months, it is capable of determining what constitutes relevant circumstances, and is still obliged to consider all such factors.[1183] Where persons would be rendered homeless consequent to an eviction order the question whether the city is reasonably capable of providing alternative land or housing is of crucial importance, irrespective of whether or not the land has been unlawfully occupied for six months or less. In *Mooiplaats* the High Court had been aware that the city did indeed own land which was vacant and which might be made available for alternative accommodation, causing Yacoob J to hold that it was impossible for the High Court *a quo* to conclude that the eviction was just and equitable without

[1177] *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC) (hereinafter *Mooiplaats*).
[1178] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC) (hereinafter *Skurweplaas*).
[1179] *Skurweplaas* [11] and *Mooiplaats* [17].
[1180] *Mooiplaats* [11] and *Skurweplaas* [5] and [6].
[1181] *Mooiplaats* [4] and *Skurweplaas* [3].
[1182] *Mooiplaats* [15]–[16].
[1183] *Mooiplaats* [16].

investigating this aspect.[1184] In the process, the court also distinguished an earlier SCA ruling in *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*.[1185] In this case the unlawful occupation had continued for a period in excess of five years, meaning that section 4(7) was at play as distinct from section 4(6).[1186] The SCA held that the municipality's position in eviction proceedings under PIE differs from that of a third party in ordinary litigation as it has constitutional obligations it must discharge in favour of potential evictees, and it should therefore not be open to it to choose not to be involved.[1187]

5.4.5.3 *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*

Subsequent to *Shorts Retreat* the SCA indicated, in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele,*[1188] that there is nothing to suggest that in an enquiry in terms of section 4(6), a court is restricted to the circumstances listed therein. The court must have regard to *all* relevant circumstances. Theron AJA extended the earlier reasoning in *Port Elizabeth Municipality* regarding section 6 to section 4 as well, to the effect that the circumstances identified are peremptory but not exhaustive.[1189] She held that where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it. This then was the position subsequently confirmed by the Constitutional Court in *Mooiplaats*, as discussed earlier, thus effectively obliterating the distinction between occupiers who have been in unlawful occupation for more or less than six months.[1190] This distinction between occupiers is therefore being rendered academic, as the court is still obliged to consider *all* relevant circumstances.

[1184] *Mooiplaats* [16].
[1185] *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* 2010 (4) BCLR 354 (SCA); (hereinafter *Shorts Retreat*).
[1186] *Shorts Retreat* [4].
[1187] *Shorts Retreat* [14].
[1188] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) (hereinafter *Shulana Court*) [13].
[1189] *Shulana Court* [13].
[1190] See "Evictions and alternative accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

5.4.5.4 *Occupiers of 51 Olivia Road*

In *Occupiers of 51 Olivia Road* Yacoob J sought to give more clarity and context on the concept of meaningful engagement, which he viewed as being in line with the spirit and purpose of a municipality's constitutional obligations.[1191] He gave an interim ruling whereby the parties were ordered to engage meaningfully with each other as "the City must have been aware of the possibility, even the probability, that people would become homeless as a direct result of their eviction at its instance".[1192] The court then held that whether there had been meaningful engagement between a city and residents on the brink of being rendered homeless is a circumstance to be considered by a court in terms of section 26(3).[1193] Yacoob J emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.[1194] There are no hard and fast rules of engagement as each eviction case is different.[1195] Therefore, engagement is bound to differ "from situation to situation, from municipality to municipality".[1196]

5.4.5.5 *Joe Slovo and Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*

Still on the aspect of meaningful engagement, *Joe Slovo* is one case in point. In that case, five judgments were prepared by different justices, namely: Moseneke DCJ, Ngcobo J, O'Regan J, Sachs J and Yacoob J.[1197] However, all the judgments supported the order set out at the end.[1198] The court decried the insufficient

[1191] *Occupiers of 51 Olivia Road* [16]. Furthermore, Yacoob J pointed out in [17] that the city's duty to engage in a reasonable manner with its citizens who face the prospects of homelessness is also squarely grounded in section 26(2) of the Constitution. Section 152(1) of the Constitution: Municipalities (local government) are obliged to provide services to communities in a sustainable manner; promote social and economic development; promote a safe and healthy environment; and encourage the involvement of communities plus community organisations in matters of local government. See also Chenwi *Evictions in South Africa* 72.
[1192] *Occupiers of 51 Olivia Road* [13].
[1193] *Occupiers of 51 Olivia Road* [22].
[1194] *Occupiers of 51 Olivia Road* [30].
[1195] Van Wyk 2011 *PER/PELJ* 8.
[1196] Van Wyk 2011 *PER/PELJ* 8.
[1197] *Joe Slovo* [1] and [301]. As also mentioned in chapter 3.
[1198] *Joe Slovo* [1] and [301].

engagement the state had with the community.[1199] O' Regan J found that the limited state consultation with the occupiers did not constitute full and meaningful engagement.[1200] However, despite the insufficiency of the engagement the court nevertheless granted the eviction but ordered that the state and the occupiers continue to engage meaningfully about various aspects, including the time for the execution of the eviction order, the consequences of the relocation, the position of individual occupiers on the municipality's housing waiting list and so forth.[1201] Through this structured and detailed engagement order the judgment effectively extended the scope of the requirement.[1202]

Clearly then, meaningful engagement can still prevail during the relocation process following the issuing of the eviction order. *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*[1203] confirmed that engagement should take place at every stage of the eviction (and housing) process.[1204] This case also stressed that the basis for engagement should be genuine and not inadequate, where only residents who met certain criteria and agreed to certain terms were offered temporary accommodation.[1205] The approach in terms of which the city had unilaterally pre-determined all the conditions, was lambasted by the Constitutional Court.[1206] The aspect of meaningful engagement, as articulated and shaped by the various judicial pronouncements, should therefore be factored-in in any envisaged eviction court rules.

5.4.6 Summary and conclusion

PIE introduced a shift in thrust from prevention of illegal squatting to prevention of illegal eviction, and the common-law remedies are now tempered with strong procedural and substantive protections that ensure that even homeless people are treated with dignity and respect.[1207] That PIE is geared towards the advancement

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[1199] *Joe Slovo* [302]–[303] and [378].
[1200] *Joe Slovo* [301].
[1201] *Joe Slovo* [7].
[1202] Ray B "Evictions, aspirations and avoidance" 2013 *CCR*, Vol. 5, 173–232 185.
[1203] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) (hereinafter *Schubart Park*)
[1204] *Schubart Park* [51].
[1205] *Schubart Park* [50].
[1206] *Schubart Park* [50].
[1207] *Port Elizabeth Municipality* [12]. See also Muller *The impact of section 26 of the Constitution* 318.

of sections 25(1) and 26(3) of the Constitution can clearly be deduced from the first two paragraphs of its Preamble. As was comprehensively explained in *Blue Moonlight,* PIE was adopted with the manifest objective of overcoming past abuses such as the displacement and relocation of people, whilst simultaneously recognising that no one may be arbitrarily deprived of property.

The Act also defines some concepts uniquely, such as 'consent'; 'owner'; 'person in charge'; and 'unlawful occupier'. However, with 'person in charge' a comprehensive definition would have been better, instead of leaving it to the courts to interpret the categories of people or the nature and extent of legal authority required to qualify such non-owners to be 'in charge'.[1208] It also took case law to clarify that PIE is not applicable where the property concerned is being used for business or commercial purposes.[1209] Furthermore, the legislative drafters could have assisted and clarified that an act of unlawful occupation by juristic persons is not protected by PIE as they do not have (home) dwellings.[1210]

The fact that eviction proceedings can be initiated in the relevant High Court or Magistrate's Court bodes well for the possible usage of uniform eviction rules in conjunction with applicable civil procedural processes. Such a prospect is also strengthened by a provision such as section 4(3), which stipulates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.[1211]

Cited cases, including *Blue Moonlight*, are a clear indication that PIE also permeates the realm of landlord-tenant evictions, complementing the common law and legislation including REHA. The discussion of REHA, which follows, illustrates this point.

[1208] Parker and Zaal 2018 *THRHR* 289.

[1209] *Ross v South Peninsula Municipality* 2000 (1) SA 569 (C) 596A–B; *Ndlovu* [20]; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) [14]; and *Mangaung v Local Municipality v Mashale and Another* 2006 (1) SA 269 (O) [6]–[7].

[1210] Instead of leaving this aspect for judicial interpretation, as was done in *Ndlovu* [20].

[1211] In *Cape Killarney* [13] the court was of the view that for purposes of an application in the High Court, such as the one under consideration, section 4(3) of PIE requires that a notice of motion as prescribed by rule 6 be served on the alleged unlawful occupier in the manner prescribed by rule 4 of the rules of court.

5.5 Rental Housing Act 50 of 1999 (REHA)

5.5.1 Introduction

This Act is relevant in the sphere of evictions where tenants hold-over, breaching the terms of the lease while electing to remain in the rented dwellings without the landlord's consent. It commenced on 1 August 2000.[1212] Some of the pertinent objectives of REHA[1213] include: defining the responsibility of government in respect of rental housing property; promoting access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market; establishment of Rental Housing Tribunals and defining their functions, powers and duties; setting general principles governing conflict resolution in the rental housing sector; facilitating sound relations between tenants and landlords; and repealing the Rent Control Act.[1214] Some of these objectives are now reiterated in the Rental Housing Amendment Act,[1215] the commencement date of which is yet to be determined by the President.

REHA's Preamble restates the entire section 26 of the Constitution, also emphasising that no legislation may permit arbitrary evictions. It then goes on to cite, amongst others, the need to balance the rights of tenants and landlords and to create mechanisms to protect them against unfair practices and exploitation. A reading of the Act indicates that it is applicable to both urban and rural dwellings.[1216] It affords tenure security for lawful tenants in rural and urban housing.[1217] Some common-law reciprocal duties between the landlord and tenant still remain intact though. For instance, the landlord is obliged though to place the tenant in occupation of property that is in a condition agreed to by the parties, or

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[1212] See also the discussion of this Act in Muller *et al* S*ilberberg & Schoeman's law of property* 500–505.

[1213] As described in its long title.

[1214] Rent Control Act 80 of 1976 (hereinafter referred to as RCA).

[1215] Rental Housing Amendment Act 35 of 2014 (hereinafter referred to as the Amendment Act), Some of REHA's objectives are formally repeated in the new section 1A which will be incorporated into REHA through the Amendment Act.

[1216] For instance, section 2(1)(a)(ii) stipulates that the government must encourage investment in "urban and rural" areas that need revitalisation and resuscitation. Section 2(2)(a) also states that measures introduced in terms of subsection (1) must optimise the use of existing "urban and rural" municipal and transport infrastructure.

[1217] Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" 2002 TSAR 254–289 264–265. See Mohamed SI *Tenant and landlord in South Africa* (Organisation of Civic Rights Durban 2003) 6, who maintains that the Act is applicable to all dwellings used for rental housing purposes. See also Maass *Tenure security* 122.

that is reasonably adequate for the purpose leased.[1218] Viljoen also confirms the landlord's duty to maintain and deliver the property in a suitable condition.[1219] As was also confirmed in *Mpange,*[1220] at common law a tenant is allowed the complete use and enjoyment of the property for the duration of the lease.[1221] The provisions of REHA and PIE are now applicable. The common-law duty to place the property in a reasonably fit condition is advanced by the proposed amendments to REHA,[1222] whereby a positive duty is placed on the landlord to provide the tenant with habitable dwelling.[1223]

Some definitions in the Act are worth noting.[1224] The word 'dwelling' includes "any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease". In addition, 'rental housing property' includes "one or more dwellings". By 'unfair practice' is meant: "(a) any act or omission by a landlord or tenant in contravention of the Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord".

5.5.2 Discussion

A tenant's rights as against the landlord include the right not to: have his or her person, home or property searched; his or her possessions seized, except in terms of a law of general application and having first obtained a ruling by a tribunal or an order of court; or the privacy of his or her communications infringed.[1225]

[1218] Glover G *Kerr's Law of sale and* lease 4th ed (LexisNexis Butterworths Durban 2014) 382.

[1219] Viljoen S *The law of landlord and tenant* (Juta Cape Town 2016) 247. See also Muller *et al Silberberg & Schoeman's law of property* 500-–501.

[1220] *Mpange and Others v Sithole* 2007 (6) SA 578 (W) (hereinafter *Mpange*).

[1221] *Mpange* [28]. The court referred to the following cases in this regard: *Poynton v Cran* 1910 AD 205 214; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 740A; *Harlin Properties (Pty) Ltd & another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) 150H; *Cape Town Municipality v Paine* 1923 AD 207 218.

[1222] Section 4B(11) is to be inserted into REHA by section 7 of the Amendment Act, which Act is not in force yet. See Viljoen *The law of landlord and tenant* 200. See also Glover *Kerr's Law of sale and lease* 385.

[1223] Viljoen *The law of landlord and tenant* 200; and Muller *et al Silberberg & Schoeman's law of property* 500–501. Section 4B(11) stipulates: "A landlord must provide a tenant with a dwelling that is in a habitable condition, as well as maintain the existing structure of the dwelling and where possible facilitate the provision of basic services to the dwelling".

[1224] Contained in section 1.

[1225] Section 4(3)(a)–(d). In terms of section 4(4) these rights apply equally to the tenant's visitors and members of his or her household. However, this sub-section is also proposed to be

Currently, the landlord's rights[1226] include the right to: (1) prompt and regular payment of rentals; (2) recovery of any outstanding amounts; and (3) termination of lease on grounds not constituting unfair practice. More significantly though, is the landlord's right, upon termination of the lease, to receive the rental housing property in a good state of repair, and to repossess it via court action.[1227]

The proposed amendments to REHA state that where the tenant fails or refuses to vacate the dwelling, after termination of the lease, the landlord has the right to evict the tenant after having obtained an order of court in accordance with PIE.[1228] The significance of such a provision is that it confirms the applicability of PIE to landlord-tenant disputes, and thus creates much needed certainty.

A novel concept introduced by the Act is the establishment of Rental Housing Tribunals, with a view to the investigation, adjudication and mediation of complaints concerning alleged unfair practices.[1229] However, the establishment of these tribunals does not preclude persons from approaching a competent court for urgent relief under circumstances where they would have been able to do so were it not for the provisions of the Act, or to institute proceedings for the normal recovery of arrear rental, or for eviction in the absence of a dispute regarding an unfair practice.[1230] Tribunals do not have jurisdiction to hear applications for eviction orders.[1231] In fact, there is a proposed amendment whereby the existing provision[1232] will be substituted by a provision compelling a tribunal to refer any matter that relates to evictions to a competent court within 30 days of receipt of a complaint.[1233] Other than that tribunals are competent to:[1234]

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repealed by section 6 of the Amendment Act. Section 4 is being wholly substituted by sections 4A and 4B, as reflected in section 7 of the Amendment Act.

[1226] Contained in section 4(5)(a)–(e).

[1227] Set out in section 4(5)(d)(i)–(ii). Sub-section 4(5) is also being repealed by section 6 of the Amendment Act and substituted by the rights contained in new section 4B of REHA.

[1228] However, the Amendment Act proposes the deletion of this provision from a date to be fixed. It is being substituted by a new section 4A. In terms of the proposed section 4B(9)(d)(ii), contained in the new section 4B proposed to be inserted by section 7 of the Amendment Act.

[1229] Rental Housing Tribunals are regulated under Chapter 4 of REHA, sections 6 to 15.

[1230] Section 13(10).

[1231] Section 10(14).

[1232] Section 13(11).

[1233] This new provision is contained in section 13 of the Amendment Act, though it is not yet in operation.

[1234] Section 13(12)(a)–(c).

(a) make a ruling as to costs as may be just and equitable;
(b) where a mediation agreement has been concluded … make such an agreement a ruling of the Tribunal; and
(c) issue spoliation and attachment orders and grant interdicts.

A ruling by a tribunal is deemed to be an order of a Magistrate's Court in terms of the Magistrates' Courts Act and is enforced in terms of that Act.[1235] Once a complaint has been lodged with the tribunal, until it has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier the landlord may not evict any tenant, subject to the tenant continuing to pay the rental as applicable prior to the complaint or, if there was an increase prior to such complaint, the amount payable immediately prior to such escalation.[1236] The landlord remains obliged to effect necessary maintenance during the aforesaid period.[1237]

The Act also criminalises certain conduct deemed wrongful. Amongst others, any person who unlawfully locks out a tenant or shuts off the utilities to the rental housing property will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and imprisonment.[1238]

REHA has been criticised for providing limited tenure protection as it does not override the landlord's common-law right to evict the tenant upon termination of the lease.[1239] For instance, the landlord's right to receive the rental housing property in a good state of repair and to repossess it through a court order has been retained in the Act.[1240] Upon failure by the tenant to redeliver the property when the lease ends the landlord still has his usual remedies for breach of contract, by virtue of the holding-over.[1241] As a result the landlord is still able to approach the court for an eviction order upon termination of the lease in accordance with the Act.[1242]

[1235] Section 13(13).
[1236] Section 13(7)(a)–(b).
[1237] Section 13(7)(c).
[1238] Section 16(hA).
[1239] Van der Walt 2002 T*SAR* 266; Mukheibir A "The effect of the Rental Housing Act 50 of 1999 on the common law of landlord and tenant" 2000 *Obiter*, Vol. 21, 325–350 329; and Maass *Tenure security* 132.
[1240] Section 4(5)(d)(i)–(ii).
[1241] Maass *Tenure security* 132; Mukheibir 2000 *Obiter* 337–338.
[1242] Muller *et al* S*ilberberg & Schoeman's law of property* 501.

Section 4(5)(c)[1243] alters the circumstances under which a landlord can now evict a tenant, thus amending the common-law rights of landlords in order to provide tenure security for tenants in the form of due process.[1244] In addition, where a fixed-term tenancy comes to an end the agreement expires by effluxion of time and with it the relationship of lessor and lessee ceases.[1245] There is no obligation on either party to renew the lease in such instances. Maass therefore argues that the extent of tenure security granted to the tenant depends on the contract and the will of both parties, as the Act reinforces the notion of sanctity of contract instead of intervening in order to provide substantive tenure rights for tenants.[1246] For instance, the RCA, predecessor to REHA, afforded tenants some measure of protection from eviction even after the expiry of the lease or the termination thereof by the landlord, which REHA fails to do.[1247] Notwithstanding the expiry of a lease of premises by the effluxion of time or through notice from the lessor the RCA allowed a court not to issue an order for the recovery of possession or the eviction of a lessee if the lessee continued to duly pay the agreed or prescribed rental and complied with other lease conditions.[1248] The lessee then became a 'statutory tenant' on a continuous basis.[1249] In comparison, REHA would seem to have had a limited impact on eviction proceedings.[1250] It is not concerned with the rights of tenants once the tenancy has terminated, but rather focuses more on the validity of the tenancy and the contractual relationship between the parties.[1251] As such, upon termination of the lease in accordance with the provisions of REHA, the

[1243] Section 4(5)(c) provides that one of the landlord's rights against the tenant his or her right to terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease.

[1244] Muller *et al Silberberg & Schoeman's law of property* 505.

[1245] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 325.

[1246] Maass *Tenure security* 134.

[1247] This is evidenced by the provisions of sections 28 and 34 of the RCA. Maass *Tenure security* 136, contends that "The pre-1994 legislature was motivated by housing shortages to create some form of continued occupation (substantive tenure) rights for tenants upon expiration of the lease. The statutory interventions amended the strong common law rights of landowners in order to afford some form of continued occupation rights for tenants".

[1248] Section 28 of RCA. This section stipulated that notwithstanding the fact that a lease of premises had expired by the effluxion of time or in consequence of notice lawfully given by the lessor concerned, a court shall not issue an order for the recovery of possession of or the ejectment of a lessee from such premises, if such lessee continues to pay the agreed or prescribed rental within 7 days after the due date or such extended period not exceeding a further 7 days as the court may allow on good cause shown and in exceptional circumstances, and complies with the other conditions of such lease, save in some exceptional cases outlined in the Act.

[1249] Section 34(2) of the RCA.

[1250] Maass *Tenure security* 157.

[1251] Maass *Tenure security* 157.

landlord can approach a court for an eviction order, whereafter the principles created in case law will become applicable. A brief focus below on some court decisions pertinent to landlord-tenant evictions will be helpful.

5.5.3 Court decisions

Some judicial decisions related to landlord-tenant evictions will be examined. While they deal with situations of holding over only a few deal with REHA such as *Kendall Property Investments v Rutgers*, and to a certain extent *Jackpersad NO and Others v Mitha and Others*. In some cases, such as *Ross* and Brisley section 26(3) of the Constitution is applied, while in other instances such as *Amod*, *Ndlovu*, *Changing Tides*, *Blue Moonlight* and *Berman Brothers* PIE is applied.

A critical analysis of REHA provisions as adjudicated upon will also be considered. Maass contends that the relationship between the legislation, Constitution and common law is unclear and intricate in landlord-tenant eviction cases due to the courts' unfamiliarity with the hierarchy of potentially conflicting laws under the Constitution.[1252] As will be noted below, some courts apply section 26(3) of the Constitution, while in other cases PIE is applied.[1253]

The following cases will be analysed: *Absa v Amod*; *Ross v South Peninsula Municipality*; *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*; *Ellis v Viljoen*; *Brisley v Drotsky*; *Ndlovu*; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*; *Kendall Property Investments v Rutgers*; *Jackpersad NO and Others v Mitha and Others*; *Blue Moonlight*; *Malan v City of Cape Town*; *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*; *Van der Westhuizen v Nxiweni*; and *Berman Brothers Property Holdings (Pty) Ltd v M and Others*.

5.5.3.1 *Absa v Amod*[1254]

In this case the tenant who was holding over after expiry of an oral lease raised a defence of non-compliance with PIE's provisions against the landlord who sought to evict.[1255] The court had to determine whether PIE was applicable to tenants who

[1252] Maass *Tenure security* 140.
[1253] Maass *Tenure security* 141.
[1254] *Absa v Amod* [1999] 2 All SA 423 (W) (hereinafter *Amod*).
[1255] *Amod* 426.

were holding over. Schwartzman J maintained that PIE should not be presumed to alter the common-law position regulating landlord-tenant law, as the legislature would have made this clear if it was its intention.[1256] His take was that the 'land' to which PIE applied was *vacant* land only to the exclusion of permanent structures thereon or formalised housing, meaning that it was not applicable to 'normal' common-law landlord-tenant situations.[1257] The court concluded that PIE applied to unlawful occupiers of vacant land, whose occupation was never lawful to start with, and did not amend the common-law position of landlord and tenant.[1258]

5.5.3.2 *Ross v South Peninsula Municipality*[1259]

The decision in *Amod* was subsequently approved in *Ross*[1260] concerning its interpretation of the application of PIE. At issue[1261] in the *Ross* case was whether section 26(3) of the Constitution has altered the common law as established in *Ridley*. This was after the appellant (Mrs. Ross) had excepted to respondent's summons for eviction, to the effect that by virtue of section 26(3) of the Constitution the respondent (municipality) should have alleged that it was seeking to evict her from her home and should have placed before the court relevant circumstances which would have entitled it to such an order.[1262] The summons had merely claimed for Mrs. Ross' ejectment from the premises on the simple basis that the municipality was the owner of the property and she was in occupation to which she had no right, based on the common-law principle of pleading established in the *Ridley* case.[1263] Ultimately, Josman AJ concluded that section 26(3) of the Constitution had indeed modified the common law as laid down in *Ridley* to the extent that a plaintiff seeking to evict a person from his or her home is now required to allege relevant circumstances that entitle the court to issue such an order.[1264] So, even though the respondent did allege that Mrs. Ross was occupying the property illegally, this was nevertheless not sufficient to satisfy the requirement of alleging relevant circumstances that entitle the court to issue an

[1256] *Amod* 428.
[1257] *Amod* 429.
[1258] *Amod* 429-430.
[1259] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) (hereinafter *Ross*).
[1260] *Ross* 599A.
[1261] *Ross* 592B.
[1262] *Ross* at 592E–F.
[1263] *Ross* 591D.
[1264] *Ross* 596G–H.

eviction order. The court had pointed out that it was beyond the scope of the appeal before it to consider what circumstances are relevant to the court, but PIE could give some guidance in this regard.[1265]

5.5.3.3 *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[1266] *and Ellis v Viljoen*[1267]

The *Ross* judgment was subsequently criticised in other High Court decisions such as *Betta Eiendomme*[1268] and *Viljoen*.[1269] The gist of the criticisms was that it would be impossible for an owner to plead personal circumstances of the defendant as these were within the exclusive knowledge of the defendant who could opt not to place them before the court, thus potentially resulting in the denial of the eviction order.[1270]

In *Betta Eiendomme* Flemming DJP, relying rather on contract-law principles and the fact that the agreement of lease had been cancelled, decided that the tenant was obliged to restore the property to the landowner as these principles had not been altered by the Constitution but were in fact a 'relevant circumstance' the court had to consider and apply.[1271] In other words, the only relevant fact was that the owner's property was occupied by the respondent without a sustainable reason.[1272] For the court the common law was still the primary source of law with regard to landlord-tenant disputes.[1273]

5.5.3.4 *Brisley v Drotsky*[1274]

The decision in *Ross* was subsequently overruled by the SCA in *Brisley*. The landlord had cancelled the lease and instituted eviction proceedings after the appellant (Mrs. Brisley) fell into arrears. Relying on *Ross* the respondent alleged

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[1265] *Ross* 596H–I.
[1266] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) (hereinafter *Betta Eiendomme*).
[1267] *Ellis v Viljoen* 2001 (5) BCLR 487 (C) (hereinafter *Viljoen*).
[1268] *Betta Eiendomme* 475F–I.
[1269] *Viljoen* 497B–H. See also *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W) 392B–F; *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others* [2001] 4 All SA 516 (W) 522G; and Muller *The impact of section 26 of the Constitution* 100–101.
[1270] Muller *The impact of section 26 of the Constitution* 100–101.
[1271] *Betta Eiendomme* [13.1]–[13.2]. See also Maass *Tenure security* 147–148.
[1272] *Betta Eiendomme* [15.4.1]–[15.4.2].
[1273] Van der Walt *Constitutional property law* (2005) 348. See also Van der Walt 2002 *SAJHR* 399–401; and Maass *Tenure security* 148.
[1274] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (hereinafter *Brisley*).

that the relevant circumstances the court had to consider were those pertaining to the cancellation of the lease as well as her (as well as her mother's and her child's) socio-economic circumstances.[1275] However, in a majority decision (of Harms JA, Streicher JA and Brand JA) in *Brisley*, the SCA disagreed with the *Ross* decision where that court held that PIE should give guidance in relation to the meaning of 'relevant circumstances' in section 26(3) of the Constitution.[1276] The court found that section 26(3) applies horizontally and should therefore apply to landlord-tenant evictions, contrary to the *Betta Eiendomme* decision (which was criticised by the SCA).[1277] It held that only those circumstances that are legally relevant should come under consideration, which restricted the scope of circumstances the court must consider.[1278] Section 26(3) of the Constitution did not give a court any discretion to deny an eviction order, under certain circumstances, in favour of an owner who would otherwise ordinarily be entitled to such (under common law).[1279] Of essence for the court was that the landlord as the owner of the property in question had cancelled the lease and the tenant no longer had a contractual right to occupation. The SCA further reasoned that the tenant had failed to allege any statutory right entitling her to occupy the property, other than what may be contained in section 26(3) of the Constitution, and the court did not have discretion to refuse an eviction order.[1280] It therefore found that the only relevant circumstances that a court may consider were that the plaintiff is the owner and the defendant is in (unlawful occupation).[1281] The personal (socio-economic) factors averred by the tenant did not constitute relevant circumstances envisaged by section 26(3) of the Constitution.

[1275] *Brisley* [35].
[1276] *Brisley* [38].
[1277] *Brisley* [39]–[40].
[1278] *Brisley* [42].
[1279] *Brisley* [42].
[1280] *Brisley* [45]. See Van der Walt *Constitutional property law* (2005) 349-350 wherein he points out that the court's point of departure is still the common law. The occupier's personal circumstances accordingly do not restrict the landowner's exclusive right of possession except where the occupier has a statutory right of occupation. The common law right of landowners to evict unlawful occupiers therefore impairs the transformative purpose of section 26(3) of the Constitution.
[1281] *Brisley* [45].

5.5.3.5 *Ndlovu case, and City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*[1282]

Subsequent to *Brisley* the SCA adjudicated on the matter of *Ndlovu*, wherein it concluded that Parliament intended to extend the protection of PIE to cases of holding over of dwellings and the like.[1283] The question that had arisen was whether 'unlawful occupiers' in terms of PIE are only those who unlawfully took possession of land (commonly referred to as squatters) or whether it includes persons who once had lawful possession but whose possession subsequently became unlawful.[1284] In the *Ndlovu* appeal the tenant refused to vacate the property even though the lease had been lawfully terminated. In the *Bekker* appeal a mortgage bond had been called up; the property was sold in execution and transferred to the appellants; and the erstwhile owner refused to vacate. In neither case did the applicants for eviction comply with the procedural requirements of PIE and the issue on appeal was whether they were obliged to do so.[1285] Having described both as being cases of holding over Harms JA, delivering the majority judgment, held that to exclude persons who hold over from PIE's definition of 'unlawful occupier' one would have to amend such definition to apply to "a person who *occupied and still* occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land".[1286] In other words, the ordinary meaning of the definition means that (textually) PIE applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful.[1287] As such, if the procedural requirements (in terms of PIE) have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation.[1288] Unless the occupier opposes the matter and discloses circumstances relevant to

[1282] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) (hereinafter *Changing Tides*).
[1283] *Ndlovu* [23].
[1284] *Ndlovu* [1].
[1285] *Ndlovu* [1].
[1286] *Ndlovu* [5].
[1287] *Ndlovu* [11].
[1288] *Ndlovu* [19].

the eviction order, the owner, in principle, will be entitled to an order for eviction.[1289]

Maass concludes that *Ndlovu* did extend application of PIE as a landowner now has to comply with the Act's strict eviction requirements to obtain an eviction order, even though landowners can still bring eviction applications in terms of the common law.[1290] Roux contends that post-*Ndlovu* the common law has very little application in eviction proceedings because either PIE, ESTA, LTA or IPILRA will be applicable.[1291]

Interestingly, REHA was never mentioned in either *Brisley* or *Ndlovu* even though both cases dealt with tenants who were holding over. This is seemingly an affirmation of REHA's limited impact on evictions.[1292] PIE provisions and the principles based on section 26(3) of the Constitution seemingly dominate. For instance still in the SCA, in *Changing Tides* Wallis JA summarised the prevailing position as follows:[1293]

> A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of (section) 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under (section) 4(7) (of PIE) those factors include the availability of alternative accommodation…Once the court decides that there is no defence to the claim for eviction and that it is just and equitable to grant an eviction order, it is obliged to grant to that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of the order and it must consider what conditions must be attached to that order. The order that it grants as a result of these two discrete enquiries is a single order.

[1289] *Ndlovu* [19]. Harms JA explained that: "Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties".

[1290] Maass *Tenure security* 156.

[1291] Roux T "Continuity and change in a transforming legal order: the impact of section 26(3) on South African law" 2004 *SALJ*, Vol. 121, 466–492 491. See also a comprehensive discussion in this regard in Boggenpoel *Property remedies* 50–61; and Muller *et al* S*ilberberg & Schoeman's law of property* 269-–291.

[1292] Maass *Tenure security* 157.

[1293] *Changing Tides* [25]. In the same paragraph Wallis JA added that the eviction order can accordingly not be granted "…until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity".

5.5.3.6 *Kendall Property Investments v Rutgers*[1294]

REHA did, however, eventually feature prominently in *Kendall* wherein a tenant who was living in a property by virtue of a tacit lease agreement resisted the landlord's written notice to vacate within one month, prompting the owner to institute eviction proceedings.[1295] Knoll J held that REHA is legislation intended to regulate access to rental housing in a manner fair to both landlord and tenant, and also to ensure that the provisions of section 26(3) of the Constitution as to circumstances relevant to an eviction order are given content.[1296] The court mentioned that the aim of section 26(3) and any legislation promulgated in advancement of the provisions of that section is to provide tenure security, whilst also remembering on the other hand that no owner may be arbitrarily deprived of property as stipulated in section 25 of the Constitution.[1297] Provisions of section 4(5) of REHA limit the common-law right of a landlord to terminate the lease when the lease applies to a dwelling, meaning that the landlord is obliged to prove the valid termination of the lease.[1298] The landlord must, therefore, prove that the grounds of termination are specified in the lease and do not amount to unfair practice. The landlord can only institute an action for eviction once the lease is validly terminated. Knoll J held that this position is in accordance with the Constitutional Court's interpretation of the constitutional matrix which gave rise to REHA.[1299]

5.5.3.7 *Jackpersad NO and Others v Mitha and Others*[1300]

In *Jackpersad* Swain J followed the dictum of Harms JA in *Ndlovu*[1301] and found that it was incumbent upon the respondents (tenants) to place before the court circumstances relevant to the exercise of the discretion he was vested with in terms of section 4(6) of PIE to decide whether it is just and equitable that they be evicted "after considering all the relevant circumstances including the rights and

[1294] *Kendall Property Investments v Rutgers* [2005] 4 All SA 61 (C) (hereinafter *Kendall*).
[1295] *Kendall* 63.
[1296] *Kendall* 64.
[1297] *Kendall* 64.
[1298] *Kendall* 70. Per Knoll J, and following the reasoning in *Chetty*, in order to prove a valid termination of the lease, "the landlord must, *inter alia*, allege and prove that the grounds of termination (i) do not constitute an unfair practice and (ii) are specified in the lease".
[1299] *Kendall* 70.
[1300] *Jackpersad NO and Others v Mitha and Others* 2008 (4) SA 522 (D) (hereinafter *Jackpersad*)
[1301] *Ndlovu* [19].

needs of the elderly, children, disabled persons and households headed by women".[1302]

Several aspects concerning REHA provisions were at play in the case, the pertinent one for this study being mediation. For instance, the tenants (of Lincoln Mansions) had initially lodged a complaint with the KwaZulu-Natal Rental Housing Tribunal against a rental increase, in terms of section 13 of REHA, which dispute was subsequently settled through mediation the validity of which (mediated settlement) the tenants later sought to challenge before the court.[1303] The court found, however, that the settlement agreement between the landlord and tenants was indeed valid and enforceable. This addresses meaningful engagement and mediation, which should be included in any suggested uniform eviction rules.

5.5.3.8 *Blue Moonlight*

Recent trends seem to indicate that landlord-tenant eviction cases are being decided through resort to the just and equitable principles stipulated in PIE, with virtually no mention or citation of REHA provisions. The Constitutional Court in *Blue Moonlight* remarked that evictions from land are dealt with under PIE, whereby section 4 provides that courts may only grant an order for eviction if it is just and equitable to do so, after considering all the relevant circumstances.[1304] The crucial question before the court was whether it was just and equitable to evict the occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place.[1305] In that matter the landowner (Blue Moonlight) was amenable to the eviction being delayed on equitable grounds, but submitted that an indefinite delay would amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution.[1306] Van der Westhuizen J affirmed the finding in *Ndlovu*[1307] in this regard to the effect

[1302] *Jackpersad* 528G–H and 529A.
[1303] *Jackpersad* 525–527.
[1304] *Blue Moonlight* [29].
[1305] *Blue Moonlight* [29].
[1306] *Blue Moonlight* [31].
[1307] *Ndlovu* [17], wherein the court had found that: "The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 (of PIE) envisage".

that the provisions of PIE are not designed to allow for the expropriation of land.[1308] As such, the eviction order was confirmed, the date by when the 'occupiers' were to vacate the building fixed, but coupled with an order against the City Council to provide temporary alternative shelter at a date preceding the eviction.[1309]

5.5.3.9 *Malan v City of Cape Town*[1310]

In *Malan* the Constitutional Court, in a majority judgment delivered by Majiedt AJ, confirmed the eviction order of an elderly female tenant whose lease had been terminated by the City Council on a one month's written notice for being in breach through arrear rentals and allowing widespread criminal activities on the property.[1311] The court significantly held that tenants in public housing may not be evicted merely on notice, as there must be something more than contractual entitlement: for instance either further breaches of the lease or the necessity to secure vacant premises for other pressing public reasons.[1312] In the absence of a good cause, the Constitution forbids a government agency from using a contractual power of termination against poor tenants in need of housing as this would infringe on tenants' security of tenure, and create the possibility of arbitrariness and abuse.[1313] REHA provisions were never invoked. Instead, the court found that the City Council had complied with the requirements of section 26(3) of the Constitution and PIE.[1314] It confirmed that the tenant's eviction must occur within PIE procedures and that this Act, in accordance with section 26(3) of the Constitution, requires a court to balance the opposing interests of landowners and occupiers in a just and equitable manner.[1315]

[1308] *Blue Moonlight* [31].
[1309] *Blue Moonlight* [104].
[1310] *Malan v City of Cape Town* 2014 (6) SA 315 (CC) (hereinafter *Malan*).
[1311] *Malan* [60]–[64] and [87].
[1312] *Malan* [64].
[1313] *Malan* [63]–[64].
[1314] *Malan* [81]–[85].
[1315] *Malan* [83]. In Majiedt AJ's words, factors including fairness, social values and the implications of the eviction must be considered.

5.5.3.10 *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*[1316]

The Constitutional Court ruling in *Occupiers of Erven 87 and 88 Berea* confirmed that eviction orders may be rescinded using the applicable court rules (High Court rule 42 in this instance) or the common law.[1317] Mojapelo AJ invoked the rule and the common-law ground of *iustus error* (just mistake) as adequate tools in setting aside an eviction order granted earlier by a High Court which had failed to enquire into all the relevant circumstances.[1318] For instance, the High Court was not aware that 180 occupants were absent when it granted the eviction order, and that the four unrepresented occupants who were present in court did not have the mandate to consent to a settlement agreement with the landowner, binding all and paving the way to the ejectment ruling.[1319] The judge also found that all the occupants had valid and *bona fide* defences to the eviction application, namely: (a) non-joinder of the City Council in circumstances where the eviction would render them homeless; and (b) the violation of their rights under section 26(3) of the Constitution, and PIE.[1320] This judgment illustrates that it would be ideal to incorporate procedures regulating the rescission of (eviction) orders in the uniform eviction rules for certainty and completeness. Elements from current general court rules in the mould of High Court rule 42 or from the common law can be imported for this purpose.

[1316] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) (hereinafter *Occupiers of Erven 87 and 88 Berea*).

[1317] *Occupiers of Erven 87 and 88 Berea* [22]. In the words of Mojapelo AJ: "The order may be set aside either in terms of rule 42 of the Uniform Rules of Court or in terms of the common law. In terms of rule 42(1)(a) an order may be rescinded where it was erroneously sought or erroneously granted in the absence of the affected party. An order is erroneously granted where there was no procedural entitlement to it. In *Ntlabezo**, the Transkei High Court considered the issue concerning common law rescission of a judgment which was consented to by a legal representative without the authority of the client. It was held that where legal representatives consent to judgments without the requisite authority, the judgment may be set aside". **Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (TkH).

[1318] *Occupiers of Erven 87 and 88 Berea* [68]–[71].

[1319] *Occupiers of Erven 87 and 88 Berea* [69].

[1320] *Occupiers of Erven 87 and 88 Berea* at [76].

5.5.3.11 *Van der Westhuizen v Nxiweni*[1321] *and Berman Brothers Property Holdings (Pty) Ltd v M and Others*[1322]

It would seem appropriate to conclude with these two High Court cases delivered in different provinces. In the case of *Van der Westhuizen* the Johannesburg High Court granted an eviction order against a tenant whose lease agreement had been terminated by reason of her allegedly being in breach through non-payment of the required rent, utility charges and deposit outstanding in the sum of R131 453.59.[1323] Her defence was not lack of financial means, but rather included: that she was refusing to pay because the applicant (landlord) allegedly failed to repair the damaged geyser and ensure that the property was in a good state of repair; non-joinder of the estate agent who had helped her sign the lease agreement; and failure by the applicant to file a report from the municipality regarding alternative accommodation. However, she never pleaded that she was an indigent or unable to pay for alternative accommodation in the event of eviction.[1324] None of the parties raised unfair practice or non-compliance with REHA provisions. Molahlehi J invoked the principles set out in *Ndlovu* pointing out that in eviction proceedings a court has a discretion, which has to be exercised based on what is just and equitable in the circumstances.[1325] He also relied on the nature of the enquiry outlined in *Changing Tides*, as also followed in the case of *Dwele v Phalatse and Others*,[1326] wherein that court had also reiterated the two inquiries mandated by sections 4(7) and (8) of PIE, in terms of which an eviction order can only be granted if it is just and equitable to do so, and no valid defence had been raised.[1327] The eviction order was ultimately granted.

In the second case of *Berman Brothers* the Western Cape High Court noted that in seeking to evict, the Berman Bros (applicants) had relied on the *rei vindicatio,* claiming that they were the owners of the property and that Ms. M (respondent) was in possession thereof, in accordance with the approach described in

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[1321] *Van der Westhuizen v Nxiweni (*21145/17) [2018] ZAGPJHC (08 May 2018) (*Van der Westhuizen)*.
[1322] *Berman Brothers Property Holdings (Pty) Ltd v M and Others* [2019] 2 All SA 685 (WCC) (hereinafter *Berman Brothers*).
[1323] *Van der Westhuizen* [6].
[1324] *Van der Westhuizen* [34].
[1325] *Van der Westhuizen* [35].
[1326] *Dwele v Phalatse and Others* (11112/15) [2017] ZAGPJHC 146 (7 June 2017) [20].
[1327] *Van der Westhuizen* [33] and [36].

Chetty.[1328] Gamble J, relying on *Ndlovu*,[1329] found that this principle has not been eroded by the development of the jurisprudence around PIE but it is now established law that the occupier must disclose circumstances for consideration under section 4(7) of PIE which are relevant to an eviction order.[1330] On the basis of the decision in *Ridgway v Janse van Rensburg*,[1331] the judge held that the onus is on the occupier to show why the ordinary consequences should not ensue, that is, that the owner is entitled to vindicate the property.[1332] Ultimately the court found that the lease had been lawfully cancelled and the erstwhile tenant was now in unlawful occupation.[1333] The owners were therefore found to be fully within their rights to seek her eviction from the property, subject to the provisions of section 4(7) of PIE, as the tenant had been in unlawful occupation for more than six months.[1334] Gamble J confirmed though that the jurisprudence that had developed in cases such as *Blue Moonlight* and *Changing Tides* establishes that where the eviction is at the behest of a private landowner (as opposed to an entity bearing a constitutional obligation to provide housing) there is no duty on such private entity to provide alternative accommodation to the occupier.[1335] Although the court eventually granted the eviction order, it nevertheless considered the status of the

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[1328] *Berman Brothers* [27]. In *Chetty* the Appellate Division held at 20C-D: "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio* need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the *res* – the onus being on the defendant to a allege and establish any right to continue to hold against the owner."

[1329] *Ndlovu* [19], wherein Harms JA held: "Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties."

[1330] *Berman Brothers* [28].

[1331] *Ridgway v Janse van Rensburg* 2002 (4) SA 186 (C) 192A–B, wherein Griesel J held: "It is then for the respondent to place 'relevant circumstances' before the court to show why the ordinary result should not follow, namely that an owner is entitled to vindicate his or her property. What are the relevant circumstances in this case? Save for relying on the technical defect…the respondent has not placed any 'relevant circumstances' before the Court as to why the ordinary consequences of ownership should not be given effect to in this case".

[1332] *Berman Brothers* [28].

[1333] *Berman Brothers* [46].

[1334] *Berman Brothers* [46].

[1335] *Berman Brothers* [47]. However, in this matter, it transpired the occupier had declined alternative accommodation offers from both the City Council and the owners respectively (see *Berman Brothers* at [48]–[49]).

occupiers' children (in view also of section 28(2) of the Constitution) and fixed the eviction date to 30 November 2019, delaying the execution thereof to 17 December 2019 to enable the eldest child to finish her matric and schooling.[1336]

5.5.4 Summary and conclusion

As Knoll J succinctly puts it in *Kendall,* REHA is a law of general application that seeks to protect and regulate the relationship of landlord and tenant in all situations where dwellings, in the form of "a house or other place of residence" are leased.[1337] It is legislation intended to regulate access to rental housing in a manner fair to both landlord and tenant, and also to ensure that the provisions of section 26(3) of the Constitution regarding circumstances relevant to an eviction order are given content.[1338] The Act seeks to balance the rights of tenants and landlords and to create mechanisms to protect them against unfair practices and exploitation, and in the process afford tenure security for lawful tenants in rural and urban housing.[1339]

REHA introduces unique concepts, previously unknown to the common law or contained in rental legislation,[1340] such as 'unfair practice'.[1341] Another novelty is the establishment of Rental Housing Tribunals, with a view to the investigation, adjudication and mediation of complaints concerning alleged unfair practices.[1342] These are aspects that can be considered for inclusion in a uniform set of eviction rules. These concepts, applied in combination with other provisions of REHA, such as those prescribed in section 4, are designed to eliminate unfair practices in the rental sphere prior to the institution of eviction proceedings.

Thus the common-law right of ending the lease is now limited by the Act as it is only once the landlord has validly terminated the lease that it is entitled to take the next step of repossessing the premises with an order of court.[1343] But REHA seems to have had a limited impact on eviction proceedings, as it seems more

[1336] *Berman Brothers* [50]–[54], and court orders A and B.
[1337] *Kendall* 63.
[1338] *Kendall* 64.
[1339] Van der Walt 2002 *TSAR* 264–265. See also the discussion in paragraph 5.5.1.
[1340] *Kendall* 65.
[1341] As described in paragraph 5.5.1.
[1342] Rental Housing Tribunals are regulated under Chapter 4 of REHA, sections 6 to 15.
[1343] *Kendall* 70.

concerned with the landlord-tenant rights during the tenancy, and the contractual relationship between the parties. However, once the lease terminates in accordance with the Act, the landlord can approach the court for an eviction order, whereafter the principles created in case law and other legislation (such as the Constitution and PIE) become applicable.[1344] For instance, in neither *Brisley* nor *Ndlovu*, both dealing with tenants who refused to vacate the leased property upon termination of their right to occupy the premises, did the courts even mention the REHA, notwithstanding that it had commenced on 1 August 2000. Also, in *Jackpersad* the court followed the dictum of Harms JA in *Ndlovu*, finding that it was incumbent upon tenants to advance circumstances relevant to the exercise of the courts' discretion in terms of section 4(6) of PIE to decide whether it is just and equitable that they be evicted "after considering all the relevant circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women".[1345] The above analysis indicates that PIE provisions, more than REHA stipulations, are being relied on in the adjudication of most landlord-tenant eviction cases. However, in most instances it is the transgression of REHA requirements and prescripts that often paves the way towards applications for eviction in the landlord-tenant sphere. REHA therefore remains relevant in the formulation of uniform eviction rules.

5.6 Conclusion

While evictions have been a constant feature in South Africa, during both the *apartheid* era and in the democratic order, they were regulated through vastly different procedures and policies. So, in this segment comparisons will first be drawn between the pre- and post-democratic South African eviction regulatory frameworks (paragraph 5.6.1). Paragraph 5.6.2 then explores the relationship between the post-democratic eviction laws and the existing civil court procedures, as well as the implications thereof for suggested eviction rules. Paragraph 5.6.3 concentrates on the reconstruction of some portions of LTA, ESTA, PIE and REHA with a view to attaining a clearer and simpler regulatory framework for evictions. Lastly, paragraph 5.6.4 looks at features common to the existing eviction laws, with possible inclusion in uniform eviction rules.

[1344] Maass *Tenure security* 157.
[1345] *Jackpersad* 528G–H and 529A.

5.6.1 Evictions during apartheid and democratic South Africa compared

As highlighted in chapter 4, during *apartheid* the common-law remedies, particularly the *rei vindicatio*, and oppressive legislation existed side by side and were applied in a racially discriminatory manner. Laws such as the Group Areas Act at some stage even divested courts of their discretion to punish land invaders or unlawful occupiers with eviction orders upon conviction. Offenders were mostly members of the Black population. Legislation permitted the execution of such eviction orders even in instances where convicted people sought to appeal. Methods of eviction varied depending on the specific legislation applicable. Litigants could choose a specific statute to invoke when evicting, and therefore merely had to rely on the actual legislative section contravened.

There existed a plethora of land laws pushing and fulfilling evil state policies and objectives aimed at harassing, prosecuting and evicting non-white occupiers from land in different ways, with little or no regard to their personal circumstances. Laws, including PISA, contained procedural directives stipulating steps to be followed when evicting people. Such directives were not contained in specific, self-standing civil court eviction rules. Instead, even criminal courts could sanction evictions upon convicting a person for trespassing, squatting in a demarcated racial group area and so forth.

In contrast, in the new South Africa various laws have now been enacted to advance the goals and aspirations of the Constitution regarding the protection or revision of property rights, security of tenure, provision of access to housing and prohibition of arbitrary evictions, particularly premised on both sections 25 and 26. As stated in *Kendall* and various other cases the aim of section 26(3) - and any legislation promulgated in advancement of the provisions of that section - is to provide tenure security, whilst also remembering that no owner may be arbitrarily deprived of property as stipulated in section 25 of the Constitution.[1346]

However, procedural prescripts and requirements in the LTA, ESTA, PIE and REHA introduce new features not hitherto contained in the civil court rules, resulting in the Acts themselves, rather than the rules, being reference points

[1346] *Kendall* 64.

whenever eviction proceedings are sought to be launched or opposed. It would have been easier to regulate the process if a uniform set of eviction rules existed, infusing elements of the different procedures contained in the four main Acts under consideration. Some of the factors for digestion in the possible design of future eviction rules, or even the amendment of the Acts follow.

5.6.2 The relationship between the post-democratic eviction laws and the existing civil court procedures

As discussed above, all the legislation that includes LTA, ESTA, PIE or REHA, in one way or another, refers to the procedures applicable to the High Court and Magistrates' Courts, including court rules. This connotes that the role of the present civil court rules or procedures is acknowledged by the substantive eviction laws, and that these regulatory processes are capable of playing a pivotal role in the possible design of uniform eviction rules, and cannot be ignored. Some illustrations of this relationship include the following:

First, section 17(3) of the LTA provides that a notice[1347] may be given by way of registered mail or through service in the manner provided for the service of summons in the Rules of Court made in terms of the Magistrates' Courts Act, read with provisions of the Rules Board Act. As pointed out earlier though, such a reference to the Magistrates' Courts in the LTA seems misplaced because the Land Clams Court is equivalent to the High Court in stature and not to a Magistrate's Court. However, the significance of section 17(3) lies in the fact that it confirms that the LTA is alive to the existence of civil procedural court rules and the role of the Rules Board in the development of such rules. It also confirms that the LTA recognises that the service of documents and notices is regulated by court rules. In eviction matters notices, applications and other documents have to be served in accordance with applicable service rules.

Secondly, in terms of section 17(3) of ESTA the Rules Board can make rules governing the procedure in the High Court and the Magistrates' Courts in terms of ESTA. Further, the High Court rules of procedure applicable in civil actions and

[1347] In terms of section 17(2). This is a notice of application for the acquisition of land by a labour tenant, which is pivotal in the securing of land tenure rights and prevention of any possible eviction proceedings in the future against such tenant or his or her successor.

applications must apply in Magistrates' Courts proceedings, with appropriate variations, until such time as procedural rules are made for the Magistrates' Courts by the Rules Board.[1348]

Thirdly, section 1 of PIE defines 'court' to mean any division of the High Court or the Magistrate's Court in whose area of jurisdiction the land in question is situated. Therefore, the relevant rules of either the High Court or Magistrates Courts are applicable in PIE matters. Suggested eviction rules have to be guided by or incorporate aspects of the existing regulatory framework in the stated courts.

In the fourth place, section 4(3) in PIE stipulates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question. Eviction rules can thus align with the existing court rules which regulate the service of notices and documents, or take a leaf therefrom.

In the fifth place, section 13(13) of REHA determines that a ruling by a Rental Housing Tribunal is deemed to be an order of a Magistrate's Court and is enforced in terms of the Magistrates' Courts Act.[1349] This means that the implementation of the ruling will have to conform to Magistrates' Courts execution processes and procedures as discussed in chapter 2. This then confirms the symbiotic relationship between REHA and the civil procedural framework, which aspect bodes well for suggested eviction rules.

These examples from the LTA, ESTA, PIE and REHA therefore illustrate that it is possible to have a uniform set of eviction rules made under the auspices of the Rules Board, which can function in conjunction with or be guided by other broader civil rules governing procedures in both the High Court and the Magistrates' Courts.

[1348] Section 17(4) of ESTA.

[1349] Section 13(11) of REHA notably stipulates that a Magistrate's Court may, where proceedings before the court relate to a dispute regarding an unfair practice, at any time refer such matter to a Tribunal.

5.6.3 Reconstruction of legislative components towards a clearer, simpler regulatory framework

Certain components of either LTA, ESTA, PIE or REHA can be reconstructed so that a clearer and simpler regulatory framework for evictions can be achieved. Some of the components would be less desirable or could be better worded while others would be more desirable for a new framework. These are described below.

5.6.3.1 Less desirable features in ESTA and PIE

5.6.3.1.1 Convoluted notification procedures

ESTA provides that, upon termination of the right of residence, the owner or person in charge ought to have first given not less than two months' written notice of the intention to obtain an eviction order to the occupier and municipality.[1350] But, as an alternative, such notification can be dispensed with by giving a notice of application to court instead to the occupier, the municipality and the provincial office of the DALRRD not less than two months before the date of the commencement of the hearing of the application.[1351] These notification procedures seem a bit convoluted, with a potential to confuse prospective litigants.

5.6.3.1.2 Distinction between *effective-date* occupiers and *future* occupiers

Another undesirable element in ESTA is the distinction between *effective-date* occupiers and *future* occupiers, as well as the different protections afforded. As mentioned earlier, section 10 gives protection to people who were occupiers on 4 February 1997[1352] (*effective-date occupiers*), whilst section 11 provides persons who became occupiers after the aforementioned date slightly less protection. This differentiation of occupiers in the present era seems unwarranted. Dispensing with

[1350] Sections 9(2)(d)(i) and (ii) of ESTA. In addition, sub-section 9(2)(d)(iii) requires that such notice should also have been sent to the head of the relevant DALRRD provincial office, for information purposes.

[1351] Proviso to section 9(2)(d) of ESTA.

[1352] The significance of this date is explained comprehensively in the Department of Land Affairs *Explanatory Guide to the Extension of Security of tenure Act, 62 of 1997* ISBN 0-621-27829-7 5. On 4 February 1997 the Minister of Land Affairs published the Bill forming the basis of ESTA for public information and comment. The importance of this date is that, now that ESTA has become law, people covered by this Act who were unfairly evicted after 4 February 1997 can apply to the court for an order allowing them to return to the land they were occupying. This was done in an endeavour to stop people from being evicted before ESTA became law.

it can simplify the eviction process. If the Act is amended accordingly, these are aspects that can be streamlined and adequately taken care of by uniform eviction rules of court.

5.6.3.1.3 Contents and the manner of service of the PIE section 4(2) notice

In *Cape Killarney*[1353] Brand AJA found that section 4(2) of PIE could have been more clearly worded, to make it obvious that the legislature intended that the contents and the manner of service of the notice contemplated in the sub-section must be authorised and directed by an order of the court concerned.[1354]

5.6.3.1.4 Applicability of PIE to residential dwellings only

PIE could also have specified that its provisions apply only to (residential) dwellings rather than commercial properties, rather than leaving this for interpretation by courts. Instead, it was left to the SCA in *Ndlovu* to determine that the provisions of PIE do not extend to buildings occupied by juristic people, and that PIE is not applicable where the property concerned is being used for business.

5.6.3.1.5 Distinction between sections 4(6) and 4(7) of PIE

A question that can also be asked is whether it is still relevant to differentiate between sections 4(6) and 4(7) of PIE on the question of the length of the occupation. As mentioned earlier, in *Mooiplaats* the court found that though the distinction between these sections is important, it is nevertheless not decisive to the justice and equity enquiry.[1355] Even if a court is faced with a case in which the land occupation falls short of six months, it is capable of determining what constitutes relevant circumstances, and is still obliged to consider all such factors.[1356] Therefore, the distinction between occupiers who have been in unlawful occupation for more or less than six months has effectively been obliterated.[1357]

[1353] *Cape Killarney* [11].
[1354] *Cape Killarney* [11].
[1355] *Mooiplaats* [15]–[16].
[1356] *Mooiplaats* [16].
[1357] See "Evictions and Alternative Accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

5.6.3.2 More desirable features common to the LTA, ESTA, PIE and REHA

The LTA, ESTA, PIE and REHA contain common elements that would be important to retain in a set of uniform eviction procedures. These elements can also provide some guidelines on what the elements of a clearer and simpler regulatory framework for evictions should look like. These are discussed hereunder.

5.6.3.2.1 Urgent eviction application procedures

Procedures for urgent eviction applications are a common feature to the LTA, ESTA and PIE, and would also have to be incorporated in any uniform set of eviction rules. For example, just like the LTA and ESTA, PIE also allows the landowner or person in charge to bring an urgent application for the eviction of an unlawful occupier pending the outcome of proceedings for a final order.[1358] Similarly, in both the High Court and Magistrates' Courts if the court is satisfied that the matter is indeed urgent it may dispense with the ordinary forms and manners of service provided for in the High Court and Magistrates' Courts rules.[1359] An application brought as a matter of urgency must be supported by an affidavit which sets out explicitly the circumstances which the applicant avers render the matter urgent and the reasons for claiming that he or she could not be accorded substantial redress at a hearing in due course.[1360]

5.6.3.2.2 Mediation processes in evictions

The mediation aspect in eviction matters is a valuable element that features through all focal legislation: LTA, ESTA, PIE, and REHA. It can form part of matters to be earmarked for better regulation through eviction rules, and potentially assist in avoiding costly and protracted litigation.

Mediation also features even in some pertinent proposed legislative amendments, including in the Land Court Bill, 2021. For instance, in respect of both sections 10(1) and 11(2) the Extension of Security of Tenure Amendment Act has proposed a clause allowing the court to grant an eviction order where mediation or

[1358] In terms of section 5(1)(a)–(c) of PIE.
[1359] High Court rule 6(12)(a) and Magistrates' Courts rule 55(5)(a).
[1360] High Court rule 6(12)(b) and Magistrates' Courts rule 55(5)(b).

arbitration efforts have failed.[1361] As highlighted in the chapter, mediation, meaningful engagement or negotiated settlement has also been endorsed or advocated by the courts, especially where state organs are parties to the eviction proceedings.[1362]

5.6.4 A one-stop set of eviction rules

In conclusion, this chapter clearly shows that a one-stop set of eviction rules can consolidate processes across all spheres where evictions prevail. Presently, to appropriately commence and finalise an eviction a person must be familiar with the specific area of the law and the applicable regulatory framework within which to operate. There is no straightforward, easy reference point. The *status quo* seems undesirable and has the potential of leading to confusion and unintended consequences or frustrations for litigants in the eviction sphere. Particularly as different sets of laws and rules have to be accessed and comprehensively implemented in the enforcement of constitutional rights in land and the protection thereof. In designing the suggested set of eviction rules the following observations are poignant:[1363]

> In addition to the legal requirements for an eviction to be undertaken, the Constitutional Court as the highest court of the Republic, has set out best practices that are important to note. These are reflected in the cases of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others; Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg; Abahlali Basemjondolo Movement SA v Premier of KwaZulu-Natal and Others and Occupiers of Erven 87 & 88 Berea v De Wet and Another*; in that: a) Evictions must be conducted in a humane manner; b) The State must provide temporary alternative accommodation in certain instances, such as where those that are evicted are unable to secure their own accommodation; c) Every property owner must engage meaningfully with evictees, individually and collectively, before commencing the eviction process; and d) Eviction processes should not discriminate against an individual or group of people such as migrants and non-nationals.

A comparative evaluation of the regulatory framework for evictions in foreign jurisdictions, which is the focus of the next chapter, can also possibly assist and

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[1361] Sections 5 and 6 of the Extension of Security of Tenure Amendment Act 2 of 2018 (not yet in operation).

[1362] Judgments such as *Port Elizabeth* Municipality; *Schubart* Park; *Joe Slovo* Community; *Occupiers of 51 Olivia* Road, and so forth come to mind.

[1363] *Evictions* https://www.sahrc.org.za/home/21/files/FINAL%20Evictions%20Educational%20Booklet.pdf (Date of use: 9 August 2021).

provide some guidance in the context of a uniform set of rules for eviction proceedings.

Chapter 6: Eviction laws in selected foreign jurisdictions

6.1 Introduction

> Eviction is one of the worst forms of violence that can afflict someone. It is not one of life's ups and downs; it is a mark of infamy inflicted by society through institutions such as the police force and the legal system. Eviction is a humiliating and traumatising experience, which risks pushing the victim down a slippery slope towards destitution and poor self-esteem. It constitutes a violent rupture of one's home life that directly feeds into the problem of homelessness… (It) has been a long-standing fact of life in European countries for many centuries.[1364]

This chapter examines eviction law in the United Kingdom (UK) and the United States of America (USA or US). As elaborated upon in chapter 1[1365] the Anglo-Saxon and Anglo-American legal systems are analysed comparatively, partly because South African law is a so-called 'mixed' legal system. These two jurisdictions, and the two states of Arizona and Texas in the USA, are selected for comparative analysis as evictions there are governed by specialised procedures. In his earlier analysis of eviction laws in England, New York City and two other countries Spamann confirms this unique position:

> Note in this connection that England and New York City provide special procedures for eviction claims: the possession claim under CPR Part 55 in England, and the non-payment variant of the summary proceeding to recover possession of real property under RPAPL § 732 in New York City.[1366]

Even though the UK and the USA have no provisions, constitutional or otherwise, that correspond to sections 25 and 26 of the South African Constitution, comparative analysis with eviction laws in these countries seems more useful for this study from a functional method perspective. The South African spheres of evictions are also distinct from the selected foreign jurisdictions as they also cater for rural and peri-urban land categories through legislation like the LTA and ESTA.

[1364] The Foundation Abbé Pierre, FEANTSA *The second overview of housing exclusion in Europe 2017* (FEANTSA Brussels 2017) 67. Available: http://www.feantsa.org/en/report/2017/03/21/the-second-overview-of-housing-exclusion-in-europe-2017 (Date of use: 15 August 2020). FEANTSA is the European Federation of National Organisations Working with the Homeless.

[1365] See paragraph 1.9.2.

[1366] Spamann http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_31.pdf (Date of use: 30 December 2016). See chapter 1, paragraph 1.9.2.

The UK and USA legal systems are different, the UK being a parliamentary democracy:[1367]

> In many states, such as the USA, Germany and South Africa, written constitutions give the courts the power to overturn legislation which is deemed to violate basic rights. However, the UK has not followed this approach. Instead, over the last few decades, it has developed its own distinctive system, which gives courts a role in protecting individual rights while respecting the sovereign law-making authority of Parliament.

In the UK, and, to a certain extent, the USA, evictions occur mainly in the form of landlord-tenant (rental) evictions and property foreclosures or squat evictions.[1368] These two jurisdictions are chosen for analysis because in European countries such as the Netherlands, Germany, Sweden, as well as in Italy evictions seem to have received little interest in the social sciences generally.[1369] Evictions in these legal systems occur mostly in the sphere of landlord-tenant laws. Although the process from rent arrears to eviction seems to be strictly regulated, the steps and the length of the process differ significantly between the countries.[1370] Comparison with these legal systems is therefore not suitable for the objectives of this study at this stage.

Generally, UK legislation criminalises illegal evictions or harassment, as in South Africa. Harassment is mentioned here because it can force a tenant or occupier to eventually leave the premises, tantamount to unlawful eviction.[1371] The Protection from Eviction Act 1977[1372] is geared towards protecting tenants from being evicted from their homes by landlords. Section 3(1) stipulates that no one can be forcibly evicted without a court order.[1373] Courts are obliged to comply with established

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[1367] O'Cinneide *Human rights and the UK Constitution* 8.

[1368] See The Foundation Abbé Pierre, FEANTSA *The second overview of housing exclusion in Europe* 67. Squat eviction connotes that successful foreclosures essentially render the occupants of the immovable property squatters as they no longer have the owner's permission to reside there.

[1369] Stenberg, Van Doorn and Gerull 2011 *European Journal of Homelessness* 40.

[1370] Stenberg, Van Doorn and Gerull 2011 *European Journal of Homelessness* 56. For instance, the period from rent arrears to eventual eviction ranges from three months in Sweden, to six months in the Netherlands, and to more than 15 months in Germany, although the process in Sweden is often shorter than three months.

[1371] See section 27 of the Housing Act 1988, c.50. https://www.legislation.gov.uk/ukpga/1988/50. Under the section, a residential occupier can claim damages if he is unlawfully evicted or is forced to leave because of harassment from the landlord.

[1372] Protection from Eviction Act 1977, c.43 https://www.legislation.gov.uk/ukpga/1977/43. (Date of use: 21 May 2021).

[1373] Section 3(1) of the Protection from Eviction Act 1977, c.43 https://www.legislation.gov.uk/ukpga/1977/43. See also Kenna P et al *Pilot project – promoting protection of the*

limitations, principles and procedures of constitutional, legislative, general or public interest laws in eviction cases.[1374]

In the US the Uniform Residential Landlord and Tenant Act of (URLTA) or the Model Residential Landlord-Tenant Code[1375] forms the basis for evictions, which are further governed by state law, local law, leases, other federal laws, the common law, and court rules.[1376] In the US the relevant procedure is regulated by state law. The choice of a state or a city is therefore significant for America.[1377] The American states of Arizona and Texas are selected to depict the position in the US generally, not necessarily because they are different from the remaining states. It would not be practically possible to focus on the legal position of each US state.

In this chapter eviction processes in both the UK and USA will be discussed mainly from two angles: (1) primary legislative instruments; and (2) secondary legislation, largely comprising civil court rules. The objective will be to determine if some aspects from such an analysis can contribute towards the development of laws or rules regulating evictions in South Africa. The position in the UK will be examined first, after a brief excursus on terminology used in the UK and USA.

6.1.1 Terminology

In both the UK and USA certain terminology tends to be used in eviction-related processes, with terms such as ‘possession orders’, ‘repossession orders’, ‘lender’ and so forth. These terms are better understood in the context in which they are used. For instance, a ‘lender’ in this context connotes an individual, a public or private group, or a financial institution that makes funds available to a person with the expectation that the funds will be repaid with interest.[1378] Repayment may occur in increments, as in a monthly mortgage payment (a mortgage being one of

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right to housing – homelessness prevention in the context of evictions (European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Luxemburg, 2016, ISBN: 978-92-79-58049-9, doi:10.2767/463280) 29 SSRN: https://ssrn.com/abstract=3286214.

[1374] Kenna *et al* Homelessness *prevention in the context of evictions* 166.

[1375] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

[1376] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

[1377] Spamann http:// www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Spamann_31.pdf (Date of use: 30 December 2016).

[1378] https://www.investopedia.com/terms/l/lender.asp#: (Date of use: 18 January 2021).

the largest loans consumers take out) or as a lump sum.[1379] In this study, 'lender' is used interchangeably with related words such as 'creditor', 'bank', 'mortgagee' or 'home-loan financer' in the context of mortgage (re)possessions. In the same vein, the term 'debtor' is used interchangeably with 'owner', 'mortgagor' or 'consumer'. In the narrower or stricter sense a possession order is where a landlord seeks return of a property from a tenant, whilst a repossession order is where a lender takes a property from an owner for non-payment of mortgage.[1380] Both processes usually culminate in an eviction. Possession proceedings are the court process by which a landlord or a lender or an owner can 'repossess' a property.[1381] However the terms 'possession order' or 'repossession order' are frequently used interchangeably nowadays albeit technically erroneous.[1382]

6.2 Eviction processes in the United Kingdom

6.2.1 Introduction

Up until the Brexit[1383] date of 31 January 2020, the United Kingdom (UK) was one of the European Union (EU) Member States, which included the framework for the legal process of evictions to be provided for by legislation and court rules, that must comply with constitutional and human rights standards.[1384] It is noteworthy that following Brexit, EU law and the EU Court of Justice no longer have supremacy over UK laws or its Supreme Court, except to a temporary

[1379] https://www.investopedia.com/terms/l/lender.asp#: (Date of use: 18 January 2021).
[1380] https://www.justanswer.co.uk/law/8v2pr-tell-difference-possession-order-repossession.html# (Date of use: 18 January 2021).
[1381] https://www.justanswer.co.uk/law/8v2pr-tell-difference-possession-order-repossession.html# (Date of use: 18 January 2021).
[1382] https://www.justanswer.co.uk/law/8v2pr-tell-difference-possession-order-repossession.html# (Date of use: 18 January 2021).
[1383] 'Brexit' is the name given to the United Kingdom's departure from the European Union, and is a combination of 'Britain' and 'exit'. On 23 June 2016, the UK held a referendum on its membership of the EU. Voters had to choose whether: "Should the United Kingdom remain a member of the European Union or leave the European Union?" 51.89% of voters voted to leave the EU. The UK left the EU on 31January 2020. Up to and including 31 December 2020 a transition period was in place. During that time nothing changed and the UK continued to comply with all EU laws and rules. On 24 December 2020 negotiators for the EU and the UK reached a deal on the two parties' new relationship. The EU and the UK have set out the terms of this deal in three agreements: the Trade and Cooperation Agreement; the Information Security Agreement; and the Nuclear Cooperation Agreement. 1 January 2021 is the date scheduled for the coming into effect of the rules set out in these agreements: https://www.government.nl/topics/brexit/question-and-answer/what-is-brexit (Date of use: 3 February 2021).
[1384] Kenna *et al* Homelessness *prevention in the context of evictions* 28.

extent.[1385] The European Union (Withdrawal) Act 2018[1386] retains relevant EU law as domestic law, which the UK can then amend or repeal.[1387] Although the UK is no longer a member of the EU, EU legislation as it applied to the UK on 31 December 2020 is now a part of UK domestic legislation, under the control of the UK's Parliaments and Assemblies.[1388] EU legislation that applied directly or indirectly to the UK before 11.00 p.m. on 31 December 2020 has been retained in UK law as a form of domestic legislation known as 'retained EU legislation'[1389] Sections 2 and 3 of the European Union (Withdrawal) Act 2018 contain the provisions relating to the retained EU legislation while section 4 regulates any remaining EU rights and obligations, including directly effective rights within EU treaties that continue to be recognised and available in domestic law after exit.[1390]

English civil law is mainly made up of primary (Parliamentary) legislation and case law, whereby courts interpret legislation and usually have to follow decisions on the same issue made by a court of equivalent or higher status.[1391] Then there are Civil Procedure Rules (CPRs) (secondary legislation) that were introduced in 1998 to regulate the procedure followed in the English civil court system, which will be elaborated upon below.[1392] The overriding objective of these rules is that all cases are dealt with in a manner that enables the courts to handle them justly. Thirdly, over and above primary legislation and procedural court rules (CPRs), there are additional regulatory measures pertaining to evictions based on mortgage (re)possessions. These are: *Mortgages and Home Finance: Conduct of Business*

[1385] See https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021).
[1386] As described in chapter 1, paragraph 1.9.2.
[1387] Sections 2, 3 and 7 of the European Union (Withdrawal) Act 2018. Pertaining to sections 2 and 3 see https://www.legislation.gov.uk/ukpga/2018/16/section/2/enacted (Date of use: 3 February 2021) and https://www.legislation.gov.uk/ukpga/2018/16/section/3/enacted (Date of use: 3 February 2021) respectively. Section 2(1) of the Act provides: "EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day". Section 3(1) reads: "Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day". The status of such "retained EU law" is also confirmed in section 7. In general, contents of this Act can be accessed at https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted (Date of use: 3 February 2021).
[1388] https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021).
[1389] https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021). A position also confirmed in in sections 2 and 3 of the European Union (Withdrawal) Act 2018.
[1390] https://www.legislation.gov.uk/eu-legislation-and-uk-law (Date of use: 3 February 2021).
[1391] https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020).
[1392] https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020).

Sourcebook (MCOB) rules; and the *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property*. Both are discussed in detail below.

The English civil court system is divided into the High Court and the County Courts.[1393] The High Court deals largely with claims in excess of £50,000 and has jurisdiction over most matters through its District Registries and the Royal Courts of Justice in London.[1394] There are three High Court divisions, namely: the Chancery, the Queen's Bench and the Family Division.[1395] Whilst the Chancery Division deals with companies generally and specialist matters such as wills, trusts, insolvency and tax, the Queen's Bench Division handles all other civil matters including contractual disputes, personal injury cases, industrial accidents, defamation cases and negligence claims.[1396]

There is also a Court of Appeal at which appeals from a decision of a High Court judge are adjudicated. Where issues of public importance are at play the further and final stage of appeal lies to the Supreme Court, where the appeal is usually heard by five justices.[1397]

Though some civil matters may be dealt with in the Magistrates' Courts (such as pub licencing), trials for most civil cases (including evictions) are, however, heard in the County Courts.[1398] County Courts handle the vast majority of civil (non-criminal) matters, such as those of: businesses trying to recover money owing; individuals seeking compensation for injuries; and landowners seeking orders that will prevent trespass.[1399] Most significantly, all County Court centres can deal with

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1393 https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020). See also https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-structure/ (Date of use: 17 January 2021).

1394 https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020).

1395 https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020); https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-structure/ (Date of use: 17 January 2021).

1396 https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020).

1397 https://www.pinsentmasons.com/out-law/guides/an-overview-of-civil-proceedings-in-england-and-wales (Date of use: 20 December 2020).

1398 https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-structure/ (Date of use: 17 January 2021).

1399 https://www.judiciary.uk/you-and-the-judiciary/going-to-court/county-court/ (Date of use: 17 January 2021).

contract and tort (civil wrong) cases and recovery of land actions.[1400] County Court judgments usually call for the repayment or return of money or property, and the court has a range of procedures to deal with enforcement of judgments.[1401]

As will be observed, most evictions in the UK emanate from landlord-tenant and mortgage (re)possession spheres. The discussion will commence with the primary legislation in the stated areas of evictions and thereafter secondary legislation.

6.2.2 Primary legislation

The main primary laws, as enacted by the UK Parliament, which will be discussed include the Human Rights Act 1998, the Housing Act 1988,[1402] Protection from Eviction Act 1977, Administration of Justice Acts[1403] 1970 and 1973 and the Financial Services and Markets Act 2000.[1404] Incidental legislation in the likes of the Consumer Credit Act 1974,[1405] Deregulation Act 2015,[1406] Landlord and Tenant Act 1985[1407] and Housing Act 2004[1408] will also be briefly touched upon or referred to depending on the context.

6.2.2.1 Human Rights Act 1998 (HRA)

As mentioned in chapter 1, the Human Rights Act 1998[1409] (HRA) 'incorporated' most of the rights and freedoms contained in the ECHR into UK law.[1410] Steven

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[1400] https://www.judiciary.uk/you-and-the-judiciary/going-to-court/county-court/ (Date of use: 17 January 2021).

[1401] https://www.judiciary.uk/you-and-the-judiciary/going-to-court/county-court/ (Date of use: 17 January 2021).

[1402] Housing Act 1988, c.50 https://www.legislation.gov.uk/ukpga/1988/50/contents.

[1403] Administration of Justice Act 1970, c.31 https://www.legislation.gov.uk/ukpga/1970/31 and Administration of Justice Act 1973, c.15 https://www.legislation.gov.uk/ukpga/1973/15/contents.

[1404] Financial Services and Markets Act 2000, c.8 https://www.legislation.gov.uk/ukpga/2000/8/contents.

[1405] Consumer Credit Act 1974, c.39 https://www.legislation.gov.uk/ukpga/1974/39/contents.

[1406] Deregulation Act 2015, c.20 https://www.legislation.gov.uk/ukpga/2015/20/contents/enacted. The Act's long title describes its purpose and scope thus: "To make provision for the reduction of burdens resulting from legislation for businesses or other organisations or for individuals; make provision for the repeal of legislation which no longer has practical use; make provision about the exercise of regulatory functions; and for connected purposes". See https://www.legislation.gov.uk/ukpga/2015/20/introduction/enacted (Date of use: 27 February 2022). Amongst others, this Act basically introduces a raft of new measures controlling assured shorthold tenancies (ASTs), aimed at preventing retaliatory evictions. See Deregulation_Act_2015.pdf (falcon-chambers.com) (Date of use: 27 February 2022).

[1407] Landlord and Tenant Act 1985, c.70 https://www.legislation.gov.uk/ukpga/1985/70.

[1408] Housing Act 2004, c.34 https://www.legislation.gov.uk/ukpga/2004/34/contents.

[1409] See full citation in chapter 1, paragraph 1.9.2.

confirms that the HRA made most of the ECHR provisions directly enforceable in the UK on 2 October 2000.[1411] This gives more substantive legal protection to individual rights, with the European Court of Human Rights (the 'Strasbourg Court') acting as a court 'of last resort' to protect human rights across the whole of Europe.[1412] The UK has voluntarily accepted the jurisdiction of the Strasbourg Court, whose judgments are binding in international law.[1413] The UK's membership of the EU has no connection to its membership of, and therefore obligations under, the ECHR.[1414]

For evictions, article 8 of the ECHR is the most relevant, dealing with the right to respect for private and family life.[1415] Article 8(1) provides that "everyone has the right to respect for his private and family life, his home and his correspondence". Article 8(2) further stipulates that there shall be no interference by a public authority with the exercise of the right described in article 8(1):[1416]

> except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Furthermore, Article 1 of the Protocol to the ECHR (also incorporated in the HRA) regulates the protection of property. It states that:

> every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[1410] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Art 3, 1950. See also www.equalityhumanrights.com › human-rights › human-rights/human-rights-act (Date of use: 15 October 2020): "The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000". See also section 1. https://www.legislation.gov.uk/ukpga/1998/42/section/1.

[1411] Steven AJM "Real security rights: time for Cinderella to go to the ball?" in Scott S and Van Wyk J (eds) *Property law under scrutiny* (Juta Claremont 2015) 61–76 64.

[1412] O'Cinneide *Human rights and the UK Constitution* 8.

[1413] O'Cinneide *Human rights and the UK Constitution* 9.

[1414] https://www.thelawyerportal.com/blog/how-will-brexit-affect-human-rights-law/ (Date of use: 19 December 2020).

[1415] https://www.echr.coe.int/documents/convention_eng.pdf.

[1416] https://www.echr.coe.int/documents/convention_eng.pdf.

However, these provisions do not impair the state's rights to enforce any laws it deems necessary to control the use of property in accordance with the general interest, to secure the payment of taxes or other contributions or penalties. Roger Pilon[1417] points out that this Article has come to be described as consisting of three 'rules'.[1418] The first one is seen as a general rule, protecting "the peaceful enjoyment of property", and also described as a declaratory or omnibus clause. The second rule prohibits the "deprivation" of property except under certain conditions, which are expatiated by the third rule, which recognises the right of states to regulate the "use" of property "in accordance with the general interest". Provisions of this Article contain elements that seem to mirror those contained in section 25 of the South African Constitution.

Of utmost importance is the fact that the HRA was designed to grant courts a greater role in protecting individual rights whilst simultaneously recognising the UK Parliament's sovereign power to make laws.[1419] Practically, Parliament will, in the main, endeavour to ensure that new laws are compatible with the rights set out in the ECHR, whilst the courts will also, where possible, interpret laws in a way compatible with Convention rights.[1420] However, it is noteworthy that British courts do not have 'strike-down' powers such as those granted to courts in countries with constitutional Bills of Rights such as those in the USA, South Africa, Germany and Canada, where laws can be invalidated on the basis of being incompatible with fundamental rights.[1421]

6.2.2.2 Housing Act 1988 (HA)

This Act, which commenced in January 1989, was passed with the object of regulating residential tenancies in England and Wales, and introduced assured tenancies (in Chapter I) and assured shorthold tenancies (in Chapter II) in the

[1417] Pilon R "The constitutional protection of property rights: America and Europe" 2008 *Economic Education Bulletin*, Vol. XLVIII, 20.
[1418] Pilon 2008 *Economic Education Bulletin* 20.
[1419] O'Cinneide *Human rights and the UK Constitution* 9–10.
[1420] www.equalityhumanrights.com › human-rights › human-r (Date of use: 15 October 2020). Section 3 requires UK courts to interpret parliamentary legislation in a manner conforming to the Convention rights as far as is possible.
[1421] O'Cinneide *Human rights and the UK Constitution* 20.

privately rented and social housing sector.[1422] An assured tenancy guarantees security of tenure because tenants are allowed to stay in a property until they choose to leave or the landlord gains possession on one of the grounds listed in the Act, such as accrued arrear rentals.[1423] Assured shorthold tenancy (AST) connotes the regulatory minimum time-frame under which a tenant has security of tenure, which can be a fixed term (6 or 12 months) or periodic (rolling weekly or monthly).[1424] After this initial agreed period the landlord is at liberty to then evict a tenant without a legal reason.[1425]

The Act brought improvements in three main areas which had earlier been regulated by the Rent Act of 1977,[1426] namely: (1) loosening of rent regulation; (2) increased security of tenure for tenants; and (3) rights of succession for assured tenancies.[1427]

Regarding rent regulation for instance, landlords can charge any amount of rent, subject to a tenant's right to challenge same either during the first six months of an AST or when the landlord issues notice to increase rent (in the case of both assured tenancy and AST).[1428] The minimum period for the issuing of a notice to increase the rent is six months in the case of a yearly tenancy, one month in respect of a tenancy where the period is less than a month and, in any other case, a period equal to the period of the tenancy.[1429] As far as increased tenure security is concerned, as briefly alluded to earlier, the Act created both the assured tenancy and the AST whereby the former gives a tenant more protection, as the landlord has no automatic right to regain possession and evict unless tenants are significantly in arrears with their rent. In order to regain possession of the property, the HA provides two types of eviction notices that may be served by landlords, namely: (a) section 8 notice; and (b) section 21 notice.

[1422] www.netlwaman.co.uk>Acts of Parliament (Date of use: 16 October 2020). See also https://www.legislation.gov.uk/ukpga/1988/50/contents (Date of use: 16 October 2020).

[1423] See www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).

[1424] england.shelter.org.uk › Housing advice › Private renting (Date of use: 17 October 2020), and www.netlwaman.co.uk>Acts of Parliament (Date of use: 16 October 2020).

[1425] See www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).

[1426] Rent Act of 1977, c. 42 https://www.legislation.gov.uk/ukpga/1977/42/contents.

[1427] www.netlwaman.co.uk>Acts of Parliament (Date of use: 16 October 2020). See also www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).

[1428] www.netlwaman.co.uk>Acts of Parliament (Date of use: 16 October 2020); www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).

[1429] In terms of section 13(3).

(a) Section 8 – Notice of proceedings for possession

This notice is a prerequisite if the landlord of an assured tenancy wishes to end the lease (even prior to its expiry) and obtain a possession order from the court, for a valid reason based on of the 17 circumstances listed in Schedule 2 of the HA.[1430] However, the ground(s) relied upon from those listed in Schedule 2 should be specified in the notice, even though they may be altered later or expanded with leave of the court.[1431] Some of these grounds include that:[1432]

- any lease obligation (other than one related to rent payment) has been breached;
- the tenant has persistently delayed paying due rent, whether or not any rent is in arrears at the commencement of possession proceedings;
- the tenant or an adult residing in the dwelling-house has been convicted of an indictable offence that took place during, and at the scene of, a riot in the UK; and
- due rent remains unpaid and was in arrears at the date of the service of the section 8 notice.

(b) Section 21 – Recovery of possession on expiry or termination of assured shorthold tenancy

This provision grants landlords automatic repossession rights upon expiry of the fixed or periodic term of the AST, subject to a minimum six months' notice period and the fulfilment of certain requirements that are described below.[1433] The Secretary of State is authorised to issue regulations prescribing the form of notice to be used in this

[1430] Section 8(2) https://www.legislation.gov.uk/ukpga/1988/50/section/8; and Schedule 2 to the Housing Act. https://www.legislation.gov.uk/ukpga/1988/50/schedule/2.
[1431] As required by section 8(2).
[1432] Schedule 2 to the Housing Act. https://www.legislation.gov.uk/ukpga/1988/50/schedule/2.
[1433] Sections 21(1) and (4). The six months' notice period is a temporary one introduced during the Covid_19 era. The normal stipulated minimum notice is two months: https://www.legislation.gov.uk/ukpga/1988/50/section/21.

regard.[1434] The landlord of an AST is not required to establish any fault on the part of the tenant as a prerequisite for regaining possession.[1435] Instead, the landlord can evict for any reason, as long as statutory requirements for the notice are met, in which case even the courts have no discretion but to grant the eviction.[1436] However, section 21A prohibits the landlord from evicting at a time when he or she is in breach of a prescribed requirement.[1437] Such breach may, for instance, relate to the maintenance of the dwelling-house or its common use areas, the health and safety of occupants, or the energy performance of the leased property.[1438]

All landlords, even under assured shortholds, are obliged to provide a safe dwelling maintained in good repair.[1439] This basic requirement to provide decent housing is premised on section 11 of the 1985 Landlord and Tenant Act[1440] and section 2(1) of the 2004 Housing Act.[1441] In general, tenants who are concerned about the condition of the leased property can ask the local housing authority to conduct an inspection through its environmental health officer, who can then order the landlord to do repairs and ensure that the dwelling complies with the applicable laws.[1442]

Furthermore, section 33 of the Deregulation Act now ensures that a section 21 notice to vacate in terms of the HA cannot be used by a landlord to settle scores (retaliate) against the tenant who has been complaining about the condition of the leased property. A section 21 notice given in relation to an assured shorthold

[1434] Section 21(8).
[1435] Lonegrass MT "Eliminating landlord retaliation in England and Wales—lessons from the United States" 2015 *Louisiana Law Review,* Vol. 75, 1072–1123 1076. https://digitalcommons.law.lsu.edu/lalrev/vol75/iss4/9.
[1436] Lonegrass 2015 *Louisiana LR* 1076.
[1437] Section 21B, on the other hand, also prohibits the landlord from evicting if he or she is in breach of statutory regulations. https://www.legislation.gov.uk/ukpga/1988/50/section/21.
[1438] Section 21A(2) https://www.legislation.gov.uk/ukpga/1988/50/section/21.
[1439] Lonegrass 2015 *Louisiana LR* 1077.
[1440] Section 11 of the Landlord and Tenant Act 1985 places a statutory duty on landlords to conduct repairs to the structure and exterior of the dwelling; to basins, sinks, baths, and other sanitary installations; and to heating and to heating and hot water installations. However, leases of longer than seven years are exempted from such requirements.
[1441] Section 2(1) of the Housing Act 2004 ushers in a new Housing Health and Safety Rating System, which requires landlords to ensure the safety of tenants from specific hazards in the form of any risk to health or safety to an occupier of a dwelling.
[1442] Housing Act 2004 sections 5–7. See also Lonegrass 2015 *Louisiana LR* 1077.

tenancy of a dwelling-house in England is invalid in circumstances where, amongst others:[1443]

- the tenant had made a complaint in writing to the landlord regarding the condition of the dwelling-house prior to the giving of the section 21 notice;
- the landlord—
  (i) failed to respond to the complaint within 14 days;
  (ii) provided an inadequate response, or
  (iii) gave a section 21 notice in relation to the dwelling-house following the complaint;
- the tenant then made a complaint to the relevant local housing authority about the same subject matter as the complaint to the landlord;
- such local housing authority served a relevant notice in relation to the dwelling-house in response to the complaint.

A court should strike out proceedings for an order for possession under section 21 of the HA if, before the order is made, such 21 notice becomes invalid by virtue of the operation of these provisions of the Deregulation Act.[1444]

The other significant feature of the HA is Chapter IV, which deals with protection from unlawful eviction. Section 27 illustrates some conduct that would constitute unlawful eviction. For instance: if the landlord or his agent deprives or unlawfully attempts to deprive the residential occupier[1445] of the occupation of the whole or part of the leased premises;[1446] or if the landlord performs acts likely to interfere with the peace or comfort of the residential occupier, or persistently withholds services reasonably required for the occupation of the premises as a residence resulting in the residential occupier ultimately giving up occupation.[1447] In such

[1443] Section 33(2) of the Deregulation Act 2015.
[1444] Section 33(6) of the Deregulation Act 2015.
[1445] The Protection from Eviction Act 1977 (PEA) defines a 'residential occupier', in relation to any premises, as a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.
[1446] Sections 27(1) and (2) respectively of the HA. https://www.legislation.gov.uk/ukpga/1988/50/section/27
[1447] Section 27(2).

instances, the landlord is liable[1448] to pay damages to the former residential occupier for the loss of occupation rights, which damages are assessed on the basis prescribed in section 28. In addition, such conduct is criminal,[1449] making the landlord guilty of an offence.[1450]

Complementing these provisions would be laws such as the Protection from Eviction Act 1977 that prohibits harassment and illegal eviction. Harassment includes acts likely to interfere with the peace and comfort of those living in the (leased) property or persistent withdrawal of services reasonably required for the occupation of premises.[1451] For instance, if the landlord obtains a court order for possession against the tenant, and executes this through the assistance of the sheriff the subsequent eviction is not unlawful. However, if the same landlord *mero motu* executes such a possession order by resorting to self-help in evicting, without engaging the services of a bailiff, he may be guilty of an unlawful eviction.[1452] The tenant, in such a scenario, may also claim damages.[1453] Relevant provisions of the 1977 Act are, therefore, worth discussing in-depth below.

In conclusion, the HA is seen as a seismic event in the UK property law that, amongst others, allowed market forces to set much of the tone for the country's rental sector with a view to the creation of a balanced environment for tenants and landlords.[1454] However, through the passage of time other legislative amendments and regulations continued to refine the rights and responsibilities of landlords and tenants.[1455]

[1448] In terms of section 27(3).
[1449] Section 29 effectively renders such conduct criminal.
[1450] Section 29(2).
[1451] Section 1(3) of the Protection from Eviction Act 1977. See also www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).
[1452] *Haniff v Robinson* 26 HLR 386, CA [9 June 1992]. See also www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).
[1453] Under section 28. See www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).
[1454] www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).
[1455] www.propertyinvestmentsuk.co.uk>housing-act-1988 (Date of use: 16 October 2020).

6.2.2.3 Protection from Eviction Act 1977 (PEA) and Protection from Harassment Act 1997[1456] (PHA)

The PEA is aimed at protecting residential occupiers. Section 1(1) defines a 'residential occupier', in relation to any premises, as a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises. This would mean that most tenants and contractual occupiers (licensees) are residential occupiers so long as they remain in lawful occupation.[1457] Even if the contract has ended most occupiers would still enjoy some measure of protection in that a court order is required for their legal eviction.[1458] Section 1(2) provides that:

> if any person unlawfully deprives the residential occupier of his occupation of the premises or any part thereof, or attempts to do so, he shall be guilty of an offence unless he proves that he reasonably believed that the residential occupier had ceased to reside in the premises.

This criminal sanction also applies to a person who "does acts calculated to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence", with the intention to frustrate the residential occupier and make him to eventually give up his occupation.[1459] Therefore, for such acts of harassment that may, in the long run, constitute constructive eviction, landlords or offenders would be guilty.[1460] Such guilt renders the offender liable, on summary conviction, to a fine not exceeding the prescribed sum or to imprisonment for a term not exceeding 6 months or to both; or, on conviction on indictment, to a fine or to imprisonment for a term not exceeding 2 years or to both. Besides such criminal sanctions, occupiers may seek damages or injunctions from civil courts if they have been subjected to harassment or illegal eviction.[1461]

[1456] Protection from Harassment Act 1997, c. 40 https://www.legislation.gov.uk/ukpga/1997/40/.
[1457] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).
[1458] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).
[1459] Section 1(3).
[1460] Section 1(4).
[1461] Section 1(5) provides that nothing "in this section shall be taken to prejudice any liability or remedy to which a person guilty of an offence thereunder may be subject in civil

Further, the Act is aimed at preventing evictions without a court order. No one may be forcibly evicted without a court order, thus preventing aggressive landlords becoming violent.[1462] Everyone, whether classified as a having a lease or licence, must be given four weeks' notice (28 days) before being evicted, the so-called 'notice to quit'.[1463] However, some occupiers are not covered by the Act. These include trespassers such as squatters, illegal sub-tenants, and tenants of mortgagors once the landlord's lender has obtained a possession order (unless the tenancy predates the mortgage).[1464]

Section 3A excludes certain tenancies and licences from its protections. These include instances where:[1465]

- accommodation is shared with the landlord;
- the landlord lives in the same building and accommodation is shared with a member of the landlord's family[1466] (but this does not apply if the building is a purpose built block of flats);
- the tenancy or licence was granted as a temporary expedient to a trespasser;
- the letting was for the purposes of a holiday only;
- no rent was payable;
- the accommodation is a hostel and the landlord is a local authority or certain other public bodies; or
- the accommodation is provided by the National Asylum Support Service (NASS).

In such cases landlords are not required to give notice to quit or get a court order, but can still be guilty of harassment or illegal eviction if they fail to give reasonable notice of the eviction.[1467]

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proceedings". See also www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).

[1462] Section 3.

[1463] Section 5.

[1464] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).

[1465] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).

[1466] In terms of section 113(1) of the Housing Act 1985, c.68 https://www.legislation.gov.uk/ukpga/1985/68/section/113, a person is a member of another's family if he is the spouse or civil partner of that person, or he and that person live together as if they were a married couple or civil partners, or he is that person's parent, grandparent, child, grand-child, brother, sister, uncle, aunt, nephew or niece.

Besides the PEA, another law which makes harassment a criminal offence is the Protection from Harassment Act 1997 (PHA).[1468] In such instances, harassment, which may constitute an illegal eviction, usually emanates from instances whereby a person attempts to deny an occupier the right to either:[1469] occupy the accommodation; the 'quiet enjoyment' of the accommodation; or exclude other people from the accommodation. Such occupiers can, for instance, invoke the provisions of sections 3 or 3A of the PHA and obtain an injunction from the civil court to stop the harassment, to be reinstated in their home, and to get compensatory damages for their landlord's conduct, so long as they prove their case on a balance of probabilities.[1470]

6.2.2.4 Administration of Justice Acts 1970 and 1973

Prior to the introduction of section 36 of the Administration of Justice Act 1970 and section 8 of the Administration of Justice Act 1973, the mortgagee's proprietary right was restricted only in one respect namely, that a court could limit the mortgagee's entitlement to an immediate order for possession by finding that the mortgagor had a reasonable prospect of paying off the mortgage in full, or otherwise satisfying the mortgagee, within a 'short time'*;* the court would then provide brief adjournment for this purpose[1471] This position was improved with the introduction of the 1970 and 1973 Administration of Justice Acts, whereby the court became entitled, in certain circumstances, to adjourn, postpone, stay, or suspend the claim for possession, order or warrant, for such period or periods as it thought fit, thereby enabling it to provide a *"*measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgage and in danger of losing their homes".[1472]

[1467] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).

[1468] See also Lonegrass 2015 *Louisiana LR* 1088.

[1469] www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020). See also sections 1 and 2 of the PHA.

[1470] Sections 3 and 3A; and www.shelter.org.uk/legal (England and Wales: 29 Nov 07) (Date of use: 16 October 2020).

[1471] https://www.33bedfordrow.co.uk/insights/articles/mortgage-possession-claims---how-long-to-go (Date of use: 21 January 2021). See *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.

[1472] *Bank of Scotland v Grimes* [1985] 2 All ER 254; https://www.33bedfordrow.co.uk/insights/articles/mortgage-possession-claims---how-long-to-go (Date of use: 21 January 2021).

Where the mortgagee under a mortgage of land, which includes a dwelling-house, launches an action in which he claims possession of the mortgaged property the court may exercise any of the powers conferred on it by section 36(2),[1473] if it appears that in the event of the court exercising its power the mortgagor is likely to be in a position, within a reasonable period, to pay any money due under the mortgage or to remedy a default consisting of a breach of any other mortgage obligation. Under section 36(2) the court:

> (a) may adjourn the proceedings, or
> (b) on giving judgment for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may–
> (i) stay or suspend execution of the judgment or order, or
> (ii) postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.

Section 8 of the 1973 Act makes the provisions of section 36 of the 1971 Act applicable even in instances where an early repayment clause exists.[1474] Simply put, a court has the power to delay giving a mortgagee possession of the mortgaged property so as to allow the mortgagor a reasonable time to pay any sums due under the mortgage, and thus avoid the possibility of an eviction in the long run.[1475]

Prior to 21 March 2016, the Administration of Justice Acts did not apply to loans regulated by the Consumer Credit Act 1974.[1476] However, the Mortgage Credit Directive 2015[1477] took effect on 21 March 2016, transferring regulation of all residential mortgages to the Financial Conduct Authority (FCA), to which the Administration of Justice Acts are applicable.[1478]

[1473] In terms of Section 36(1) of the 1970 Act.
[1474] See also https://www.33bedfordrow.co.uk/insights/articles/mortgage-possession-claims---how-long-to-go (Date of use: 21 January 2021).
[1475] In terms of section 36 of the 1970 Act.
[1476] https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/mortgage_possession/legal_background (Date of use: 21 January 2021).
[1477] Mortgage Credit Directive Order 2015 SI 2015/910, as amended; FCA, PERG 4.4 https://www.handbook.fca.org.uk/handbook/PERG/4/4.html (Date of use 21 January 2021).
[1478] In terms of section 36 of the Administration of Justice Act 1970 https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/mortgage_possession/legal_background (Date of use: 21 January 2021).

6.2.2.5 Financial Services and Markets Act 2000 (FSMA)

This Act created the Financial Services Authority (FSA) as a regulator for insurance, investment business and banking, and the Financial Ombudsman Service to resolve disputes as a free alternative to the courts. In April 2013 the current Financial Conduct Authority (FCA) substituted the FSA.[1479] The Act contributed immensely towards the comprehensive management of home finance transactions, whereby on 31 October 2004 lenders and intermediaries of regulated mortgage contracts (RMCs) became regulated.[1480] A 'Regulated Mortgage Contract' is a loan on the security of a first legal mortgage on land in the UK of which at least 40% is used as or in connection with a dwelling by the borrower, who can be an individual or a trustee.[1481]

The significance of this legislation is that it gives the FCA general rule-making powers, in terms of which it can make such rules applying to authorised persons as appear to it to be necessary or expedient for the purpose of protecting the interests of consumers, with respect to the carrying on by such persons either of regulated activities, or unregulated activities.[1482] The FCA basically regulates all home-owner mortgages and lifetime mortgages which include equity release to older borrowers.[1483] It is tasked with regulating the provision of financial services and the delivery of the mortgage market review.[1484]

In October 2003 the FSA[1485] issued the *Mortgages and Home Finance: Conduct of Business Sourcebook* (MCOB) that consists of rules governing the relationship

[1479] https://www.legislation.gov.uk/ukpga/2000/8/contents.
[1480] www.lexisnexis.com › uk › financialservices › document (Date of use: 18 November 2020).
[1481] FCA, PERG 4.4 https://www.handbook.fca.org.uk/handbook/PERG/4/4.html. PERG 4.4.1 specifically defines the term, and clarifies that the meaning of 'RMC' is derived from Article 61(3)(a) of the Regulated Activities Order. Mortgage Conduct of Business (MCOB) rule 1.2.5 G(1) provides, amongst others, that In order for a loan to fall within the definition of a regulated mortgage contract, at least 40% of the total of the land to be given as security must be used as or in connection with a dwelling. It cannot apply to a loan secured on property that is used solely for a business purpose.
[1482] Section 137A (previously section 138).
[1483] https://mortgages.online/articles/mortgages/who-regulates-mortgages-in-the-uk/ (Date of use: 22 November 2020).
[1484] https://mortgages.online/articles/mortgages/who-regulates-mortgages-in-the-uk/ (Date of use: 22 November 2020). The Mortgage Market Review is basically a mechanism for cracking down on poor lending services by building societies and banks, for the benefit and protection of consumers.
[1485] Empowered by the original section 138 of the FSMA.

between mortgage lenders and borrowers.[1486] The MCOB rules apply to RMCs entered into on or after 31 October 2004.[1487] In essence, they apply to every institution that carries on a home finance activity. They constitute a broad scheme of regulations covering aspects such as: mortgage selling; communication; conduct of advising and selling; terms of offer documents; and duty to treat customers fairly. These rules include MCOB Chapter 13, which is a set of rules specifically regulating arrears and repossessions of and evictions relating to mortgaged properties. In a way it implements government's *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property* (Pre-Action Protocol). Both the pre-action protocol and MCOB Chapter 13 are comprehensively discussed under the segment on secondary legislation dealing with rules and regulations, to which the focus now turns.

6.2.3 Secondary legislation

6.2.3.1 Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property (Pre-Action Protocol)

6.2.3.1.1 General

The Pre-Action Protocol came into effect on 19 November 2008 (through the Ministry of Justice).[1488] It is intended to make proceedings for residential possession claims a last resort.[1489] Major lenders subsequently agreed with the government on 24 November 2008 that they would not commence mortgage possession proceedings in relation to residential property unless the borrower had accrued three months' arrears.[1490] Therefore, possession claims based on

[1486] https://www.handbook.fca.org.uk/handbook/MCOB/1/.pdf (Date of use: 22 November 2020).
[1487] https://www.handbook.fca.org.uk/handbook/MCOB.pdf (Date of use: 22 November 2020).

[1488] https://www.lawsociety.org.uk/en/topics/property/mortgage-possession-claims (Date of use: 21 January 2021).
[1489] https://www.lawsociety.org.uk/en/topics/property/mortgage-possession-claims (Date of use: 21 January 2021).
[1490] https://www.lawsociety.org.uk/en/topics/property/mortgage-possession-claims (Date of use: 21 January 2021).

mortgage arrears (or arrears under home purchase plans) must initially be dealt with under this Pre-Action Protocol.[1491]

Pre-action protocols, by their very nature, play a pivotal role in the resolution of disputes, encouraging parties first, to have more contact, secondly, to resolve the issues wherever possible without resorting to court, and further ensure that the parties have all the relevant information to resolve matters early on.[1492] In the Pre-action Protocol a 'possession claim' is defined as "a claim for the recovery of possession of property under Part 55 of the Civil Procedure Rules 1998", whilst a 'home purchase plan' means "a method of purchasing a property by way of a sale and lease arrangement that does not require the payment of interest".[1493] In its Preamble[1494] the Pre-action Protocol explains that: it describes the behaviour the court will normally expect of the parties prior to the start of a possession claim; it does not alter the parties' rights and obligations; and it is in the interests of the parties that mortgage payments or payments under home purchase plans are made promptly and that difficulties are resolved wherever possible without court proceedings. However, the Pre-action Protocol notes in its Preamble that in some

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1491 https://www.inbrief.co.uk/claim-preparations/mortgage-pre-action-protocol/(Date of use: 21 January 2021); https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/mortgage_possession/pre-action_protocol_for_mortgage_arrears (Date of use: 21 January 2021). In terms of scope, paragraph 4 of the Pre-Action Protocol https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha provides as follows:

"4.1 This Protocol applies to arrears on–

(a) first charge residential mortgages and home purchase plans regulated by the Financial Conduct Authority under the Financial Services and Markets Act 2000 (as amended by the Financial Services Act, 2012);

(b) second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property; and

(c) unregulated residential mortgages.

4.2 Where a potential claim includes a money claim and a possession claim, this protocol applies to both.

4.3 The protocol does not apply to Buy To Let mortgages".

1492 https://www.inbrief.co.uk/claim-preparations/mortgage-pre-action-protocol/ (Date of use: 21 January 2021).

1493 Paragraph 1.1(a) and (b) https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).

1494 The Preamble is contained in paragraphs 2.1; 2.2; and 2.3 https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).

cases an order for possession may be in the interest of both the lender and the borrower.[1495]

Amongst others, the Pre-action Protocol aims to first, ensure that the parties (who are the lender or home purchase plan provider, collectively referred to as 'the lender', and a borrower or home purchase plan customer, collectively referred to as 'the borrower') act fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears.[1496] Secondly, it aims to encourage greater pre-action contact between the lender and the borrower in order to seek agreement between the parties, and where agreement cannot be reached, to enable efficient use of the court's time and resources.[1497]

The Pre-action Protocol unequivocally stipulates that initiating a possession claim should be a last resort, until or unless all other reasonable attempts to resolve the situation have failed.[1498] Parties should consider whether it would be reasonable and appropriate to extend the term of or change the type of mortgage; defer payment of interest; capitalise the arrears; or "make use of any Government forbearance initiatives in which the lender chooses to participate".[1499] If there is an authorised tenant in occupation of the property, the court will, at the possession hearing, consider, amongst others, whether to adjourn the possession claim until possession has been recovered against the tenant, to make an order conditional upon the tenant's right of occupation.[1500]

[1495] Paragraph 2.3. https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).
[1496] Paragraph 3.1(a) https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).
[1497] Paragraph 3.1(b). https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).
[1498] Paragraph 7.1
[1499] Paragraph 7.1. https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).
[1500] Paragraph 7.2. https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha (Date of use: 21 January 2021).

6.2.3.1.2 Possible court orders in mortgage repossession proceedings

The diagram below helps to illustrate possible orders that may be granted by a court presiding over mortgage repossession proceedings.

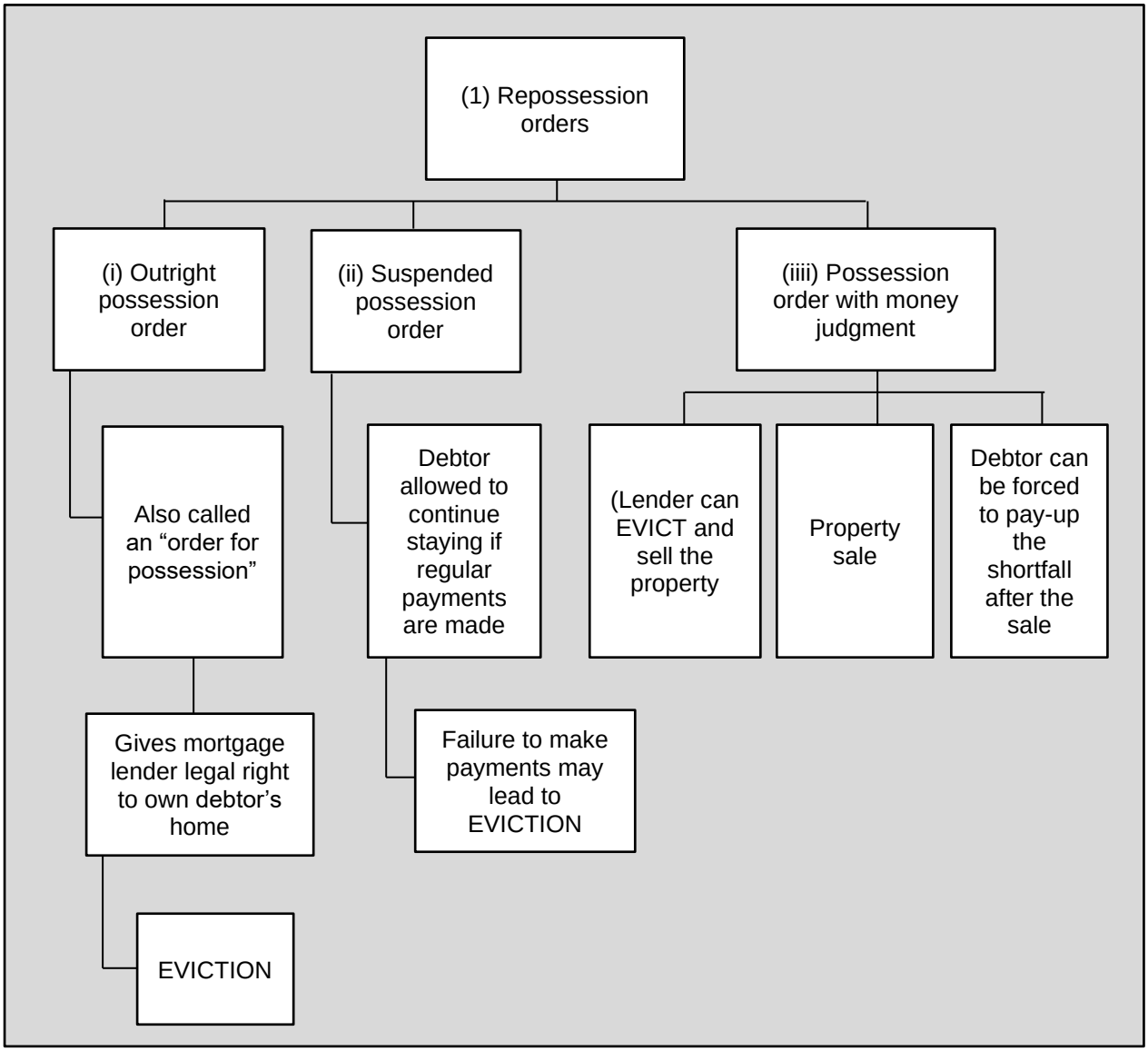

Diagram 6.1: Possible mortgage repossession orders

Should the matter eventually proceed to court, the presiding officer will consider whether or not the Pre-Action Protocol has been complied with.[1501] If not, the presiding officer may even be amenable to granting a suspended possession

[1501] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

order rather than an outright possession order.[1502] In other words, in granting a repossession order the court can either grant an 'outright possession order' or a 'suspended possession order'.[1503] An outright possession order gives the mortgage lender a legal right to own the debtor's home on the date given in the order and is sometimes called an 'order for possession'.[1504] The date given is usually 28 days after the court hearing, and if the debtor fails to vacate the home by the date so ordered, then the lender can request an eviction order from the court.[1505] A suspended possession order means that if the mortgage debtor makes regular payments as set out in the order, he is allowed to continue staying in the home.[1506] However, if he fails to make the payments, then the lender can ask the court to evict.[1507]

The judge can make a money order instead, whereby the mortgage debtor has to pay the lender the amount set out in the order.[1508] Failure to pay can lead to money being deducted from the debtor's wages or bank account proceeds, or to the bailiffs attaching the debtor's assets. However, the debtor cannot be evicted from the residential home via a money order, although non-payment may result in the lender approaching the court again for a possession order this time around.

In the alternative, the court can grant a possession order with a money judgment. This means that, together with a possession order, a money judgment can be issued by the judge at the same time.[1509] The money judgment segment allows the lender to get back all the money owed on the mortgage. As such, if the lender evicts the debtor but is not able to get back all the money owed from selling the

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1502 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

1503 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1504 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1505 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1506 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1507 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1508 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).
1509 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021); https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

property, the debtor can be forced to pay-up the difference, without the lender having to approach the court again.[1510]

Further alternatively, the judge can adjourn (delay) the hearing or set aside the case, meaning that no order will be made and the case is concluded.[1511] Normally, if after hearing all the evidence, the judge is not satisfied that the lender has proved that he has a right to take possession of the mortgaged property, the court can dismiss the case.[1512] Upon such dismissal, the debtor can ask the judge to make an order obliging the lender to pay its own legal costs.[1513]

6.2.3.2 MCOB Rules Chapter 13[1514] (MCOB 13)

6.2.3.2.1 General

Chapter 13 of the MCOB rules deals with aspects of arrears, payment shortfalls and repossessions in respect of RMCs and home purchase plans. Basically, in terms of these rules mortgage lenders are prohibited from initiating court action against defaulting mortgage debtors without adhering to the regulating provisions. In essence, initiating foreclosure proceedings that would culminate in an eviction should be the last resort by the mortgage lender, when all else fails. Debtors must be treated fairly and allowed a reasonable opportunity to make arrangements to pay off the mortgage arrears, if they are able to.[1515] Mortgage lenders must consider any reasonable request from the debtor to change when or how further payments should be made, and only invoke court action as a last resort if all other attempts to collect the arrears are counter-productive.[1516] MCOB13.3.2A R is more elaborate in this regard. It stipulates, amongst others, that a lender must, when

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1510 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

1511 https://www.gov.uk/repossession/repossession-orders (Date of use: 19 January 2021).

1512 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020). See also https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/mortgage_possession/types_of_orders (Date of use: 21 January 2021).

1513 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020); https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/mortgage_possession/types_of_orders (Date of use: 21 January 2021).

1514 https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter

1515 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

1516 https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

dealing with a mortgage debtor who is facing payment difficulties, make reasonable efforts to reach an agreement with the debtor over the method of repaying any shortfall on the home mortgage bond, with a view towards agreeing an alternative to taking possession of the property. The mortgage lender must also allow a reasonable time over which any shortfall should be repaid, and taking the debtor's circumstances into consideration, grant, unless it has good reason not to do so, a mortgage debtor's request for a change to either the date on which the payment is due or the method by which payment is made. Where no reasonable payment arrangement can be made, the debtor should be allowed to remain in possession and occupation of the bonded property for a reasonable period to effect a sale of the property. The lender should not repossess the property unless all other reasonable attempts to resolve the position have failed. The rules reiterate some of the procedures that a mortgage lender should adhere to prior to commencing court action, as embodied in the Pre-Action Protocol.[1517] For instance, a lender must, amongst other things, ensure that a customer is informed of the need to contact the local authority to establish whether he is eligible for local authority housing after his property is repossessed.[1518]

6.2.3.2.2 Repossessions

Rule 13.6 deals directly with the process of repossession. In the legal sense, if one looks at the Administration of Justice Act 1970,[1519] this would entail a process where "the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property".[1520] It is a precursor to eviction. Seeing that MCOB Rule 13.6.1R recognises that repossessions can also occur voluntarily it is therefore prudent to give context to 'voluntary repossession'. Voluntary repossession occurs when the mortgage debtor gives the property keys to the lender and moves out to enable

[1517] MCOB 13.4.5 and MCOB 13.5 https://www.handbook.fca.org.uk/handbook/MCOB.pdf; https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

[1518] MCOB 13.4.5 R(2) https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter; paragraph 5.3 of the Pre-Action Protocol https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha.

[1519] Specifically, at section 36(1).

[1520] Section 36(1).

the selling of the property in order to pay off the mortgage.[1521] The debtor would thus no longer live in the mortgaged home upon handing-in the keys, although he still remains responsible for mortgage interest, buildings insurance and maintenance costs until it is sold.[1522]

As soon as possible after repossession of the mortgaged property (whether voluntarily or by legal action) the lender must endeavour to sell such property to reduce or remove the outstanding debt, notify the debtor of any resultant shortfall and whether steps are going to be taken to recover the shortfall.[1523] Conversely, the debtor should also be notified of any surplus from the sale proceeds, which may be payable to him.[1524] In general, the lender owes the debtor a duty of care when selling the property, since it must get the best possible price for it.[1525]

6.2.3.3 Civil Procedure Rules (CPRs)

6.2.3.3.1 General

The Civil Procedure Rules (CPRs),[1526] which largely replace the Rules of the Supreme Court and the County Court Rules, are rules of civil procedure used by the Court of Appeal, High Court of Justice, and County Courts in civil cases in England and Wales, and apply to all cases commenced after 26 April 1999.[1527] The CPRs are designed to improve access to justice by making legal proceedings cheaper, quicker, and easier to understand for non-lawyers, thus substituting many archaic legal terms with ‘plain English’ equivalents, such as ’claimant’ for ’plaintiff’ and ’witness summons’ for ’subpoena’.[1528] Their primary legislative

[1521] https://england.shelter.org.uk/housing_advice/repossession/voluntary_repossession_and_handing_back_the_keys (Date of use: 22 January 2021).

[1522] https://england.shelter.org.uk/housing_advice/repossession/voluntary_repossession_and_handing_back_the_keys (Date of use: 22 January 2021).

[1523] MCOB 13.6.1–13.6.4 https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter

[1524] MCOB 13.6.6 https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter

[1525] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

[1526] Schedule 1 to the Civil Procedure Act 1997. https://www.legislation.gov.uk/ukpga/1997/12/contents (Date of use; 18 November 2020); The Civil Procedure Rules 1998 https://www.legislation.gov.uk/uksi/1998/3132/contents (Date of use: 22 January 2021).

[1527] The Civil Procedure Rules 1998 https://www.legislation.gov.uk/uksi/1998/3132/signature (Date of use: 22 January 2021).

[1528] The Civil Procedure Rules 1998 https://www.legislation.gov.uk/uksi/1998/3132/contents (Date of use: 22 January 2021).

source is the Civil Procedure Act 1997.[1529] This Act conferred the power to make Civil Procedure Rules on the Civil Procedure Rule Committee.[1530] It also established the Civil Justice Council, a body composed of members of the judiciary, members of the legal professions and civil servants, and charged with reviewing the civil justice system.[1531]

6.2.3.3.2 Practice directions

The CPRs are emboldened by practice directions, made under the hand of the Chief Justice.[1532] In essence, practice directions give practical advice on how to interpret the rules themselves. Practice directions are statutory, and may be part of a set of rules (as in CPRs); or they may be made on a free-standing basis by division heads, including court judges.[1533] The practice directions to the CPRs apply to civil litigation in the Queen's Bench Division and the Chancery Division of the High Court, and to litigation in the County Courts other than family proceedings.[1534] They also apply to appeals to the Civil Division of the Court of Appeal where relevant. Upon the promulgation of the Constitutional Reform Act 2005[1535] in April 2006, the power to make practice directions for the civil courts fell to the Lord Chief Justice (with the approval of the Lord Chancellor in most instances) in terms of the Civil Procedure Act.[1536] However, the Constitutional Reform Act authorises the Lord Chief Justice to nominate a judicial office holder to perform his functions with regard to making designated directions.[1537]

[1529] Civil Procedure Act 1997, c. 12 (enacted on 27 February 1997) https://www.legislation.gov.uk/ukpga/1997/12 (Date of use: 21 January 2021).

[1530] Section 2 https://www.legislation.gov.uk/ukpga/1997/12/section/2 (Date of use: 22 January 2021).

[1531] Section 6 https://www.legislation.gov.uk/ukpga/1997/12 (Date of use: 21 January 2021).

[1532] Clause (2) http://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes (Date of use: 21 January 2021); and section 5 of the Civil Procedure Act 1997 https://www.legislation.gov.uk/ukpga/1997/12 (Date of use: 21 January 2021).

[1533] Burrows D *Where have all the practice directions gone*? (2020) https://www.iclr.co.uk/blog/commentary/where-have-all-the-practice-directions-gone/ (Date of use: 22 January 2021).

[1534] Clause (1) https://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes (Date of use: 20 December 2020).

[1535] Constitutional Reform Act 2005, c. 4 https://www.legislation.gov.uk/ukpga/2005/4/contents.

[1536] Section 5 https://www.legislation.gov.uk/ukpga/1997/12/section/5; (Date of use: 21 January 2020); and (Clause (2) of the Practice Directions http://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes (Date of use: 21 January 2021).

[1537] Part 1 of Schedule 2 of the Constitutional Reform Act.

Consequently, he nominated the Master of the Rolls to make practice directions for the civil courts.[1538]

6.2.3.3.3 Division of the CPRs

In Part 1 of the CPRs sub-rule 1.1(a) states that "these Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost". Items covered under various parts of the rules are vast, but those pertinent for purposes of this study include the following:

- overriding objective (Part 1);
- service of documents (Part 6);
- how to start proceedings – the claim form (Part 7);
- responding to particulars of claim (Part 9);
- evidence (Part 32);
- judgments and orders (Part 40);
- possession claims (Part 55);
- landlord and tenant claims and miscellaneous provisions about land (Part 56);
- writs and warrants – general provisions (Part 83); and so forth.

6.2.3.3.4 Part 56 of CPRs – landlord and tenant claims and miscellaneous provisions about land

The CPR Part 56 deals with claims under certain landlord and tenant legislation such as: the Chancel Repairs Act 1932; the Leasehold Reform Act 1967; the Access to Neighbouring Land Act 1992; and the Leasehold Reform, Housing and Urban Development Act 1993. Part 56 primarily addresses landlord and tenant claims and most significantly those by which new business tenancies are sought under the Landlord and Tenant Act 1954.[1539] It is not really relevant for the purposes of this study, particularly as it is more pertinent for commercial leases.

[1538] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes (Date of use: 20 December 2020).

[1539] https://www.lawgazette.co.uk/news/property-litigators-face-testing-times-when-landlord-and-tenant-act-cases-were-brought-under-the-cpr-significant-confusion-for-lawyers-resulted-/21858.article (Date of use: 20 December 2020).

The same applies to the related Practice Direction 56, which supplements Part 56. Instead, what is relevant to this study is Part 55 – Possession Claims, which is now dealt with.

6.2.3.3.5 Part 55 of CPR – Possession claims[1540]

In the UK evictions are mainly regulated by Part 55 of the CPRs. The Part 55 procedure must be used in all claims for possession of land.[1541] In the definitions segment Rule 55.1 gives a clear indication of the categories under which evictions are managed in the UK. [1542]

Rule 55.2, on the other hand, sets out the scope of applicability of the rules in an even more comprehensive manner. It basically describes that CPR Part 55 is used in claims for the recovery of possession of land, including buildings or parts thereof, where the claim includes:[1543]

- A possession claim brought by a landlord (or former landlord); a mortgagee; or a licensor (or former licensor);
- A possession claim against trespassers; and
- A claim by a tenant seeking relief from forfeiture.

[1540] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55 (Dates of use: 20 April 2016, and 25 November 2020).

[1541] https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1542] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55 (Dates of use: 20 April 2016, and 25 November 2020). Rule 55.1 provides that:
"(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings);
(b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not;
(c) 'mortgage' includes a legal or equitable mortgage and a legal or equitable charge and 'mortgagee' is to be interpreted accordingly;
(d) 'the 1985 Act' means the Housing Act 1985;
(e) 'the 1988 Act' means the Housing Act 1988;
(f) 'a demotion claim' means a claim made by a landlord for an order under section 82A of the 1985 Act or section 6A of the 1988 Act ('a demotion order');
(g) 'a demoted tenancy' means a tenancy created by virtue of a demotion order; and
(h) 'a suspension claim' means a claim made by a landlord for an order under section 121A of the 1985 Act".

[1543] https://thesheriffsoffice.com/articles/care-home-resident-defined-as-a-part-55-trespasser (Date of use: 29 November 2020).

[1543] Rule 55.2 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55 (Dates of use: 20 April 2016, and 25 November 2020).

Most possession claims follow a fixed date procedure, whereby the court fixes a hearing date when it issues the claim form.[1544] This date should be no less than 28 days after issue, except in trespass claims where the court papers must be served no less than five days (if residential property) or two days (other land) before the hearing.[1545] Shelter (a registered charity that campaigns to end bad housing and homelessness) points out that there are specific rules for serving the claim in trespass cases, and for notifying occupiers in mortgage cases.[1546] Although the defendant is not required to file an acknowledgment of service or defence, however, except in trespass cases, his failure to do so may be taken into account during the determination of the party liable for costs.[1547] All witness statements must be filed and served at least two days before the hearing. In trespass cases the claimant's statements are filed with the claim form at the outset, whereas in all other categories of eviction proceedings witness statements must be filed and served at least two days before the hearing.[1548]

The enforcement of judgments or orders (via writs or warrants) is regulated by Part 83 of the CPRs, in particular rule 83.8A thereof. In respect of both mortgage possession claims and rental possession claims (whether assured shorthold tenancies or assured tenancies) if a possession order is granted and the debtor or tenant fails to leave by the date specified therein, the lender or landlord can apply to the court for a warrant of possession, which will be enforced by a County Court bailiff who will also carry out the eviction.[1549]

Akin to the South African context the UK CPRs are also aided by practice directions. The practice direction supplementing CPR Part 55, which deals with possession claims for the recovery of possession of land and buildings, is titled:

[1544] Rule 55.5. Also https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1545] Rule 55.5. Also https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1546] https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1547] Rule 55.7(3). Also see https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1548] Rules 55.8(3) and (4). Also see https://england.shelter.org.uk/legal/possession_proceedings_and_eviction/possession_process/part_55_-_possession_claims (Date of use: 27 Nov 2020).

[1549] Rule 83.8A. Also see https://www.gov.uk/government/organisations/ministry-of-housing-communities-and-local-government (Date of use: 27 Nov 2020).

Practice Direction 55A – Possession Claims.[1550] These directions provide direct and clear guidance in areas where the rules may not be elaborate. For instance, under rule 55.3 concerning the commencement of claims, paragraph 1.1 of the practice direction spells out that:[1551]

> except where the County Court does not have jurisdiction, possession claims should normally be brought in the County Court. Only exceptional circumstances justify starting a claim in the High Court.

The provisions of the rules and the practice direction cover a wide ambit of aspects though.[1552]

6.2.3.3.6 Illustrative eviction process, as demonstrated through mortgage possession claims

In order to evict, a lender must first obtain possession of the property through the courts, a process described as taking possession action. Rule 55.10 of Part 55 of the CPRs regulate the actual process of conducting proceedings in this regard, complemented by parts 55.3 and 55.4 of Practice Direction 55A. Normally, the process commences with the debtor being served with a County Court claim for possession of the property as instituted by the lender, in which the details about the court hearing and the case are outlined.[1553] This is coupled with a notice from the lender, addressed to 'the tenant or the occupier', confirming that court action has been started.[1554] The particulars of claim will specify: the amount owing to the mortgage lender; the instalments due; and the steps taken by the lender to collect

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[1550] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55/pd_part55a (Date of use: 19 December 2020).

[1551] Whereas in sub-rule 1(a) of rule 55.3 the rule itself had merely stated that “the claimant may make the claim at any County Court hearing centre, unless paragraph (2) applies or an enactment provides otherwise”. This therefore illustrates how practice directions generally supplements areas not comprehensively or practically covered by legislation.

[1552] Such as: 55.3 – starting the claim; 55.4 – particulars of claim; 55.5 – hearing date; 55.6 – service in claims against trespassers; 55.8 – the hearing (consumer credit act claims relating to the recovery of land, enforcement of charging order by sale, section ii – accelerated possession claims of property let on an assured shorthold tenancy); 55.18 – postponement of possession (section iii – interim possession orders, section iv – orders fixing a date for possession), and so forth. Practice Direction 83 namely, Writs and Warrants – General Provisions, supplements Part 83 of the CPRs.

[1553] Rules 55.10(2) and (3), read with part 55.3–1.1 of Practice Direction 55A https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55/pd_part55a (Date of use: 19 December 2020). See also https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

[1554] Rules 55.10(2)(a) and (3)(a).

the arrears.[1555] The matter then proceeds to a hearing and judgment is given in the manner described earlier.

Unless the debtor opts to utilise the available appeal procedures, or applies for suspension of the court order and so forth, an outright possession order will give a date by which the debtor should vacate his home, usually 28 days after the hearing (with a possibility of an extension). If the debtor fails to vacate by the fixed date, the lender must apply for a warrant of possession.[1556]

Alternatively, if the debtor manages to make an acceptable offer or arrangement for the payment of arrears, the lender is still entitled to obtain a suspended possession order from the court. This will allow the debtor to stay in the mortgaged residence subject to the sustained payment of arrears and adherence to the agreement.[1557] However, if the debtor defaults on or breaches the arrangement the lender can still apply for a warrant of possession, with the ultimate aim of evicting.[1558]

The warrant of possession gives the court bailiff the authority to eject the debtor from his home, without which there can be no lawful eviction.[1559] In executing the warrant the bailiff must, 14 days prior to the eviction day, give the debtor a notice of eviction specifying the date and time of the anticipated ejectment.[1560]

During the actual eviction the bailiff can use a reasonable amount of force, if needs be, to gain entry into the debtor's home and to remove the debtor and

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[1555] Part 55.4–2.5 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part55/pd_part55a (Date of use: 19 December 2020). See also https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

[1556] https://www.gov.uk/evicting-tenants/eviction-notices-and-bailiffs (Date of use: 23 January 2021).

[1557] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/what-happens-when-your-mortgage-lender-takes-you-to-court/ (Date of use: 18 November 2020).

[1558] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

[1559] Rules 83.8A, 83.13 and 83.26 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-83-writs-and-warrants-general-provisions (Date of use: 23 January 2021). See also https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

[1560] Rules 83.8A, 83.13 and 83.26 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-83-writs-and-warrants-general-provisions (Date of use: 23 January 2021). See also https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

anyone else found in the property.[1561] The lender or its representative should be at the eviction site to enable the bailiff to hand over the property keys.[1562] The locks are changed to prevent the debtor from re-entering. The bailiff can break in and change the locks if no one is found at the property.[1563] Further, if resistance is anticipated from the debtor the bailiff may ask the police to be present when carrying out the eviction in case there is a breach of the peace, even though those police are not allowed to help the bailiffs with the actual ejectment process.[1564] As the lender has a right to vacant possession of the property, all possessions such as furniture and belongings should be removed.[1565]

6.2.4 Summary and conclusion

It is clear from the above analysis that UK laws (primary and secondary), including protocols, are designed in such a way as to give both the tenants and mortgaged property owners some reasonable security of tenure. Even when evictions occur the regulatory framework therefor is solid and geared towards the protection of human rights. This is more evident in the area of mortgage arrears (re)possessions whereby laws such as the Administration of Justice Acts 1970 and 1973, the Pre-Action Protocol and the MCOB Rules encourage alternative dispute resolution measures, whereby court action and eviction are not easily resorted to.

Even in the landlord-tenant sphere a wide range of laws such as the Housing Act 1988, Protection from Eviction Act 1977; Deregulation Act 2015, Landlord and Tenant Act 1985, and Protection from Harassment Act 1997 spell out the rights and obligations of both landlords and tenants in a balanced manner. So when evictions do ultimately occur it is within a comprehensively regulated framework. The one disturbing factor though is the distinction between assured shorthold tenancy (AST) and assured tenancy as introduced and contained in the Housing Act 1988 (HA), and the distinctive levels of tenure security. As indicated earlier,

[1561] http://www.housingrepossessions.co.uk/role-bailiffs-property-repossessions.html (Date of use: 23 January 2021).

[1562] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

[1563] http://www.housingrepossessions.co.uk/role-bailiffs-property-repossessions.html (Date of use: 23 January 2021).

[1564] https://www.propertyinvestmentsuk.co.uk/what-happens-during-a-house-repossession/ (Date of use: 23 January 2021).

[1565] https://www.citizensadvice.org.uk/debt-and-money/mortgage-problems/eviction-for-mortgage-arrears/ (Date of use: 18 November 2020).

under the AST the landlord is at liberty to evict a tenant without a legal reason after the initial agreed period. As long as statutory requirements for the section 21 notice are met even the courts have no discretion but to grant the eviction.[1566] Assured tenancy, on the other hand, offers increased tenure security with the HA giving the tenants more protection, as the landlord has no automatic right to regain possession and evict unless tenants are significantly in arrears with their rent.

Of utmost significance though is that the UK's Civil Procedure Rules (CPRs) have a segment entirely dedicated to possession claims which ultimately lead to evictions, in the mould of Part 55, as complemented by Practice Direction 55A. This then ensures that the procedure to be followed in eviction-related proceedings is certain, uniform and easy to determine nationally. Discussing each and every aspect of the rules may end up taking a huge chunk of this chapter. Suffice to say that the UK has one of the most comprehensive set of rules and practice directions when it comes to possession claims and evictions, which can be a valuable guide in the formulation of related rules in the South African context.

The US has a different evictions regulatory framework, from which South Africa can draw and benefit. Therefore, at this stage it is worth examining the position in the US.

6.3 Eviction processes in the United States of America (US)

6.3.1 Introduction

This segment on the US looks at the context in which evictions arise, some background factors, pertinent human rights aspects, court structures or make-up, legislation pertaining to foreclosures, landlord-and-tenant laws as related to evictions and incidental aspects concerning the regulation of evictions in a broader sense. The discussion will revolve around evictions in the US generally, including relevant federal laws, and in the states of Arizona and Texas specifically.

6.3.1.1 General

In the US evictions in the general sense of the word mainly arise in the sphere and context of rentals and foreclosures. However, in the narrower, commonly

[1566] Lonegrass 2015 *Louisiana LR* 1076.

understood context *evictions* are landlord-initiated forced moves from rental property, whilst *foreclosures* are forced moves from owner-occupied property initiated by lending institutions.[1567] Evictions tend to affect the urban poor mostly due to non-payment of rent, whereas foreclosures mainly impact the working and middle class,[1568] largely attributable to the failure to maintain mortgage bond repayments. In common practice, therefore, "*eviction* is the process used by landlords to recover possession of leased real property from tenants who do not want to leave".[1569] Thus, in the US 'eviction' is mainly used in the landlord-tenant context. Fox contends that poor people are more likely to be evicted partly because most of them rent property, even though the poor are simultaneously not the only renters evicted.[1570] Most evictions in the US are the result of non-payment of rent for whatever reason, as the mostly low-income tenants would not be facing eviction if they had all the available back rent.[1571]

Historically, many homeowners lost their homes to foreclosure during the Great Recession of 2008.[1572] Since then, these previously owner-occupied properties are being converted to rentals, resulting in new challenges for prospective homeowners and renters alike.[1573] Institutional investors are buying large quantities of single-family homes primarily to convert them into rental properties, meaning that there are fewer available homes for those who want to be homeowners instead of being landlords.[1574] Many of the single-family rentals that sprung-up post-recession were previously foreclosed properties whose former low-income homeowners were substituted by investor landlords who purchased the properties in many of those neighbourhoods.[1575]

[1567] Desmond M and Kimbro RT "Eviction's fallout: housing, hardship, and health" 2015 *Social Forces*, Vol. 94, Issue 1, 295–324, https://doi.org/10.1093/sf/sov044.
[1568] Desmond and Kimbro 2015 *Social Forces* 295–324.
[1569] "Eviction: an overview" A Cornell Law School Legal Information Institute article https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1570] Fox J "The high cost of eviction: struggling to contain a growing social problem" 2020 *Mitchell Hamline Law Journal of Public Policy and Practice*, Vol. 41, Iss. 3, Article 3, 1–33 4. https://open.mitchellhamline.edu/policypractice/vol41/iss3/3.
[1571] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 30–31.
[1572] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 8.
[1573] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 8.
[1574] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 8–9.
[1575] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 12.

Even though adequate housing remains a human right in the US, this does not translate to an obligation for the government to provide housing for everyone.[1576] What it does mean is that governments are required to ensure adequate protection from eviction, compensation for property affected by the eviction, and that the evicted do not become homeless.[1577] However, Fox maintains that the current US legal process is failing in this regard.[1578] Although human-rights norms require governments to create policies that "ensure security of tenure to all",[1579] eviction statistics nevertheless reflect that the US currently provides security of tenure to no one.[1580] As a result, Fox contends that eviction is a national humanitarian crisis, advocating for US laws and court processes to be reformed to acknowledge the fundamental right of housing.[1581]

6.3.1.2 Court structures

There are two separate court systems in the USA, namely: the federal and the state courts, as the US Constitution created federalism.[1582] Each state has its own set of state courts.[1583] The Constitution and Congress laws specifically reserve certain powers to the federal government, such as bankruptcy, whilst powers not specifically designated to the federal government fall to the individual state governments.[1584] Each state is therefore responsible for making its own laws that are important to that particular state, although such state laws cannot conflict with or violate the Constitution.[1585] Whilst state courts are individually responsible for interpreting and deciding matters of their state constitutions, federal courts

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[1576] The US subscribes to Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). See also Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 29.

[1577] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 29.

[1578] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 29.

[1579] U.N. Office of the High Commissioner for Human Rights, *The Human Right to Adequate Housing*, Fact Sheet No. 21/Rev. 1 (Nov. 2009), https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

[1580] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 32.

[1581] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 32-33.

[1582] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021). Federalism means that governmental powers are shared between the federal government and state governments.

[1583] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

[1584] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021); and https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).

[1585] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

conversely interpret the US Constitution and adjudicate matters of federal law.[1586] However, both systems are organised in a similar hierarchy, with lower courts, appellate courts and a court of last resort.[1587]

Court systems vary by state, as each state's Constitution and laws establish a particular state's court system.[1588] Each state would thus first have lower courts, also known as courts of general jurisdiction, usually operating on a county level and having the authority to hear a broad range of cases of a criminal and civil nature.[1589] Secondly, losing litigants in a lower court can then appeal to the state appellate courts, which are intermediate courts that review questions of legal procedure or matters of law arising from the lower court decisions.[1590] Thirdly, irrespective of the outcome in the appellate court, either party can appeal an issue to the State Supreme Court, which is the court of last resort or highest court for the particular state.[1591] Although there is only one highest court per state, Texas has two, namely the 'Texas Supreme Court' to hear civil cases and the 'Texas Court of Criminal Appeals' to hear criminal cases.[1592]

6.3.1.2.1 Arizona

The Arizona state court system is divided into three types of courts based on jurisdiction: appellate, general and limited. Courts of limited and special jurisdiction include the Justice Courts and the Magistrate Courts.[1593] Justice of the Peace Courts have jurisdiction over, amongst others: eviction actions, and landlord and

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1586 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

1587 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

1588 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

1589 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021). Different states call these courts by different names though, such as district courts, circuit courts, county courts, trial courts or even as superior courts.

1590 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021). Whereas lower courts often use juries to decide cases, appellate courts utilise a panel of judges to review only a particular point or issue, without rehearing the entire case. The panel can even choose whether or not to accept the appeal at all, and if accepted, the panel votes on the issue, whereby the majority rules.

1591 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

1592 https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

1593 https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).

tenant disputes; civil disputes involving amounts less than $10,000; and small claims cases involving less than $3,500.[1594] The Arizona Superior Court is a court of general jurisdiction and is considered one court with locations in each of the 15 counties in the state, with jurisdiction over, amongst others: family law (divorce, legal separation, annulment, paternity); and other cases in which the value of property in question is $1,000 or more, exclusive of interest and costs.[1595] Lastly, courts of Appellate Jurisdiction include the Arizona Supreme Court (court of last resort) and the Arizona Court of Appeals (intermediate appellate court), and review decisions made in a lower court.[1596] The Supreme Court, amongst others, provides rules of procedure for all the courts in Arizona, and has discretionary jurisdiction, whereby it may refuse to review the findings of a lower court.[1597]

6.3.1.2.2 Texas

The Texas' court system has three levels: trial, appellate, and supreme.[1598]

The basic structure of the present court system of Texas was established by an 1891 amendment to the Texas Constitution of 1876, which established the Supreme Court as the highest state appellate court for civil matters, and the Court of Criminal Appeals as the highest state appellate court in criminal matters.[1599] District courts are the state trial courts of general jurisdiction.[1600] In addition to such state courts, the Texas Constitution provides for a county court in each county, presided over by the county judge.[1601] The legislature has also established statutory county courts to assist the constitutional county courts with their judicial functions in the more populous counties.[1602] At the trial or local level, courts are the most numerous, consisting of over 450 state district courts, over 500 county courts, over 800 Justice of the Peace courts, and over 900 municipal courts.[1603]

[1594] https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021). Other categories of matters for Justice of the Peace Courts are: misdemeanour crimes; initial appearances and preliminary hearings for felonies; preliminary hearings for felonies; collection cases; and traffic cases.
[1595] https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).
[1596] https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).
[1597] https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).
[1598] https://law.tamu.libguides.com/texascaselaw (Date of use: 31 January 2021).
[1599] https://libguides.law.ttu.edu/txcourts (Date of Use: 31 January 2021).
[1600] https://libguides.law.ttu.edu/txcourts (Date of Use: 31 January 2021).
[1601] https://libguides.law.ttu.edu/txcourts (Date of Use: 31 January 2021).
[1602] https://libguides.law.ttu.edu/txcourts (Date of Use: 31 January 2021).
[1603] https://law.tamu.libguides.com/texascaselaw (Date of use: 31 January 2021).

These are the courts which handle the vast majority of legal matters in Texas.[1604] Texas Rule of Civil Procedure 510.3(b) and Texas Property Code section 24.004 ensure that Justice of the Peace Courts have original jurisdiction in eviction cases, in which they may award damages up to $20,000 exclusive of court costs but inclusive of attorney's fees.[1605] However, if all matters between the parties cannot be adjudicated in a Justice of the Peace Court in which the eviction proceedings (commonly referred to as 'forcible entry and detainer proceedings') are pending due to its limited jurisdiction, "then either party may maintain an action in a court of competent jurisdiction for proper relief".[1606]

6.3.2 Foreclosures

6.3.2.1 General

Contrary to the position in the UK, the US has largely avoided passing national-level legislation or protocols regulating the mortgage relationship, thus leaving the regulation aspect in the hands of individual states.[1607] For instance, only twenty-one states require a mortgagee to pursue repossession of a defaulted property through a lawsuit in court (judicial foreclosure).[1608] The remaining twenty-nine states do not require judicial involvement in order for a home to be repossessed and eventually sold.[1609] In some states[1610] a deed of trust is used instead of a mortgage instrument.[1611] Unlike in the UK where the lender's entitlement, in the

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[1604] https://law.tamu.libguides.com/texascaselaw (Date of use: 31 January 2021).

[1605] Willis DJ "Residential Evictions in Texas" https://lonestarlandlaw.com/residential-evictions-in-texas/ (Date of use: 27 January 2021).

[1606] *McGlothlin v. Kliebert*, 672 S.W.2d 231, 233 (Tex. 1984). See Willis https://lonestarlandlaw.com/residential-evictions-in-texas/ (Date of use: 27 January 2021).

[1607] Krebs N "British cures for American foreclosure woes" 2015 *Chicago-Kent Journal of International and Comparative Law* (*Chi.-Kent J. Int' l & Comp. Law*), Vol. 15, Iss. 2, 1-24 10. http://scholarship .kentlaw.iit.edu/ckjicl/vol15/iss2/3.

[1608] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 10.

[1609] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 10.

[1610] The following states use Mortgage Agreements: Alabama, Arkansas, Connecticut, Delaware, Florida, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and Wisconsin. The following states use Deed of Trusts: Alaska, Arizona, California, District of Columbia, Georgia, Mississippi, Missouri, Nevada, North Carolina, and Virginia. The following states may use either Mortgage Agreements or Deed of Trusts: Colorado, Idaho, Illinois, Iowa, Maryland, Montana, Nebraska, Oklahoma, Oregon, Tennessee, Texas, Utah, Wyoming, Washington, and West Virginia. Source: https://www.lawdepot.com/law-library/faq/deed-of-trust-faq-united-states/ (Date of use: 25 January 2021).

[1611] A deed of trust is another contractual method of securing a real estate transaction, but includes three parties: a lender, borrower and a third-party trustee. Therefore, whereas a mortgage

case of payment default, to sell the mortgaged property is provided for every mortgage (the so-called power of sale), this is not incorporated into every mortgage agreement by statute in the US.[1612] However, many mortgages and deeds of trust in the US do contain power of sale provisions as part of the agreement, although such provisions are only valid in states that do not require judicial foreclosures and allow the mortgagee to sell the property without having to go to court. Krebs points out that despite these provisions, several states, including New York, have passed legislation regulating a sale under these circumstances.[1613] The sale of a mortgaged property significantly divests ownership from the debtor, resulting in him losing the property and eventually being forced out of it. So it is always best if it is regulated or subject to some form of judicial oversight just like in the UK and South Africa. Lenders otherwise prefer settling borrower defaults by power of sale provisions as they are often cheaper and less time consuming than seeking judicial action.[1614] In short therefore, although mortgages in the UK are all subject to substantially similar regulations, mortgages and foreclosures in the US are nevertheless subject to different laws that vary drastically from state to state.[1615]

In Krebs' view this current position in the US has created a "somewhat dysfunctional and inefficient" system of governance that affects property values and foreclosure rates.[1616] Yet, lawmakers have remained reluctant to create federal legislation regulating financial institutions and mortgage markets. Amongst the benefits of federal foreclosure legislation, both the mortgage lender and the borrower would have been assured that the controlling federal provisions apply, and they are guaranteed certain rights and responsibilities under the law.[1617]

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only involves two parties – the borrower and the lender, a deed of trust adds an additional party, a trustee, who holds the home's title until the loan is repaid. In the event of default on the loan, the trustee is responsible for starting the foreclosure process. See https://www.quickenloans.com/learn/deed-of-trust (Date of use: 25 January 2021); https://www.sec.gov/Archives/edgar/data/1330622/000119312507212664/dex10121.htm (Date of use: 25 January 2021); and https://www.lawdepot.com/law-library/faq/deed-of-trust-faq-united-states/ (Date of use: 25 January 2021).

[1612] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 10.
[1613] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 10.
[1614] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 10.
[1615] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 11.
[1616] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 13.
[1617] Krebs 2015 *Chi.-Kent J. Int' l & Comp. Law* 13.

On the aspect of federal law one glimmer of hope is that the Servicemembers Civil Relief Act of 2003 (SCRA)[1618] provides some protections to members of the military going through foreclosure challenges.[1619] For instance, in states where foreclosures are typically non-judicial the SCRA requires a court order (or a waiver from the servicemember) before his house can be sold via foreclosure.[1620] If the lender forecloses without a court order or a waiver, the sale is then invalid if done during the period of military service or one year thereafter.[1621] This is a strict liability section of the SCRA, and anyone who knowingly violates this provision may be fined and/or imprisoned for a period of up to one year.[1622] Courts are authorised under the SCRA, and obliged in certain instances, to stay a non-judicial foreclosure proceeding or adjust the payments, if the servicemember's ability to meet his or her obligation under the mortgage or deed of trust is materially affected because of his or her military service.[1623]

Furthermore, with regard to judicial foreclosures the SCRA generally protects servicemembers against default judgments.[1624] The Act provides that for civil court

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[1618] Servicemembers Civil Relief Act (SCRA) (50 U.S.C. § 3901, et seq) https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021).

[1619] The SCRA is also applicable in landlord-tenant eviction matters, as discussed in paragraph 6.6.3.2 below.

[1620] SCRA 50 U.S.C. § 3953. See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021).

[1621] SCRA 50 U.S.C. § 3953. See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021). The timeframe of one year after a period of military service is also referred to as the "tail coverage" period. This tail coverage period has changed over time. Between December 2008 and mid-May 2018 it varied between 90 days, nine months and one year. On May 24, 2018, the President signed into law the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174. Section 313 thereof provides for a permanent extension of the Section 3953 (non-judicial foreclosure) one-year tail coverage period: https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021).

[1622] SCRA 50 U.S.C. § 3953(d). See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021).

[1623] SCRA 50 U.S.C. § 3953(b). See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021).

[1624] SCRA 50 U.S.C. § 3931. See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021). At § 3931(b)(1) the SCRA stipulates that In any civil court proceeding in which the defendant servicemember does not make an appearance, a plaintiff creditor must file an affidavit with the court stating one of three things: 1) that the defendant is in military service; 2) that the defendant is not in military service; or 3) that the creditor is

proceedings where a defendant servicemember has not made an appearance and it seems that he or she is in military service, a court may not enter a default judgment against that defendant until after it appoints an attorney to represent such defendant's interests.[1625] For the US Department of Justice this occurs most frequently in the context of judicial foreclosure proceedings.[1626] The court must stay a civil court proceeding for at least 90 days if the appointed attorney has been unable to contact the defendant servicemember, or if there may be a defence to the action that requires that the defendant be present.[1627] The above provisions of the SCRA are also applicable in respect of rental evictions, as will be discussed further below.

In addition to federal law, most states have their own statutes that provide additional protections for servicemembers.[1628] As will be observed below, Texas is one such state.

6.3.2.2 Arizona

6.3.2.2.1 General

Lenders may foreclose on deeds of trusts or mortgages in default using either a judicial or non-judicial foreclosure process.[1629] Judicial foreclosure, whereby a lawsuit is instituted to get an order to foreclose, is used when no power of sale is present in the mortgage or deed of trust. The foreclosure order is then used to auction the mortgaged property off to the highest bidder. With the non-judicial foreclosure, the power of sale in a deed of trust or mortgage pre-authorises the sale of property, by the lender or deed trustee, to recoup the loan balance upon

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unable to determine whether or not the defendant is in military service after making a good faith effort to determine the defendant's military service status.

[1625] SCRA 50 U.S.C. § 3931(b)(2). See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021).

[1626] https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021).

[1627] SCRA 50 U.S.C. § 3931(d). See https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021).

[1628] https://www.nolo.com/legal-encyclopedia/foreclosure-protection-servicemembers-civil-relief-act.html (Date of use: 26 January 2021).

[1629] http://www.foreclosurelaw.org/Arizona_Foreclosure_Law.htm (Date of use: 23 January 2021).

the borrower's default. Non-judicial foreclosure is the primary method used in Arizona, over and above judicial foreclosure.[1630]

6.3.2.2.2 Applicable laws

The laws that govern foreclosures are found in Title 33, Chapters 6 and 6.1 of the Arizona Revised Statutes (A.R.S).[1631] There are various procedures and guidelines in these laws describing foreclosure processes, notice requirements, and time-lines to be followed, but only a few are worth discussing in detail at this stage. To officially start a non-judicial foreclosure in Arizona, the trustee or lender should record a notice of sale in the land records, and the sale date cannot be sooner than 91 days after the date of the recording of the sale notice.[1632] Thereafter, the trustee or lender must send the notice of sale to the borrower (debtor) by certified mail within five business days after recording it.[1633] The notice of sale should also be published in a newspaper for four consecutive weeks, be posted on the property at least 20 days before sale (if posting can be accomplished without a breach of the peace), and also be posted in the court building.[1634]

Arizonan laws allow the debtor an opportunity to prevent the non-judicial foreclosure sale by reinstating the loan before 5:00 p.m. (Mountain Standard Time) on the day before the sale, other than on Saturday or a legal holiday, through payment of all missed payments, fees, and current costs in one lump-sum payment.[1635] However, Arizona does not have a post-sale statutory right of redemption, which allows the debtor whose property has been foreclosed to

[1630] https://www.foreclosure.com/statelaw_AZ.html (Date of use: 25 January 2021).

[1631] https://www.azleg.gov/arsDetail/?title=33 (Date of use: 25 January 2021). See also https://www.foreclosure.com/statelaw_AZ.html (Date of use: 25 January 2021).

[1632] A.R.S § 33–808(C)(1). See https://www.nolo.com/legal-encyclopedia/arizona-foreclosure-laws-and-procedures.html (Date of use: 26 January 2021).

[1633] A.R.S § 33–809(C). See https://www.nolo.com/legal-encyclopedia/arizona-foreclosure-laws-and-procedures.html (Date of use: 26 January 2021).

[1634] A.R.S § 33–808. See https://www.nolo.com/legal-encyclopedia/arizona-foreclosure-laws-and-procedures.html (Date of use: 26 January 2021); and https://www.nolo.com/legal-encyclopedia/arizona-foreclosure-laws-and-procedures.html (Date of use: 26 January 2021).

[1635] Section 33–813 of the Arizona Revised Statutes https://www.azleg.gov/arsDetail/?title=33 (Date of use: 25 January 2021).See also https://www.lawyers.com/legal-info/bankruptcy/foreclosures/arizona-foreclosure-process.html (Date of use: 23 Jan 2021).

reclaim such property by making payment in full of the sum of the unpaid loan plus costs.[1636]

6.3.2.2.3 Deficiency judgments

A deficiency judgment may be obtained in Arizona when a property in foreclosure is sold at a public sale for less than the balance of the secured loan amount.[1637] The difference between the sale price and outstanding debt is known as a 'deficiency balance', hence the term 'deficiency judgment'.[1638] Some states therefore do allow the lender to sue the foreclosed owner in a separate lawsuit to obtain a deficiency judgment for the remaining amount.[1639] However, in Arizona lenders are prohibited by statute (section 33-729) from obtaining deficiency judgments in foreclosures in instances where the land size is 2.5 acres or less and the property used for either a single one-family or single two-family dwelling.[1640] Such deficiency actions should be brought within 90 days of a power of sale foreclosure, and the judgment would be limited to the difference of the balance owed and the fair market value of the property.[1641]

6.3.2.3 Texas

6.3.2.3.1 General

The most common foreclosure method in Texas, on deeds of trust or mortgages, is non-judicial, although judicial foreclosures are also allowed.[1642] However, a

[1636] A.R.S Ann. § 33–811(E). See https://www.nolo.com/legal-encyclopedia/arizona-foreclosure-laws-and-procedures.html (Date of use: 26 January 2021); and https://www.foreclosure.com/statelaw_AZ.html (Date of use: 25 January 2021).

[1637] https://www.foreclosure.com/statelaw_AZ.html (Date of use: 25 January 2021).

[1638] https://www.lawyers.com/legal-info/bankruptcy/foreclosures/arizona-foreclosure-process.html (Date of use: 23 Jan 2021). See also https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1639] https://www.lawyers.com/legal-info/bankruptcy/foreclosures/arizona-foreclosure-process.html (Date of use: 23 Jan 2021).

[1640] https://www.foreclosure.com/statelaw_AZ.html (Date of use: 25 January 2021). See also http://www.foreclosurelaw.org/Arizona_Foreclosure_Law.htm (Date of use: 23 January 2021) and https://www.lawyers.com/legal-info/bankruptcy/foreclosures/arizona-foreclosure-process.html (Date of use: 23 Jan 2021).

[1641] Section 33-814 of the Arizona Revised Statutes https://www.azleg.gov/arsDetail/?title=33 (Date of use: 25 January 2021).

[1642] https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021); https://www.lanelaw.com/foreclosure/blog/process-in-texas (Date of use: 25 January 2021); Willis https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021). See also http://www.foreclosurelaw.org/Texas_Foreclosure_Law.htm (Date of use: 23 January 2021).

judicial foreclosure process is required for home equity loans,[1643] property owners' associations, and for property taxes.[1644]

6.3.2.3.2 Applicable laws

The Texas Property Code Chapter 33 contains the general applicable provisions.[1645] The lender must first send the debtor a Notice of Default and Intent to Accelerate (that is, to demand that the entire balance of the loan be repaid), giving the debtor at least 20 days to cure the default.[1646] If the default persists a sale notice is then issued. Notices of foreclosure sales of a residential homestead should be mailed to the debtor, filed with the county clerk and posted (usually on a bulletin board in the lobby of the courthouse) at least 21 calendar days prior to the intended foreclosure date.[1647] The typical sale notice provides information about the debt, the legal description of the property, and designates a three-hour period during which the sale will be held.[1648] However, as in Arizona, the debtor does have a right to reinstate before the sale.[1649] 'Reinstating' occurs when the debtor settles the overdue amount, plus fees and costs, to bring the loan up to date and thus stops a foreclosure.[1650] Reinstatement of the loan must be made within 20

[1643] A home equity loan is a loan for a fixed amount of money that is secured by the borrower's home. It is repaid with equal monthly payments over a fixed term, just like the original mortgage. If it is not repaid, the lender can foreclose on the home. The amount that can be borrowed is usually limited to 80-85 percent of the equity in the home. It is usually used for home improvements, payment for college education and so forth: by tapping into the equity of the borrower's home's — the difference between what the home could sell for and what is owed on the mortgage — as a way to cover the costs: https://www.consumer.ftc.gov/articles/0227-home-equity-loans-and-credit-lines (Date of use: 26 January 2021).

[1644] https://www.lanelaw.com/foreclosure/blog/process-in-texas (Date of use: 25 January 2021); and https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1645] Texas Property Code Chapter 51 https://statutes.capitol.texas.gov › Docs › htm › PR.51.htm (Date of use: 25 January 2021).

[1646] Texas Property Code section 51.002(d). See https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1647] Texas Property Code section 51.002(b). See Willis DJ "Foreclosure in Texas" https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021); and https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1648] Texas Property Code section 51.002(b). See Willis https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021).

[1649] Texas Property Code section 51.002(d). See https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1650] https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

days after the mailing of the Notice of Default and Intent to Accelerate.[1651] Even though some states have a law granting a foreclosed homeowner time after the foreclosure sale to redeem the property, Texas law, however, generally does not provide such homeowner (debtor) a right to redeem the home subsequent to the foreclosure.[1652]

6.3.2.3.3 Additional protections for military servicemembers

Over and above the protections offered by the Servicemembers Civil Relief Act of 2003, the Texas Property Code accords additional safeguards for military personnel. The Code grants the court the power, in foreclosure actions against a military servicemember, to either: (1) stay the proceedings for a period of time as justice and equity require; or (2) adjust the contractual obligations secured by a mortgage, deed of trust, or other lien, in order to preserve the interests of all parties.[1653] This would be the case where, in proceedings filed during a military servicemember's period of active military duty or during the nine months after the date on which that service period concludes, it appears that such servicemember's ability to comply with the obligations of the mortgage, deed of trust, or other lien is materially affected by the servicemember's military service.

Furthermore, a sale, foreclosure, or seizure of property under a mortgage, deed of trust, or other contract lien may not be conducted during the military servicemember's period of active military service duty or during the nine months after the date on which that service period concludes.[1654] The exception would be where such sale, foreclosure, or seizure is conducted under a court order issued before the sale, foreclosure, or seizure; or the military servicemember has waived his or her rights under this section only as provided in the Code.

[1651] Texas Property Code section 51.002(d). See https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1652] https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021); and Willis https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021).

[1653] In terms of section 51.015(c).

[1654] In terms of section 51.015(d).

6.3.2.3.4 Deficiency judgments

In Texas, to get a deficiency judgment, the lender must file a lawsuit within two years after the foreclosure sale.[1655] The debtor is allowed to request the court to determine the property's fair market value.[1656] If the court determines that the fair market value is more than the foreclosure sale price, the debtor would then be entitled to an offset against the deficiency.[1657]

6.3.2.4 Conclusion

The foreclosure process, including property-sale methods, in both Arizona and Texas is substantially similar. At the conclusion of the foreclosure sale, if the debtor (foreclosed homeowner) fails to vacate the home, the purchaser who bought the property at the sale must give a notice to quit (move out) before instituting an eviction lawsuit against such debtor. This type of lawsuit is called a 'special detainer' action in Arizona and a 'forcible detainer' action in Texas.[1658] This is based on the premise that as foreclosure "gives the new owner *title*; the next step is to obtain *possession*".[1659] So in Texas, for example, after giving the necessary three-day notice to vacate the purchaser would proceed and file a forcible detainer petition in the justice court against the previous homeowner.[1660] Then, upon judgment, the new owner should wait for the constable to post a 48-hour notice on the door after which the former borrower can be evicted if he is otherwise unwilling to leave.[1661] The civil procedural rules applicable to evictions in both states will be discussed comprehensively below alongside evictions in landlord-tenant disputes, which are discussed first.

[1655] Texas Property Code section 51.003(a). See https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1656] Texas Property Code section 51.003(b).

[1657] Texas Property Code section 51.003(c). See https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021). The relevant portion of section 51.003(c) stated in full reads: "If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price".

[1658] See also https://www.alllaw.com/articles/nolo/foreclosure/texas-foreclosure-laws.html (Date of use: 25 January 2021).

[1659] Willis https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021). Words in *italics* are from the original source / text.

[1660] *Willis* https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021).

[1661] Willis https://lonestarlandlaw.com/foreclosure-in-texas/ (Date of use: 25 Jan 2021).

6.3.3 Evictions in the landlord-tenant context

6.3.3.1 General

In the US eviction and related matters are governed by six basic types of legal instruments: federal law, state law, local law, leases, the common law, and court rules.[1662]

The common law governs eviction issues not dealt with by regulations or lease agreements, and is most likely to apply to commercial leases as most relevant regulations target residential rentals.[1663] Landlords and tenants may include lease terms and conditions which may overrule some common-law rules, but they are not allowed to contradict official regulations.[1664]

Most states regulate residential renting, including the eviction process, basing their laws on the Uniform Residential Landlord and Tenant Act (URLTA) or the Model Residential Landlord-Tenant Code (Tent. Draft 1969).[1665] URLTA is a federal law enacted in 1972 to govern residential landlord and tenant interactions, and is not designed for commercial, industrial or agricultural rental agreements.[1666] Although it does not favour any party, it nevertheless gives tenants previously unrecognised rights by recognising the contractual nature of the landlord-tenant relationship, making the landlord-tenant business relationship fair to all parties involved.[1667] URLTA's purposes are to:[1668]

> (1) simplify, clarify, modernise, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants;
> (2) encourage landlords and tenants to maintain and improve the quality of housing; and
> (3) make uniform the law among those states that adopt the Act.

The Model Residential Landlord-Tenant Code, on the other hand, was drafted in 1969 under the joint sponsorship of the American Bar Foundation and the Legal

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[1662] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1663] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1664] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1665] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1666] https://definitions.uslegal.com/u/uniform-residential-landlord-and-tenant-act-urlta/ (Date of use: 19 December 2020). See also https://www.landlordology.com/summary-uniform-residential-landlord-and-tenant-act-urlta/ (Date of use: 19 December 2020).
[1667] https://definitions.uslegal.com/u/uniform-residential-landlord-and-tenant-act-urlta/ (Date of use: 19 December 2020).
[1668] https://definitions.uslegal.com/u/uniform-residential-landlord-and-tenant-act-urlta/ (Date of use: 19 December 2020).

Services Program of the Office of Economic Opportunity.[1669] Its main aim was to stimulate discussion of the reform of landlord-tenant law through the comprehensive revision, or code, approach.[1670] Some of the persons responsible for this code participated in the preparation of the 1972 URLTA.[1671]

Except for the District of Columbia and other territories directly administered by the federal government, there are few federal laws regarding eviction.[1672] Those that do exist deal mainly with discriminatory housing practices in general, such as the Civil Rights Act of 1866 and 42 U.S. Code, Chapter 45, Federal Fair Housing Act.[1673] One of the significant Acts is the Servicemembers Civil Relief Act of 2003 (SCRA) which has also been touched upon under the discussion on foreclosures.[1674] It is of equal importance when military members become part of eviction-related landlord-tenant civil court disputes. Some additional features thereof are therefore worth evaluating.

6.3.3.2 Servicemembers Civil Relief Act (SCRA)

The Servicemembers Civil Relief Act is a federal law signed by President Bush on December 19, 2003, which imposes certain procedural requirements in all civil cases (including eviction cases) to protect members of the armed services and their families. These requirements apply to any court of any state whether or not the court is a court of record.[1675] As indicated earlier, in order to protect military service members, the SCRA imposes special requirements prior to entering a default judgment in any case (including an eviction matter in this context) in which the defendant fails to make an appearance. If a service member receives actual notice of an action against him while he or she is in military service or within 90 days after the end of the service, then at any time before a final judgment is entered in the case, the court may stay the case for not less than 90 days on its

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[1669] Williams RF and Phillips Jr PB "The Florida Residential Landlord and Tenant Act", 1973 *Florida State University Law Review* (*Fla. St. U. L. Rev.*), Vol. 1, Iss. 4, 555-595 555. https://ir.law.fsu.edu/lr/vol1/iss4/1.

[1670] Williams and Phillips Jr 1973 *Fla. St. U. L. Rev* 555.

[1671] Williams and Phillips Jr 1973 *Fla. St. U. L. Rev* 555.

[1672] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

[1673] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

[1674] See paragraph 5.3.2.1 above.

[1675] 50 U.S.C. § 3911(5). See also *Evictions Deskbook – Texas Justice Court Trainer Centre,* November 2017: https://gato-docs.its.txstate.edu/jcr:39f24876-3e91-4f39-bf30-b0b32e12e6a0/Evictions%20Deskbook.pdf (Date of use: 16 December 2020).

own accord, and must do so upon application of the service member under certain circumstances.

A court may also stay an eviction case concerning residential premises that are occupied by a service member or his or her dependents and for which the monthly rent does not exceed a prescribed amount at a given time ($3,584.99 as of January 1, 2017).[1676] If a stay is granted the court may grant to the landlord "such relief as equity may require".[1677] If the court so grants relief to the service member, it may also specify an amount of rent to be paid to the landlord while the case is pending, to be apportioned from the service member's pay.[1678]

In any eviction suit in which the defendant does not make an appearance, before entering a default judgment, the court "shall require the plaintiff to file with the court an affidavit: stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or stating that the plaintiff is unable to determine whether or not the defendant is in military service".[1679] For instance, a plaintiff can file an affidavit from the defendant's parent(s) stating that he or she (defendant) was not in military service.[1680] If a proper affidavit under the SCRA is filed, then there are three possibilities, namely:[1681]

- the defendant is not in military service, whereby the court may enter a default judgment; or

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[1676] 50 U.S.C. § 3951(a); 82 Fed. Reg. 10762 (February 15, 2017).

[1677] 50 U.S.C. § 3951(b).

[1678] 50 U.S.C. § 3951(d). The Secretary of the relevant service branch must make an allotment of the service member's pay to satisfy the terms of the court's order, subject to the regulations concerning the maximum amount of a service member's pay that may be allotted under the SCRA.

[1679] 50 U.S.C. § 3931(b). Such affidavit may be a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury [50 U.S.C. § 3931(b)(4)]. Usually plaintiffs will attach a printout obtainable from the Department of Defense's website (https://www.dmdc.osd.mil/scra/owa/home), although they are not required to use that form as long as they show "necessary facts" to support the affidavit. See *Evictions Deskbook – Texas Justice Court Trainer Centre*, November 2017: https://gato-docs.its.txstate.edu/jcr:39f24876-3e91-4f39-bf30-b0b32e12e6a0/Evictions%20Deskbook.pdf (Date of use: 16 December 2020).

[1680] *Evictions Deskbook – Texas Justice Court Trainer Centre*, November 2017: https://gato-docs.its.txstate.edu/jcr:39f24876-3e91-4f39-bf30-b0b32e12e6a0/Evictions%20Deskbook.pdf (Date of use: 16 December 2020).

[1681] *Evictions Deskbook – Texas Justice Court Trainer Centre*, November 2017: https://gato-docs.its.txstate.edu/jcr:39f24876-3e91-4f39-bf30-b0b32e12e6a0/Evictions%20Deskbook.pdf (Date of use: 16 December 2020).

- the court is unable to determine whether the defendant is in military service, in which case the court may – but does not have to – require the plaintiff to post a bond in an amount approved by the court to protect the defendant if it turns out that he is indeed in military service,[1682] or
- it appears that the defendant is in military service, wherein the court may not enter a judgment until after the court appoints an attorney to represent the defendant.[1683]

If the plaintiff fails to file an affidavit under the SCRA in an eviction case, the court may not grant a default judgment. If the plaintiff files an affidavit stating that the defendant is not in military service but fails to "show necessary facts to support the affidavit" the court may not grant a default judgment. If a default judgment is entered against a service member who did not have notice of the action during the period of military service, or within 60 days after termination of or release from military service, the court must re-open the judgment upon application of the service member for the purpose of allowing him or her to defend the action if it appears that he or she was materially affected in making a defence to the action by reason of military service and he or she has a meritorious or legal defence to the action or some part of it.[1684] A request to rescind a default judgment must be made by or on behalf of the service member no later than 90 days after the date of termination of or release from military service.[1685]

6.3.3.3 Common eviction regulatory framework amongst various states

Local court rules often significantly impact the eviction process, prescribing management procedures that influence the length of time it takes landlords to evict unwanted tenants.[1686]

Generally, landlords may legally evict tenants for one of three basic reasons, namely: non-payment of rent; non-trivial violations of lease agreements; and

[1682] 50 U.S.C. § 3931(b)(3).
[1683] 50 U.S.C. § 3931(b)(2).
[1684] 50 U.S.C. § 3931(g)(1).
[1685] 50 U.S.C. § 3931(g)(2).
[1686] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

expired leases.[1687] However, landlords may not evict or refuse to renew tenants' leases for improper reasons, as may be defined by law. For instance, whilst a landlord can opt not to renew a lease simply because he or she does not like a tenant, he or she may nevertheless not refuse to renew a lease because the tenant is an African-American.[1688] Further, as is the case in the UK, landlords are prohibited from carrying out retaliatory evictions. They may not evict for improper reasons such as in retaliation for reporting housing code violations, or because the tenant sued the landlord for discriminatory renting practices.[1689] In some states evictions in retaliation of any tenant report of landlord misconduct is prohibited.[1690] Landlords may also not harass tenants to try to get them to leave, and may specifically not cut off utilities or change locks.[1691]

Procedurally, landlords must give tenants a Notice to Quit before evicting them. This is a notice to a tenant to leave the premises (quit) either by a certain date or to pay overdue rent or correct some other default within a short space of time.[1692] Although state laws vary, the notice must generally be served personally on the tenant or posted in a prominent place such as the front door with a copy sent by certified mail.[1693] The notice and failure of the tenant to leave are a requirement to launch an eviction proceeding (also referred to as an unlawful detainer suit).[1694] At a minimum, this notice should inform the tenant of the reasons behind the landlord's intention to evict and what the tenant can do to avoid eviction.[1695] The precise format and timing of the notice varies by jurisdiction.[1696] In most states, tenants being evicted for not paying rent may avoid eviction by paying all arrear rent.[1697] If the matter remains unresolved and the tenant fails to vacate after the Notice to Quit the landlord must initiate steps to obtain the requisite court order.

[1687] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1688] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1689] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1690] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1691] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1692] https://dictionary.law.com/Default.aspx? (Date of use: 5 December 2020).
[1693] https://dictionary.law.com/Default.aspx? (Date of use: 5 December 2020); and https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1694] https://dictionary.law.com/Default.aspx? (Date of use: 5 December 2020).
[1695] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1696] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1697] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

Since the normal civil court system is notoriously backlogged, most jurisdictions have a special summary process in their housing courts utilised only for eviction matters, and designed to resolve conflicts within the shortest possible time.[1698] If the tenant refuses to leave even in the face of an eviction order then the landlord must engage marshals or law enforcement officers to assist with the eviction.[1699]

In essence eviction rules vary by jurisdiction. To gain some in-depth understanding of the manner in which the laws and rules work in practice, the situation in the states Arizona and Texas will now be discussed.

6.3.3.4 Arizona

Both primary legislation and secondary legislation (rules) covered here are more or less equally important in the regulation of Arizonan evictions taking place in the landlord-tenant sphere. Both categories of legislation respectively regulate various aspects of a substantive and procedural nature.

6.3.3.4.1 Primary legislation

In Arizona, eviction actions are called 'special detainer' actions.[1700] Applicable legislation comprises the Arizona Residential Landlord Tenant Act,[1701] the Arizona Mobile Home Parks Residential Landlord and Tenant Act[1702] and others. The Arizona Residential Landlord Tenant Act features most prominently in this regard, and will be discussed in detail. The other laws will not be analysed extensively as they are not of much relevance in the South African context.

6.3.3.4.1.1 Arizona Residential Landlord Tenant Act

Under the Arizona Residential Landlord and Tenant Act, a landlord may undertake a 'special detainer' action if and when first, a tenant violates one of his or her

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[1698] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1699] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).
[1700] (Arizona Revised Statutes [A.R.S.] 33–1337). https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).
[1701] A.R.S. Title 33 Chapter 10. https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020). A.R.S. is an abbreviation for Arizona Revised Statutes.
[1702] A.R.S. Title 33 Chapter 11. https://www.azag.gov/sites.../ArizonaMobileHomeParksResidential (Date of use: 5 December 2020). See also https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=72&articleid=380 (Date of use: 28 January 2021).

obligations (such as the obligation to pay rent on time) and secondly, as a result of this violation by the tenant the landlord wishes to retake possession of the rental unit.[1703] The Act describes three main reasons that entitle the landlord to approach the court for eviction, the first of which is non-payment of rent. However, the landlord is obliged to give the tenant written notice to pay the rent within five days or face eviction proceedings.[1704] While the landlord is not obliged to accept part-payment, if he or she elects to do so forgoes the right to terminate the rental agreement for the rest of that month – unless a signed waiver is received from the tenant permitting him or her to proceed with the eviction if the balance of the rent due remains unpaid by a specified date.[1705]

A second ground for eviction is failure to properly maintain the leased premises in a manner that materially affects health and safety, in contravention of A.R.S. § 33-1341. Examples include: violating applicable building codes; intentionally or negligently causing damage or destruction; failing to dispose or improperly disposing of garbage and other waste; or improper usage of electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances.[1706] However, the landlord again has to notify the tenant in writing, describing the problem and giving the tenant five days within which to remedy it or face eviction proceedings.[1707]

A third ground for eviction is a general violation of the lease or rental agreement, for instance, lying in the rental application about material aspects such as current employment status; previous evictions or a criminal record; or by keeping unauthorised pets or guests in the leased premises.[1708] In such an instance the

[1703] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).
[1704] A.R.S. § 33–1368(B). https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).
[1705] A.R.S. § 33–1371. https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).
[1706] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).
[1707] (A.R.S. §33–1368(A)).
[1708] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

tenant must be afforded ten days' written notice within which to remedy matters.[1709]

Self-help measures, whereby a landlord attempts to physically or forcefully evict a tenant are prohibited.[1710] Instead, a landlord must pursue eviction through the formal court process after the tenant has disregarded a written notice mentioned above. The formal eviction process commences when the landlord files a complaint with the justice court (if the amount in dispute is $10,000 or less) or superior court in the county in which the leased premises are situated.[1711] The tenant will then receive a copy of the complaint and a summons that informs the tenant of the date on which the eviction hearing will take place.[1712] The tenant must be present in court on the hearing date if he or she opposes the eviction, so that their side of the story can be heard. A decision on whether to grant an eviction order will then be taken on the basis of the landlord and the tenant's testimonies.[1713]

The tenant can fight the proceedings on various fronts. For instance, he or she can allege payment of the rent owed. In terms of the Act,[1714] the landlord is generally required to accept payment and discontinue the envisaged eviction proceedings if the tenant pays the rent fully within the five-day notice period; or if the tenant pays the rent in full plus any late fees after the five-day notice period but before the landlord has filed a complaint with the court to commence the eviction process. If the tenant pays the entire rental due as well as any reasonable late fees after the landlord has filed a complaint with the court but before the judge has determined the matter, the landlord is again generally required to accept such payment and discontinue the action where the tenant also pays the landlord's attorney fees and court costs. However, if the tenant wishes to pay the full rent, applicable

[1709] A.R.S. § 33–1368(A). https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).

[1710] A.R.S. § 33–1367. https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).

[1711] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

[1712] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

[1713] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

[1714] Under A.R.S. § 33–1368(B). https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).

reasonable late fees, the landlord's attorney fees and court costs *after* the judge has granted the eviction order, then the landlord has the discretion to accept such payment and reinstate the rental agreement.[1715]

If the tenant fixes a problem concerning a failure to properly maintain the rental unit within the five-day written notice period, or a problem involving a violation of the lease or rental agreement within the ten-day notice frame-work, the landlord may generally not continue to pursue eviction on those grounds.[1716]

A tenant whose landlord "unlawfully removes or excludes the tenant from the premises or wilfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service" may elect to either recover possession of the rental unit or terminate the rental agreement.[1717] In either of these instances, the tenant will be owed either two months' rent or twice the actual damages sustained by the tenant (whichever is greater).[1718]

Similar to the UK, A.R.S. § 33–1381 prohibits a landlord from seeking a retaliatory eviction within six months of a tenant exercising his legal rights in circumstances whereby:

- the tenant has complained to a government agency about a building or health code violation;
- the tenant has complained to the landlord about repairs that the landlord is required to make under A.R.S. § 33–1324 ("Landlord to maintain fit premises");
- the tenant has organised or become a member of a tenants' union or similar organisation; or
- the tenant has complained to the government agency in charge of enforcing the wage-price stabilisation act.

[1715] See also https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

[1716] In terms of A.R.S. § 33–1368(A). https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).

[1717] Under A.R.S. § 33–1367. https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).

[1718] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).

However, such prohibition would not apply if the tenant has not paid rent. It would also not apply if the violation of the applicable building or housing code was primarily caused by lack of reasonable care by the tenant or with his or her consent.[1719] Furthermore, the Fair Housing Act[1720] renders it unlawful for a landlord to discriminate against a tenant based on race, religion, gender, national origin, disability, and familial status (for instance, where the tenant is divorced or pregnant or has children under the age of 18).[1721]

6.3.3.4.1.2 Arizona Mobile Home Parks Residential Landlord and Tenant Act

This legislation is applicable to rented mobile homes and rented mobile home spaces within mobile home parks in Arizona. Mobile home parks are parcels of land that have four or more mobile home spaces.[1722] Rented mobile homes and rented mobile home spaces are governed by the Arizona Mobile Home Parks Residential Landlord and Tenant Act,[1723] and all references cited are to the applicable portion of the Arizona Revised Statutes (A.R.S.).[1724] The aims of the Act are to simplify, clarify and establish the law regulating the rental of mobile home spaces plus the rights and obligations of landlords and tenants and encourage landlords and tenants to maintain and improve the quality of mobile home housing.[1725] Every right and obligation described in the Act imposes an obligation of 'good faith' equally on landlords and tenants, meaning that in the event of disputes, both sides must treat each other honestly and fairly.[1726] The provisions of this Act are not applicable to rented apartments, condos and houses, which are ordinarily regulated by the Arizona Residential Landlord and Tenant Act.[1727] As

[1719] A.R.S. § 33–1381C. https://www.azag.gov/.../AZResidentialLandlordandTenantAct (Date of use: 5 December 2020).
[1720] Title VIII of the federal Civil Rights Act of 1968.
[1721] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=19&articleid=26 (Date of use: 5 December 2020).
[1722] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=72&articleid=380 (Date of use: 11 December 2020).
[1723] A.R.S. Title 33 Chapter 11.
[1724] https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=72&articleid=380 (Date of use: 11 December 2020).
[1725] A.R.S. § 33–1402. https://www.azag.gov/sites.../ArizonaMobileHomeParksResidential (Date of use: 5 December 2016). See https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=72&articleid=380 (Date of use: 11 December 2020).
[1726] A.R.S. § 33–1410. https://www.azag.gov/sites.../ArizonaMobileHomeParksResidential (Date of use: 5 December 2016). See https://www.azlawhelp.org/articles_info.cfm?mc=3&sc=72&articleid=380 (Date of use: 11 December 2020).
[1727] A.R.S. Title 33 Chapter 10.

mobile home parks are not a feature in South Africa, it is not necessary to analyse the provisions of this Act in depth.

6.3.3.4.1.3 Other applicable laws

Besides the legislation discussed above another statute, which will not be discussed at length, is the Recreational Vehicle (RV) Long-Term Rental Space Act.[1728] This Act applies to, regulates and determines rights, obligations and remedies for a recreational vehicle space that is rented in a recreational vehicle park or mobile home park by the same tenant under a rental agreement for more than one hundred eighty consecutive days.[1729] For a park trailer that is located in a recreational vehicle park or mobile home park, this legislative chapter applies if the space is rented by the same tenant for more than one hundred eighty consecutive days without regard to whether a rental agreement is executed. However, the Act does not apply to mobile homes, manufactured homes and factory-built buildings or to a property with one or two recreational vehicle rental spaces.

Generally, for matters that do not fall under the Residential Landlord Tenant Act, the Mobile Home Park Act or the Recreational Vehicle (RV) Long-Term Rental Space Act there are other common rules and laws that are applicable to rental relationships and eviction actions. These general eviction statutes can be found in the Arizona Revised Statutes, Title 12, Chapter 8.[1730] They cover the following spheres: residence at medical, educational, counselling or religious institutions; member of a fraternal or social organisation operated for the benefit of the organisation; hotel, motel or recreational lodging; employee of landlord whose occupancy is conditional on the employment; public housing; unauthorised occupants; commercial properties; properties sold through a sale by a trustee (in which actions may only be filed in Superior Court).[1731]

[1728] Title 33, Chapter 19.
[1729] In terms of section 33–2101.
[1730] A.R.S. § § 12–1171 through 1183. https://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/12/01171.htm (Date of use: 28 January 2021). See also https://www.azcourthelp.org/browse-by-topic/eviction/tenant-information/tenant-eviction-resources/eviction-statutes (Date of use: 13 December 2020).
[1731] See https://www.azcourthelp.org/browse-by-topic/eviction/tenant-information/tenant-eviction-resources/eviction-statutes (Date of use: 13 December 2020).

Something uniquely noticeable in both the Arizona Residential Landlord Tenant Act and Arizona Mobile Home Parks Residential Landlord and Tenant Act is that, almost like PIE in South Africa, each has a section prescribing the procedure for special detainer actions (evictions), service and trial postponement, being section 33–1377 and section 33–1485 respectively, notwithstanding the fact that in Arizona there are Rules of Procedure for Eviction Actions (RPEA), to which the attention now turns.

6.3.3.4.2 Secondary legislation: Rules of procedure

In Arizona there are Rules of Procedure for Eviction Actions (RPEA), effective 1 January 2009.[1732] Over the years these rules have undergone various changes, the latest being on 27 August 2019[1733] and 12 November 2019 respectively.[1734] Rule 1 describes the title and scope of the rules.[1735]

Rule 5 regulates the issuance and service of summons and complaint, although it is made clear that summons in an eviction matter is a document separate from the complaint.[1736] Summons is actually the face of the proceedings, outlining technical particulars such as the names of the defendant, court name and address, trial date and time and so forth. The complaint, on the other hand, describes the party claiming entitlement to possession of the property (plaintiff) and the property in question, states the specific reason for the eviction, and must contain a caption in bold print directed to the defendant stating the following:

[1732] Arizona Supreme Court No. R–07–0023 (RPEA). See https://www.azcourts.gov/rules/Recent-Amendments/More-Rules/Rules-of-Procedure (Date of use: 20 April 2016).

[1733] Arizona Supreme Court No. R–19–0018, effective 1 January 2020. See https://www.azcourts.gov/rules/Recent-Amendments/More-Rules/Rules-of-Procedure-for-Eviction-Actions (Date of use: 11 December 2020).

[1734] Arizona Supreme Court No. R–19–0042, effective 12 November 2019. See https://www.azcourts.gov/rules/Recent-Amendments/More-Rules/Rules-of-Procedure-for-Eviction-Actions (Date of use: 11 December 2020).

[1735] Rule 1 provides: "**Rule 1. Title and Scope of Rules**
These rules shall be known and cited as the Rules of Procedure for Eviction Actions ("RPEA"). These rules shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions, which are jointly referred to in these rules as "eviction actions". For purposes of these rules, there shall be only one form of action known as an "eviction action." The Arizona Rules of Civil Procedure apply only when incorporated by reference in these rules, except that Rule 80(i) shall apply in all courts and Rule 42(f) shall apply in the superior courts".

[1736] Rule 5(a).

"YOUR LANDLORD IS SUING TO HAVE YOU EVICTED. PLEASE READ CAREFULLY".[1737]

In essence, the eviction process in Arizona, as informed by the laws and rules, in practice works in the manner hereby outlined. The following must be served with the eviction notice:[1738] a copy of the lease; any addendums related to the cause for the eviction; and six months of accounting records showing charges and payments (if the eviction is founded on non-payment of rent). An eviction action summons and complaint must be served by a constable or sheriff either personally on the tenant or posted and mailed to the tenant by certified mail.[1739] Alternative methods of service, such as posting the notice on the residence or mailing it by certified mail, must be specifically requested and approved by a judge first.[1740] The tenant may file a written answer or answer orally in open court on the record, indicating whether he or she admits or denies the allegations of the complaint. If the court sets a trial date, the tenant may be ordered to file a written answer.[1741] If the court determines that a defence or proper counterclaim may exist, a trial must be ordered.[1742] The only issue at trial is the right of actual possession and there is no inquiry into the merit on title.[1743] Default judgment may be granted against the tenant if he or she is not present in the court when the case is called by the judge.[1744] Stipulated judgments[1745] are granted in those instances where tenants agree that the allegations in the complaint are true, and judgment will be entered against the tenant. A tenant will not be able to offer a defence and cannot appeal from this type of judgment.[1746] As mentioned before, a sheriff or

[1737] Rule 5(b).
[1738] https://www.azcourthelp.org/browse-by-topic/eviction/tenant-information/tenant-eviction-resources/eviction-statutes (Date of use: 13 December 2020).
[1739] Rule 5(f).
[1740] https://www.azcourthelp.org/browse-by-topic/eviction/tenant-information/tenant-eviction-resources/eviction-statutes (Date of use: 13 December 2020).
[1741] Rule 7.
[1742] Rule11(b)(1).
[1743] A.R.S. § 12–1177(A) https://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/12/01177.htm (Date of use: 28 January 2021).
[1744] Rule 13(b)(3) of the RPEA. https://govt.westlaw.com/azrules/Document/N2B1FB430DCF111DDB971F5C1341DE2D7?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default) (Date of use: 28 January 2021).
[1745] Stipulated judgments are covered by RPEA 13(b)(4).
[1746] https://www.azcourthelp.org/browse-by-topic/eviction/tenant-information/tenant-eviction-resources/eviction-statutes (Date of use: 13 December 2020).

constable is the person authorised to execute a writ of restitution by removing all occupants a**n**d their possessions from the dwelling.[1747]

Landlords must therefore carefully follow the rules and procedures required by Arizona law when evicting a tenant; otherwise the eviction may be rendered invalid.[1748] This is particularly so as evictions often occur very quickly, with serious consequences for tenants who may lose a place to live. The rules at least become a shielding device that somehow guarantees that the eviction is justified, also ensuring that the tenant has sufficient time to find a new home.[1749]

At this stage it is worth looking at the eviction laws in the State of Texas in comparison to the system in Arizona.

6.3.3.5 Texas

As is the position with Arizona all the substantive and procedural laws evaluated in this segment play a vital role in the regulation of evictions in Texas occurring in the landlord-tenant context. Evictions are handled by the Justice of the Peace Courts (justice courts) located in various neighbourhood precincts spread around Texas' 254 counties where the property is situated, irrespective of the monetary value at stake.[1750]

Eviction actions are commonly referred to as 'forcible entry and detainer suits'.[1751] At times 'forcible detainer' is also used. Strictly speaking though, 'forcible detainer' applies when an owner seeks to evict a person lawfully in possession (for instance, a tenant); whilst 'forcible entry and detainer' (FED) refers to a situation when a person without legal authority to be on the premises (for example, a

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[1747] A.R.S. § 33–1481(B). https://www.azleg.gov/viewdocument/?docName=http://www.azleg.gov/ars/33/01481.htm (Date of use: 28 January 2021).

[1748] https://www.nolo.com/legal-encyclopedia/the-eviction-process-arizona-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1749] https://www.nolo.com/legal-encyclopedia/the-eviction-process-arizona-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1750] https://www.buildium.com/laws/texas-eviction-laws/ (Date of use: 16 December 2020); and Willis https://lonestarlandlaw.com/residential-evictions-in-texas/ (Date of use: 29 Jan 2021).

[1751] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).

trespasser) refuses to surrender possession.[1752] In practice, these terms are commonly used interchangeably.[1753]

6.3.3.5.1 Primary legislation

Texas eviction laws have evolved with the passage of time. Prior to 2013, Texas was "truly the Wild West of the eviction world, with judges in small claims courts interpreting the laws differently across 254 different counties".[1754] The situation took a turn for the better in 2013 with the advent of a law that compelled landlords and judges to adhere to a more uniform standard and process.[1755]

6.3.3.5.1.1 Texas Property Code

The eviction process is primarily governed by the Texas Property Code, Title 4 Chapter 24.[1756] A landlord must legally terminate the tenancy before filing an eviction lawsuit (also called a forcible entry and detainer suit) upon the tenant's failure to vacate.[1757] If the occupant is a tenant under a written or oral lease and defaults or holds over beyond the end of the rental term or renewal period the landlord must give him or her at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit.[1758] The landlord cannot force a tenant out by shutting off the power or changing the locks, as such 'constructive eviction' is against the law.[1759]

There are certain stipulated service methods and notice procedures which can be evaluated for adoption in the South African eviction regulatory context. For instance, the notice to vacate must be given personally or by mail at the leased premises.[1760] Personal delivery to the tenant or any person living at the premises who is at least 16 years of age or older, or personal delivery to the premises and affixing the notice to the inside of the main entry door is crucial. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt

[1752] Willis https://lonestarlandlaw.com/residential-evictions-in-texas/ (Date of use: 29 Jan 2021).
[1753] Willis https://lonestarlandlaw.com/residential-evictions-in-texas/ (Date of use: 29 Jan 2021).
[1754] https://www.buildium.com/laws/texas-eviction-laws/ (Date of use: 16 December 2020).
[1755] https://www.buildium.com/laws/texas-eviction-laws/ (Date of use: 16 December 2020).
[1756] https://www.texaseviction.com/texas-eviction-laws (Date of use: 13 December 2020).
[1757] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).
[1758] In terms of section 24.005 of the Texas Property Code.
[1759] https://www.buildium.com/laws/texas-eviction-laws/ (Date of use: 16 December 2020).
[1760] Section 24.005(f).

requested, to the leased premises.[1761] Alternatively, a landlord is permitted to deliver the notice to vacate by, amongst others, securely affixing to the outside of the main entry door a sealed envelope that contains the notice and on which is written the tenant's name, address, and the words "IMPORTANT DOCUMENT" all in capital letters.[1762] Once the time stated in the notice to vacate has passed, a landlord can then file a suit to evict in the justice court where the leased property is situated.[1763] The petition for an eviction suit can be filed through eFile[1764] or via a form for the petition obtainable from the relevant court.[1765] In actions whereby a defendant is a member of the military service the citation[1766] required by rule 739 of the Texas Rules of Civil Procedure must include the following notice to the defendant:

SUIT TO EVICT

THIS SUIT TO EVICT INVOLVES IMMEDIATE DEADLINES. A TENANT WHO IS SERVING ON ACTIVE MILITARY DUTY MAY HAVE SPECIAL RIGHTS OR RELIEF RELATED TO THIS SUIT UNDER FEDERAL LAW, INCLUDING THE SERVICEMEMBERS CIVIL RELIEF ACT (50 U.S.C. APP. SECTION 501 ET SEQ.), OR STATE LAW, INCLUDING SECTION 92.017, TEXAS PROPERTY CODE. CALL THE STATE BAR OF TEXAS TOLL-FREE AT 1-877-9TEXBAR IF YOU NEED HELP LOCATING AN ATTORNEY. IF YOU CANNOT AFFORD TO HIRE AN ATTORNEY, YOU MAY BE ELIGIBLE FOR FREE OR LOW-COST LEGAL ASSISTANCE.

Upon the filing of the suit the tenant should be served with papers at least six days before the trial. A sheriff or constable may serve by delivering the papers to the tenant or to a member of the tenant's household who is 16 years or older. If service of the papers has been attempted twice unsuccessfully, a judge can allow service in an alternative method, such as slipping the papers through a mail slot, under the front door, or affixing them to the front door.[1767] In justice court, the tenant is not required to file a written answer but is allowed to do so if he disagrees

[1761] https://www.texaseviction.com/texas-eviction-laws (Date of use: 13 December 2020).
[1762] Sub-section 24.005(f–1)
[1763] Section 24.004 of the Texas Property Code. See also https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).
[1764] Eviction Petition (eFileTexas.gov). Landlords can file for eviction in a Justice of the Peace court via the eFile system, as per https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).
[1765] https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).
[1766] Section 24.0051(c).
[1767] https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).

with the claims in the suit.[1768] Instead of filing an answer, the tenant will have to attend the hearing or risk a default judgment against him. The hearing must be scheduled for no sooner than ten days after the filing of the suit and no later than 21 days. The tenant is allowed the right to request a jury for his hearing at least three days before the trial.

A tenant is allowed to raise defences if the matter eventually proceeds to trial, as to why he or should not be evicted. One of the most popular and successful defences is that the landlord did not follow all the rules when terminating the tenancy.[1769] For instance, the tenant can aver that the landlord improperly served the notice to vacate or failed to wait long enough before filing the eviction lawsuit, and is likely to win the eviction suit, in which case the landlord will be back at square one in any attempt to remove the tenant.[1770] Another possible defence to an eviction action in Texas is a landlord's failure to maintain habitable premises or a landlord's unlawful discrimination.[1771]

However, if the landlord prevails in an eviction suit, he or she is entitled to a judgment for possession of the premises and a writ of possession.[1772] If the court rules against the tenant he or she has an option to appeal before their property is removed from the leased premises. It is illegal for a landlord to take self-help measures to remove the tenant, as the only person allowed do so is an officer of the law, authorised by the judge who ordered the eviction.[1773] In executing the writ of possession a sheriff's deputy or constable will start by posting a note on the door giving the tenant 24 hours to vacate, or else the tenant will be forcibly removed by law enforcement.[1774] An officer executing the writ is allowed, amongst others, to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord. The writ of possession must

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[1768] https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).

[1769] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1770] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1771] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1772] Section 24.0061 of the Code.

[1773] https://www.nolo.com/legal-encyclopedia/the-eviction-process-texas-rules-landlords-property-managers.html (Date of use: 13 December 2020).

[1774] https://www.buildium.com/laws/texas-eviction-laws/ (Date of use: 16 December 2020).

authorise the executing officer, at his or her discretion, to engage the services of a bonded or insured warehouseman to remove and store part or all of the property at no cost to the landlord or the officer executing the writ.[1775] The writ of possession must also contain a notice mentioning that under section 7.003, Civil Practice and Remedies Code, the officer is not liable for damages resulting from the execution of the writ if the officer executes it in good faith and with reasonable diligence.[1776] Furthermore, a sheriff or constable is authorised to use reasonable force in executing a writ.[1777]

Lastly, section 24.007 provides that a final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. Such a judgment may also not be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas[1778] bond in an amount set by the court. In setting the supersedeas bond the county court mustl provide protection for the appellee (respondent landlord) to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem appropriate.[1779]

In summary, the eviction process in Texas can be described in the manner that follows.[1780] The landlord must give the tenant at least three days to move out prior to filing an eviction suit, although the notice period can be shorter or longer based on the lease terms. The eviction hearing cannot take place for at least ten days after the petition is filed. Once judgment has been issued, no further action can take place for five days to give the parties the opportunity to appeal, which is optional. If the tenant files an appeal, the hearing cannot take place for at least eight days. Once there is a final judgment, the landlord can ask the judge for a writ

[1775] Section 24.0061(e).
[1776] Section 24.0061(g).
[1777] Section 24.0061(h).
[1778] A supersedeas bond (often shortened to supersedeas), also known as a defendant's appeal bond, is a type of surety bond that a court requires from an appellant who wants to delay payment of a judgment until an appeal is over. This is a feature of common law, and in particular the American legal system: http://ksd.uscourts.gov/index.php/local-rule/rule-62-2-supersedeas-bonds/ (Date of use: 4 February 2021).
[1779] See also https://www.texaseviction.com/texas-eviction-laws (Date of use: 13 December 2020).
[1780] Based on a Texas State Law Library guide contained in: https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).

of possession. The sheriff or constable must post a 24-hour notice before 'executing the writ' and removing tenant's property from the rented premises. Clearly then, landlords must carefully follow all the rules and procedures required by Texas law when evicting a tenant; otherwise, the court can refuse to issue an order of eviction. An analysis of the applicable rules of procedure now follows.

6.3.3.5.2 Secondary legislation: Rules of procedure

In Texas eviction rules are governed by rules 500 to 510 of the Texas Rules of Civil Procedures for Justice Courts, more specifically by Rule 510 titled 'Eviction Cases', effective from 31 August 2013.[1781] An eviction case is a lawsuit brought to recover possession of real property under Chapter 24 of the Texas Property Code,[1782] often by a landlord against a tenant.[1783] There are rules applicable to lawsuits to recover possession of real property under Texas Property Code,[1784] including those concerned with petitions in eviction suits, and with what must be contained therein.[1785] For instance, a petition in an eviction case must be sworn to by the plaintiff and must contain certain descriptions, including the address, if any, of the premises that the plaintiff seeks possession of; the facts and the grounds for eviction; and when and how notice to vacate was delivered.[1786] In addition, the total amount of rent due and unpaid at the time of filing, if any is required. A court must adjudicate the right to actual possession and not title.[1787] This confirms that the institution of eviction proceedings is not only limited to holders of title deeds in land. Counterclaims and the joinder of suits against third parties are not permitted in eviction cases. A claim that is not asserted because of this rule can be brought in a separate suit in a court of proper jurisdiction.

Part of the information that must be in the papers served on the tenant when a landlord initiates an eviction suit includes the timeframe for the hearing that must

[1781] https://www.texasrealestate.com.uploads/files/presentations/EvictionsMadeEasy.ppt (Date of use: 30 November 2020).
[1782] http://statutes.legis.state.tx.us/Docs/SDocs.PROPERTYCODE.pdf (Date of use: 5 December 2020).
[1783] According to Rule 500.3 (d).
[1784] Rule 510.
[1785] Rule 510.3.
[1786] Rule 510.3(a). This is in addition of the requirements of rule 502.2.
[1787] Rule 510.3(e).

not be sooner than ten days after the petition is filed but not later than 21 days.[1788] Alternative methods for service of the eviction suit papers[1789] are also catered for.[1790] A tenant may file an answer to the petition in an eviction suit, but is not required to do so.[1791] The tenant is also allowed to request a jury for the eviction hearing.[1792] The allegations of the petition must be taken as true and judgment by default must be rendered in favour of the plaintiff if:

- the petition contains all required information;
- the defendant fails to appear at trial;
- no answer was filed before the case was called for trial;
- proof of service has been filed;[1793] and
- the plaintiff has filed the required military service affidavit and the court is not barred from granting a default judgment under the Servicemembers Civil Relief Act.[1794]

Once again, a clear feature of these rules is that although they do govern the procedure for evictions in Texas, they nevertheless seemingly share this role, to a certain extent, with other legislative instruments discussed above, in a complementary manner. Therefore, a positive and encouraging factor in this regard is that it does seem possible for a dedicated set of eviction rules to co-exist with legislation designed to regulate evictions in the residential sphere. This factor can be considered when uniform eviction rules are designed in South Africa.

6.3.4 Summary

It seems clear that in the US evictions generally occur in the areas of foreclosures and landlord-tenant disputes, but the word 'eviction' is largely applied in the landlord-tenant context. Fox contends that eviction is a national humanitarian

[1788] Section (a) of rule 510.4. This section governs suits in the justice court and regulates the requirements for what information must be in the papers served on the tenant when a landlord initiates an eviction suit.

[1789] See also https://guides.sll.texas.gov/landlord-tenant-law/eviction-process (Date of use: 16 December 2020).

[1790] These are described in sections 510.4(b) and (c).

[1791] Rule 510.6.

[1792] Rule 510.7.

[1793] Proof of service has been filed in accordance with rule 510.4.

[1794] See Evictions Deskbook – Texas Justice Court Trainer Centre, November 2017: https://gato-docs.its.txstate.edu/jcr:39f24876-3e91-4f39-bf30-b0b32e12e6a0/Evictions%20Deskbook.pdf (Date of use: 16 December 2020).

crisis, advocating for US laws and court processes to be reformed to acknowledge the fundamental right of housing.[1795]

The legal system in the USA is divided into federal laws and courts on the one hand and state laws and courts on the other. The Constitution and Congress laws specifically reserve certain powers to the federal government, whilst powers not specifically designated to the federal government fall to the individual state governments.[1796] Therefore, each state is responsible for making its own laws that are important to it, although such state laws cannot conflict with or violate the Constitution.[1797] A federal law such as the Servicemembers Civil Relief Act of 2003 (SCRA) for instance is of great significance to individual states, as it provides protections to military members going through foreclosure and eviction challenges.

States, including Arizona and Texas, enjoy autonomy to legislate within their jurisdictions on various spheres of the law, of which eviction is one. Laws governing foreclosures in Arizona are found in Title 33, Chapters 6 and 6.1 of the Arizona Revised Statutes (A.R.S), whilst in Texas the Texas Property Code Chapter 33 contains the general applicable provisions.

Landlord-tenant disputes in the US are governed by federal law, state law, local law, leases, the common law, and court rules. In the various states local court rules play a significant role in the eviction process, prescribing management procedures that influence the length of time it takes landlords to evict unwanted tenants.[1798] Evictions are generally triggered by three basic reasons, namely: non-payment of rent; non-trivial violations of lease agreements; and expired leases.

In Arizona applicable legislation comprises the Arizona Residential Landlord Tenant Act, the Arizona Mobile Home Parks Residential Landlord and Tenant Act and others, whilst in Texas the eviction process is mainly regulated by the Texas Property Code, Title 4 Chapter 24. In addition, the Rules of Procedure for Eviction Actions, effective 1 January 2009 are applicable in Arizona, whereas in Texas

[1795] Fox 2020 *Mitchell Hamline Law Journal of Public Policy and Practice* 32–33.

[1796] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021); and https://www.azcourts.gov/juryduty/Types-of-Courts (Date of use: 31 January 2021).

[1797] https://study.com/academy/lesson/the-state-court-system-of-the-united-states-definition-structure.html (Date of use: 31 January 2021).

[1798] https://www.law.cornell.edu/wex/eviction (Date of use: 5 December 2020).

eviction rules are governed by rules 500 to 510 of the Texas Rules of Civil Procedures for Justice Courts, more particularly by Rule 510 titled 'Eviction Cases', effective from 31 August 2013.

Significant to this study is that although the specified rules in both states do govern the procedure for evictions, they nevertheless share this role efficiently with other legislative instruments discussed above, in a complementary way. This aspect augurs well for any envisaged eviction rules in South Africa.

6.4 Conclusion

A distinctive feature in the legal systems of South Africa, the UK and the USA emanating from the above discussion is that all of them seek to conform to international human rights standards, particularly in the spheres of security of tenure, housing rights and evictions. Secondly, the evaluation of the relevant legal processes and regulatory frameworks in the UK and the US firmly illustrate and confirm that it is indeed possible, and perhaps desirable, to have a set of laws and procedural rules dedicated specifically to the governance of eviction matters. The laws should avoid any possible inhumane consequences of evictions, whilst at the same time seek to safeguard the interests of property owners or landlords.

The UK Housing Act, 1988 was passed to regulate residential tenancies in England and Wales, and introduced assured tenancies and assured shorthold tenancies in the privately rented and social housing sector.[1799] This distinction seems undesirable and complicates the regulatory framework. It would be better, both from administrative and regulatory angles, to have a uniform type of tenancy wherein security of tenure is guaranteed for all. In that way leases and evictions associated therewith can be effectively regulated through a simplified, harmonised set of primary and secondary legislative prescripts. This will do away with a process whereby two types of eviction notices may be served by landlords under the HA, namely:

- section 8 notice – a prerequisite notice if the landlord of an assured tenancy wishes to end the lease (even prior to its expiry) and obtain a possession order from the court; and

[1799] www.netlwaman.co.uk>Acts of Parliament (Date of use: 16 October 2020).

- section 21 notice – recovery of possession on expiry or termination of assured shorthold tenancy.

A feature that is common to the Housing Act, Protection from Eviction Act and the Deregulation Act in the UK, the Arizona Landlord and Tenant Act and the Texas Property Code in the USA is that they all aim to root out unlawful evictions, prohibit the harassment of tenants and eliminate constructive evictions (whereby tenants are forced to vacate premises due to unbearable living conditions exerted by landlords). More or less similar provisions are also contained in the relevant South African laws such as PIE, REHA, ESTA and the LTA.

Another noteworthy aspect is that in the legal systems of both the UK and US applicable primary legislation is complemented by procedural rules regulating repossessions and evictions. This confirms two things. First, the inclusion in primary legislation of provisions that prescribe procedural aspects concerning the commencement and conducting of eviction proceedings as well as the execution of ejectment orders is not a bar to the development of court rules dedicated to various aspects in the eviction process. Secondly, both substantive eviction laws and rules can indeed be mutually inclusive harmoniously to the benefit of prospective litigants.

In the UK in particular, the eviction rules are categorised into two of the separate spheres in which evictions occur, namely: landlord-tenant rentals and mortgage foreclosures. As mentioned earlier on in this chapter,[1800] the Financial Conduct Authority (FCA) issued the *Mortgages and Home Finance: Conduct of Business Sourcebook* (MCOB) in 2003, enabled by provisions of the Financial Services and Markets Act. It consists of rules that govern the relationship between mortgage lenders and borrowers. Included in these rules is MCOB 13, which specifically regulates arrears and repossessions of and evictions relating to mortgaged properties. The connotation then would be that as an alternative to having one uniform set of rules covering all eviction spheres there can be separate sets of rules regulating the different areas of evictions, also informed also by pertinent legislative instruments.

[1800] Under paragraph 6.2.2.5 above.

In the US a 2003 federal law, the Servicemembers Civil Relief Act (SCRA), imposes certain procedural requirements in all civil cases (including eviction cases) to protect members of the armed services and their families. These requirements apply to any court of any state, including the States of Arizona and Texas discussed herein. As illustrated, the SCRA imposes special requirements prior to entering a default judgment in any case (including an eviction matter) in which the defendant fails to make an appearance, in order to protect military service members. In certain instances the court must grant a stay of proceedings for a minimum of 90 days. It would therefore seem prudent to include related special dispensation for national army personnel in eviction laws and rules in South Africa.

Following upon this comparative evaluation of the regulatory framework for evictions in these foreign jurisdictions it is now ideal to analyse the angles and areas covered in the various chapters of this study and unpack the findings or conclusions emanating from them. This will be done with a view to making appropriate recommendations concerning the possibility of the development of uniform procedural eviction rules, for use in South African civil court proceedings. All of this is contained in chapter 7, which follows.

Chapter 7: Conclusions and recommendations

7.1 Introduction

The aim of this study was, broadly, to investigate, from a procedural perspective, the necessity and feasibility of introducing stand-alone uniform eviction court rules to regulate eviction suits from the commencement stage up to the execution of eviction orders in South Africa. The hypothetical premise around which the study revolves is that there is no comprehensive set of court rules regulating evictions in South Africa, notwithstanding the existence of substantive laws pertinent to evictions. Should any inadequacies in this regard be validated by the research findings, then the secondary objective of the study concentrated on developing mechanisms towards improving shortcomings. This necessitated, amongst others, a rigorous examination of the current procedural prescripts regulating the general conduct of eviction proceedings in civil courts. Moreover, a detailed analysis of the constitutional background, legislation and cases on evictions pre- and post-Constitution in South Africa was required. Reference to and analysis of laws as well as procedures on evictions in selected foreign jurisdictions was also vital.

The nature of the study therefore required an evaluation and in-depth research of the provisions of South African eviction-related legislation (including the LTA, ESTA, PIE and REHA), other relevant laws, the common law, case law, the South African civil procedural system as well as a comparative legal analysis of the position in the UK and USA.

Prescripts of substantive eviction-related laws are presently incorporated or infused in some civil procedural laws and practice directives regulating eviction proceedings in South African courts but to a very limited, unsatisfactory extent, thus leaving room for the creation of a uniform regulatory framework.

The research sought to address the questions set out below:

(a) Do the procedural laws, inclusive of court rules, adequately and comprehensively regulate eviction litigation uniformly in both the high courts and lower courts? This question is asked in view of the fact that in South Africa currently there are no clear-cut, straightforward court

rules to commence and finalise evictions in both the High Court and the Magistrates' Courts. Instead, eviction proceedings are conducted by using the general court rules of procedure. Moreover, both the action (trial) and motion (application) procedures are used interchangeably when launching eviction proceedings as the current court rules seem silent in this regard. Such a state of affairs may be confusing and undesirable, particularly when viewed from an angle of an ordinary, non-sophisticated litigant.

To answer this question, the current laws and rules underpinning court procedures for evictions were evaluated,[1801] together with applicable case law. A historical analysis of the common law and legislative principles informing procedures through which eviction proceedings were conducted in the pre-democratic era was made.[1802] In the process, relevant court decisions were also considered. Selected foreign jurisdictions were examined on a comparative basis.[1803] Developments in the international human rights sphere pertinent to the issues covered in the study were also looked at.[1804]

(b) To what extent are the provisions of statutes dealing with evictions accommodated in the existing civil court rules?[1805] To deal with this question, the historical context informing the enactment of the present eviction legislation was investigated.[1806] In the process, the eviction laws preceding PIE and related statutes, relevant constitutional provisions and case law were examined.[1807] Then a systematic evaluation of the provisions of PIE and those of incidental laws was conducted, simultaneously juxtaposing pertinent provisions and concomitant judicial pronouncements against provisions of the prevailing court rules and practice directives. The aim was to gauge

[1801] In chapter 2.
[1802] In chapter 4.
[1803] In chapter 6.
[1804] In chapters 1, 3 and 6.
[1805] Statutes which include the LTA; ESTA; PIE; and REHA.
[1806] In chapters 3 and 4.
[1807] Pre-democratic era laws that were analysed in this regard include PISA, the Group Areas Acts, the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977.

the proportions to which the court rules and practice reflect synergy with the provisions of the LTA, ESTA, PIE, REHA and other applicable statutes respectively, as developed or interpreted by case law.

(c) Is there room for improvement of procedural laws in the institution, execution and conclusion of eviction proceedings? Increasing the infusion of eviction-law prescripts in civil court rules is necessary for practical, efficient usage by prospective litigants in the advancement of rights. Throughout the study this prospect was evaluated. In the process of addressing this question an examination of judicial pronouncements or recommendations in our courts was made, and similarly extended to developments in selected jurisdictions. This was to extrapolate lessons that can be learnt, from a South African legal context.

(d) If room for improvement is indeed found to exist the question that follows is what recommendations can be made towards the effective litigation of eviction matters? Further, if the development of a uniform set of eviction rules is amongst those recommendations, what should be included in such rules? The development of uniform eviction rules is indeed recommended. The fundamental procedural elements that can be included in the suggested eviction rules are also recommended below. However, as stated previously,[1808] it is beyond the scope of this study to design model eviction rules, due to the vast nature of areas likely to be traversed in any such suggested rules, judging by the magnitude and content of the four main eviction-related Acts, which are the LTA, ESTA, PIE and REHA.

7.2 Findings and conclusions

An analysis of jurisdictions in South Africa, UK and certain states in the USA confirms that formats can be extracted for gainful and flexible adoption in the South African legal context that can contribute to the development of unique eviction court rules. Only the stated foreign jurisdictions are selected at this stage,

[1808] In chapter 1.

as it is beyond the scope of this study to conduct research of all foreign jurisdictions having stand-alone uniform eviction rules. The reasons and basis for selecting the specific foreign jurisdictions were outlined in chapter 1.

The main findings that can be extracted are contained in the following paragraphs.

7.2.1 Existing civil procedural laws and rules

Chapter 2 entailed an **examination of the existing civil procedural laws and rules** of the High Court, Magistrates' Courts and Land Claims Court of South Africa, particularly in relation to execution processes against immovable property. These are: the Superior Courts Act; the High Court Rules; practice directives of the respective divisions of the High Court; the Magistrates' Courts Act; and the Magistrates' Courts Rules. The nature of practice directives of the regional divisions of the Magistrates' Courts was briefly touched on, although they currently do not directly regulate specific eviction-related matters.

Evictions emanating from sales of immovable property were therefore discussed in the context of the mentioned laws and rules informing such sales and other preceding execution processes. The extent to which these laws and rules incorporate or embrace eviction-law principles was analysed. The procedural laws in the different courts were examined mainly from an evictions-regime perspective: essentially touching on the processes preceding or building-up to evictions, namely: (1) summons; (2) judgment: for payment of debt; (3) order declaring immovable property executable; (4) writ of execution; (5) attachment; and (6) sale in execution. This analysis confirmed that currently there are no procedural laws directly or exclusively dedicated to evictions across all spheres in South Africa. Instead primary legislation, such as the Superior Courts Act and the Magistrates' Courts Act, together with the rules of the various courts mainly regulate execution processes against immovable property, which frequently culminate in eviction actions and orders.

Case law, including judgments in matters such as *Saunderson*, *Mortinson*, *Gundwana* and *Jaftha*, has contributed to amendments being introduced to execution rules such as High Court rules 31 and 46 (and corresponding

Magistrates' Courts rule 43 by association); Magistrates' Courts rule 5(10); and changes to section 66(1)(a) of the Magistrates' Courts Act.

Practice directives of the various High Court divisions also endeavour to supplement court rules and implement judicial pronouncements concerning execution processes incidental to evictions, and offer some practical guidelines, albeit in a disjointed fashion. The disjuncture is occasioned by the fact that there are different practice directives for different provincial divisions of the High Court, so the directives are not always uniform even on execution against immovable property. As previously observed, the practice directions of the Gauteng High Court divisions regulate execution and eviction related matters in the most comprehensive manner, from which much can be learnt in other provinces. For example, practice directions 15.10 and 15.7 of the Pretoria and Limpopo Division elaborately cover evictions in terms of PIE. Similarly in the Johannesburg Local Division practice directive 10.9 also deals with PIE evictions. In addition, the Johannesburg Local Division practice manual designs specimen or draft orders attached for the guidance of legal practitioners, which must be adapted to meet the exigencies of each case. These specimen orders cover various stages of evictions under respective sections of PIE. The four specimen orders are in respect of:[1809]

- order for substituted service of the main application papers and the PIE Act's section 4(2) notice;
- order for the authorisation of a section 4(2) notice;
- notice in terms of section 4(2); and
- order of eviction under section 4(8).

Furthermore, the Johannesburg Local Division practice directive 10.17 is extremely helpful as its elements can arguably contribute immensely to the development of uniform eviction rules. It is uniquely dedicated to the aspect of foreclosure (and execution when property is, or appears to be, the defendant's primary home). It is based on various judgments, including *Saunderson*, *Jaftha*, *Folscher*, *Mortinson*, *Sebola*, *Petersen*, *Ntsane*, *Rossouw*, *Gundwana* and *Lekuku*. Amongst others, it requires that in every matter where a judgment is sought for

[1809] Van Loggerenberg *Erasmus Superior courts practice*, Vol. 3, H3–144D/144F.

execution against immovable property, which might be the defendant's primary residence or home, an affidavit should be attached to the Notice of Set Down. The required details to be set out in the specimen affidavit stated in directive 10.17.1 are specified and include:

- confirmation of compliance with the judgments in *Saunderson*, *Jessa* and *Dawood*;
- relevant factors for consideration by the court as suggested in *Mortinson*, *Folscher* and *Lekuku*;
- manner of service of court process to the judgment debtor; and
- the sheriff's return of service reflecting the documents relied on by the judgment creditor as attached and served together with the court process.

The court decisions cited in practice directive 10.17 significantly protect the interests of execution debtors who are exposed to the risk of being evicted from their erstwhile homes, and advance the values enshrined in the Constitution. For instance, the court in *Dawood* held that summons where execution against immovable property is sought should contain a notice alerting the debtor, amongst others, that in terms of section 26(3) of the Constitution he or she may not be evicted from their home nor may their home be declared executable and sold in execution without an order of court made after considering all the relevant circumstances.[1810] Such summons should also inform the debtor that in terms of High Court rule 46 no writ of execution can be issued against the debtor's primary residence (that is, his or her home) without a court order made after consideration of all relevant circumstances, including his or her own submissions.[1811] The conclusion to be drawn from this is that it would be most ideal if this type of an injunction were not only contained in a practice directive, general court rule or a court judgment but transparently amongst a set of uniform rules specifically dedicated to evictions. This conclusion is fuelled by the fact that currently procedural aspects impacting on evictions and beneficial to defendants still remain obscured amongst a rubric of laws, rules and practice directives meant for litigation of general categories of disputes (including but not limited to evictions).

[1810] *Dawood* [37].
[1811] *Dawood* [37].

Eviction-related rules, including execution processes against immovable properties, are not a unique, stand-alone feature presently but are currently lumped amongst bulk court rules. A separate procedural system for conducting eviction cases in various courts seems most desirable.

7.2.2 Old-order legal framework regulating evictions

Unlike the situation in the current constitutional democracy, **in the past evictions were governed arbitrarily through draconian laws**, without consideration of any relevant circumstances or appropriate judicial oversight. The common-law principles, particularly the *rei vindicatio* remedy and oppressive legislation, existed side by side and were applied in a racially discriminatory manner during *apartheid*. There existed a plethora of land laws advancing and fulfilling wicked state-contained procedural directives stipulating steps to be followed when evicting. Such directives were not contained in specific, self-standing civil court eviction rules. Instead, even criminal courts could sanction evictions upon convicting a person for trespassing, squatting in a demarcated racial group area and so forth. Laws such as the Group Areas Act at some stage even divested courts of their discretion to punish land invaders or unlawful occupiers with eviction orders upon conviction, which offenders were mostly Black people. Legislation permitted the execution of such eviction orders even in instances where convicted people sought to appeal. Methods of eviction varied depending on the specific legislation applicable. Litigants could choose a specific statute to invoke when evicting, and merely had to rely on the actual legislative section contravened. Constitutional provisions such as those in sections 25 and 26 were adopted against this background, geared towards the advancement of human rights in the democratic era.[1812]

7.2.3 Constitutional directives on evictions

The provisions of section 26 of the South African Constitution, as interpreted in various judgments such as *Jaftha, P E Municipality* and *Gundwana*, are primarily aimed at alleviating homelessness by prescribing the right of access to adequate housing, at the state's expense, and prohibiting arbitrary evictions. As correctly

[1812] *Port Elizabeth Municipality* [10].

indicated by Muller, the inclusion of this right in the Constitution marked a decisive break with the past unscrupulous practices, and the eviction laws experienced a paradigm shift to a position where factors pertaining to personal circumstances of unlawful occupiers and potential hardships that may be triggered by evictions now stand at the forefront of the enquiry into the justice and equity of the eviction.[1813]

The discussion in chapter 3 confirmed that the Constitution recognises the intricate relationship between land rights, the right of access to adequate housing and of not being arbitrarily evicted, through both sections 25 and 26. Sachs J's articulation that the stronger the right to land, the greater the prospect of a secure home, remains significantly relevant to this day.[1814]

As stated in *Kendall* and various other cases the aim of section 26(3) and any legislation promulgated in advancement of the provisions of that section is to provide tenure security, whilst also remembering that no owner may be arbitrarily deprived of property as stipulated in section 25 of the Constitution.[1815]

7.2.4 Present-day legal framework on evictions

Roux's view is that post-*Ndlovu,* the common law has very little application in eviction proceedings because other legislation is applicable. As such, the LTA, ESTA, PIE and REHA feature prominently,[1816] being legislation aimed at the advancement of values enshrined in sections 25 and 26 of the Constitution, and pertinent in the spheres in which evictions mostly occur. Procedural prescripts and requirements in the stated legislation introduce new features not hitherto contained in the current civil court rules, resulting in the Acts themselves, rather than the rules, being reference points whenever eviction proceedings are sought to be launched or opposed.

Therefore, the conclusion here is that any envisaged eviction rules in South Africa ought to take cognisance of and seek to advance those laws or their values and objectives, including the constitutional values enshrined mainly in sections 25 and 26. Amongst such legislation, the most significant is PIE, which was adopted with

[1813] Muller *The impact of section 26 of the Constitution 154*.
[1814] *Port Elizabeth Municipality* [19].
[1815] *Kendall* 64.
[1816] As discussed in chapter 5.

the manifest objective of overcoming past abuses and ensuring that evictions in future take place in a manner consistent with the values of the new constitutional dispensation.[1817] Features drawn from and specific to each of the four main eviction-related statutes capable of playing a significant role in the development of a set of eviction rules will now be highlighted.

7.2.4.1 Procedural features specific to individual statutes

The LTA, ESTA, PIE and REHA each contain features unique to those specific statutes. Some of these unique features can be highlighted for inclusion in a uniform set of eviction rules.

7.2.4.1.1 LTA

It is not common that a person being evicted is compensated by the one evicting. Yet, with the LTA the court granting an eviction must also order the farm owner to pay a just and equitable compensation to the labour tenant.[1818] Because of the unique situation of labour tenants, in determining what would constitute a fair compensation the court must consider factors :comprising: (1) the replacement value of structures and improvements to be demolished by the labour tenant; (2) the value of materials which may be removed; and (3) circumstances giving rise to the eviction.[1819] The eviction order can otherwise not be executed until payment of the compensation due.[1820] The labour tenant being evicted can also be allowed a fair time to tend a crop to which he or she is entitled, and thereafter reap and remove it upon ripening.[1821]

The farm owner must also give the labour tenant and the Director-General of the DALRRD at least two months' written notice of the intended eviction.[1822] Such a

[1817] *Port Elizabeth Municipality* [11].
[1818] Section 10(1)(a).
[1819] Sections 10(2)(a)–(e) list all factors to be considered by the court .
[1820] Section 10(3).
[1821] Section 10(1)(b(ii)). In terms of section 10(1)(b)(i) the court may order the farm owner to allow the labour tenant being evicted a fair chance to "demolish such structures and improvements as were erected by the labour tenant and his or her associates or predecessors, and to remove materials so salvaged".
[1822] Section 11(1).

notice will then compel the Director-General to convene a meeting during the two-month period aimed at attaining some sort of a settlement between the parties.[1823]

7.2.4.1.2 ESTA

Similar to the LTA, but distinct from PIE and REHA, ESTA also mandates the court making the eviction order to prescribe just and equitable compensation to the occupier, payable by the landowner or person in charge, in appropriate circumstances, for structures erected plus improvements made and any standing crops planted on the land.[1824] The occupier may also be allowed a fair opportunity to demolish the structures and improvements erected on the land, and to tend standing crops until they are ready for harvesting and removal.[1825] An occupier being evicted should also be paid outstanding wages and benefits which may be due in accordance with applicable labour laws.[1826] The carrying out of the eviction order remains prohibited until compensation due has been paid, except if satisfactory guarantees for such payment have been made.[1827]

A feature unique to ESTA,[1828] but included in PIE[1829] as well, is that during the execution of an eviction order (including a removal or demolition order) the sheriff is allowed to be assisted by any person, as long as the sheriff remains present at all times during such eviction, demolition or removal. This is crucial and helpful particularly in those instances where resistance to eviction is encountered or anticipated. Magistrates' Courts Rules also allow sheriffs to call for police help where necessary during the service or execution of court process.[1830] Eviction rules in the foreign jurisdictions discussed in the previous chapter also cater for this situation. It is a feature that can be considered for inclusion in any envisaged eviction rules in South Africa.

In two provisions ESTA shows that uniformity is required in eviction proceedings. First, it provides that, upon termination of the right of residence the owner or

[1823] Section 11(3).
[1824] Section 13(1)(a). Section 13(2) sets out aspects to be considered when determining a just and equitable compensation, including the value of materials and crops.
[1825] Section 13(1)(c).
[1826] Section 13(1)(b).
[1827] Section 13(3).
[1828] Section 12(3).
[1829] Section 4(11) of PIE.
[1830] Rule 8(2) of the Magistrates' Courts Rules. See chapter 5, paragraph 5.4.2.

person in charge ought to have first given at least two months' written notice of the intention to obtain an eviction order to the occupier and the municipality within which the land in question is situated, containing the grounds for the envisaged eviction.[1831] However, the Act gives an alternative option whereby the notice "*to obtain an eviction order*" can be dispensed with by giving a notice of "*application to court*" instead to the occupier, the municipality and the head of the relevant provincial office of the DALRRD. This must occur not less than two months before the date of the commencement of the hearing of the application.[1832] The requirements for this alternative notice are convoluted, and can potentially confuse prospective litigants. Instead, it is best to have one uniform type of notice of intention to evict followed by the actual application for eviction. Alternatively, the termination of the right of residence can be followed by a direct application to court for eviction delivered two months before the anticipated date of the court hearing. The litigation process can thus be simplified and shortened. These are elements that can be streamlined and adequately taken care of by uniform eviction rules of court.

Secondly, ESTA contains the unsatisfactory element of the distinction between *effective-date* occupiers and *future* occupiers, as well as the different protections accorded.[1833] It is desirable that such categorisation of occupiers be eradicated from legislation, to avoid inclusion in the envisaged eviction rules

7.2.4.1.3 PIE

There are some factors to be considered when designing future eviction rules, or when amending PIE. Those that stand out include the fact that PIE applies to proceedings for eviction against unlawful occupiers in respect of land nationally, whereas ESTA and LTA are mainly aimed at protecting rural or peri-urban occupiers and farm labour tenants respectively from unfair evictions.

Some of PIE's provisions should be articulated in a more comprehensive manner. For example, in *Cape Killarney* it was held that section 4(2) could have been more

[1831] Sections 9(2)(d)(i) and (ii). In addition, section 9(2)(d)(iii) requires that such notice should also have been sent to the head of the relevant provincial office of the DALRRD, for information purposes.
[1832] Proviso to section 9(2)(d).
[1833] As discussed in chapter 5.

clearly phrased to express the legislature's intention that the contents and the manner of service of the notice contemplated therein must be authorised and directed by an order of the court concerned.[1834]

An 'unlawful occupier' is basically a person who occupies land without the consent of the owner or *person in charge* or without any other right in law to occupy such land. However, the categories of people or the nature and extent of legal authority required to qualify such non-owners to be 'in charge' is not described in PIE.[1835] Instead, case law has established that persons in charge will include holders of limited rights[1836] registered against the land that permit occupation or the right to control entrance into land.[1837] However, defined categories of *persons* to be regarded as being 'in charge' within the Act itself would be helpful, rather than leaving it to the courts' interpretation. The same applies for a direct elucidation in the Act itself that it applies only to dwellings rather than commercial properties, as more clearly explained below.[1838]

A concern around PIE[1839] pertains to the provisions relating to unlawful occupation for less or more than six months – sections 4(6) and 4(7) – and whether it is still relevant to differentiate between the two. In *Mooiplaats* the court found that although the distinction between these sections is important, it is nevertheless not decisive to the justice and equity enquiry.[1840] The Constitutional Court has effectively poured cold water on the distinction between occupiers who have been in unlawful occupation for more or less than six months.[1841]

7.2.4.1.4 REHA

Some of the aspects of REHA that are relevant to note in the context of establishing uniform eviction procedures are the following: REHA introduces Rental Housing Tribunals to investigate or adjudicate landlord-tenant complaints or

[1834] *Cape Killarney* [11].
[1835] Parker and Zaal 2018 *THRHR* 289. See the discussion in chapter 5.
[1836] Such as personal servitudes, including *habitatio*, usufruct or *usus*, as held in *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA) and *October v Hendricks* 2016 (2) SA 600 (WCC).
[1837] Parker and Zaal 2018 *THRHR* 297.
[1838] See paragraph 7.2.4.3 below.
[1839] Discussed in chapter 5.
[1840] *Mooiplaats* [15]–[16].
[1841] See "Evictions and alternative accommodation in South Africa" www.seri-sa.org › images › Evictions_Jurisprudence_Nov13 (Date of use: 22 March 2020).

disputes. However, these tribunals do not have jurisdiction to hear applications for eviction orders,[1842] and will in the future be compelled to refer any matter relating to evictions to a competent court within 30 days of receipt of a complaint.[1843] A ruling by a tribunal is equivalent to an order of a Magistrate's Court.[1844] Significantly, once a complaint has been lodged with the tribunal, until it has made a ruling on the matter or a period of three months has elapsed, whichever is the earlier, the landlord may not evict any tenant subject though to the tenant continuing to pay due rental.[1845] However, upon termination of the lease in accordance with the provisions of REHA, the landlord can approach a court for an eviction order, whereafter the principles created in case law will become applicable.[1846] Although REHA seems to have had a limited impact on eviction proceedings,[1847] it still plays a significant role in landlord-tenant disputes which often culminate in evictions.

7.2.4.2 Procedural features common to different eviction-related statutes

THE LTA, ESTA, PIE and REHA contain important provisions that are common to some or all of them. These could be rationalised and applied as part of a set of uniform eviction rules.

7.2.4.2.1 Urgent eviction applications

Procedures for urgent eviction applications are a feature common to the LTA, ESTA and PIE, and would also have to be incorporated in any uniform set of eviction rules. The significance of urgent application procedures is evidenced by the fact that they also form part of the existing civil court rules. The LTA, ESTA and PIE allow the landowner or person in charge to bring an urgent application for the eviction of an unlawful occupier pending the outcome of proceedings for a final order.[1848] The *Groengras Eiendomme* case is one illustration of an urgent eviction application in terms of section 5 of PIE. Similarly, in both the High Court and

[1842] Section 10(14).
[1843] This new provision is contained in section 13 of the Rental Housing Amendment Act 35 of 2014 (not yet in operation).
[1844] Section 13(13).
[1845] Section 13(7)(a)–(b).
[1846] Maass *Tenure security* 157.
[1847] Maass *Tenure security* 157.
[1848] As mentioned in chapter 5.

Magistrates' Courts, if the court is satisfied that the matter is indeed urgent it may dispense with the ordinary court procedures and grant appropriate relief expeditiously.[1849] It is therefore possible to have cross-references and inter-action in this regard between envisaged eviction rules and ordinary civil court rules, ensuring uniformity in procedure where appropriate.

7.2.4.2.2 Mediation

Mediation in eviction matters is a necessary element that features through all focal legislation, namely the LTA, ESTA, PIE, and REHA. A conclusion to be drawn in this study is that mediation should form part of recommended eviction rules, particularly as it can assist in avoiding costly and protracted litigation. An example is PIE, which provides for a voluntary mediation process that may be initiated either by a municipality under whose jurisdiction the land falls although not owned by it or the designated provincial MEC if the land is owned by the municipality.[1850] In *Jackpersad* a mediated settlement had been achieved following the initial lodgement of a complaint with a Rental Housing Tribunal against a rental increase, in terms of section 13 of REHA, the validity of which settlement had been upheld by the court.[1851] Mediation also features in some pertinent proposed legislative amendments. For instance, the Extension of Security of Tenure Amendment Act proposes the insertion of a clause allowing the court to grant an eviction order where mediation or arbitration efforts have failed.[1852] As highlighted in chapter 5, courts have also encouraged mediation, meaningful engagement or negotiated settlement in eviction matters, especially where state organs are parties to the proceedings. *Port Elizabeth Municipality*; *Schubart Park*; *Joe Slovo* Community; *Occupiers of 51 Olivia* Road, and so forth are some of the judgments that come to mind. Meaningful engagement can still prevail and play a pivotal role even during the relocation process subsequent to the issuing of an eviction order. *Schubart Park* confirmed that engagement should take place at every stage of the eviction (and housing) process.[1853]

[1849] High Court rule 6(12)(a) and Magistrates' Courts rule 55(5)(a).
[1850] Section 7, discussed in chapter 5.
[1851] *Jackpersad* 525–527.
[1852] This refers to both sections 10(1) and 11(2) of ESTA. Sections 5 and 6 of the Extension of Security of Tenure Amendment Act 2 of 2018 (not yet in operation).
[1853] *Schubart Park* [51].

7.2.4.2.3 Specific type of procedure to use in instituting eviction proceedings

Another aspect not directly or clearly spelt out in the four eviction-related statutes is the **specific type of procedure to use in instituting eviction proceedings**. In civil procedure matters can be brought to court using either the motion (application) route in which evidence is contained in the parties' respective affidavits or the action (trial) method whereby evidence is led *viva voce*.[1854] As elaborated upon in chapter 5, it is always best to specify the type(s) of procedure to be used or whether litigants can invoke either one, instead of leaving it to interpretation. As an example, although the LTA fails to directly specify it the 'applications' procedure is the preferred method mentioned in most of its provisions.[1855]

Further, PIE does not specifically prescribe the usage of either application or motion proceedings. This would therefore mean that, in view of the definition of 'court', the rules of either the High Court or Magistrates' Courts are applicable. This conclusion finds support in provisions of the Act, such as those contained in section 4(3), which also stipulates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.[1856] With regard to REHA and landlord-tenant disputes, in terms of proposed amendments, where the tenant fails or refuses to vacate the dwelling after termination of the lease, the landlord has the right to evict the tenant after having obtained an order of court in accordance with PIE.[1857] The significance of such a provision is that it confirms the applicability of PIE to landlord-tenant disputes, and thus creates much needed certainty. In addition, the Constitutional Court ruling in *Occupiers of*

[1854] As indicated in chapter 2.

[1855] Section 6 of the LTA is titled 'Application of eviction', though the Act itself does not clearly specify whether proceedings should be launched via the action or motion procedure or interchangeably. In section 9(3) "may apply to the Court" is used; section 15 says "may make urgent application", thus favouring motion proceedings; whilst the "applications" procedure is the preferred method throughout Chapter 3 of the Act.

[1856] In *Cape Killarney* [13] the court was of the view that for purposes of an application in the High Court, such as the one under consideration, section 4(3) of PIE requires that a notice of motion as prescribed by rule 6 be served on the alleged unlawful occupier in the manner prescribed by rule 4 of the rules of court.

[1857] Section 4B(9)(d)(ii) is contained in the new section 4B proposed to be inserted by section 7 of the Amendment Act.

Erven 87 and 88 Berea (landlord-tenant dispute) confirmed that eviction orders may be rescinded using the applicable court rules or the common law.[1858]

As far as ESTA is concerned, the Rules Board can make rules governing the procedure in the High Court and the Magistrates' Courts in terms of ESTA.[1859] The High Court rules of procedure applicable in civil actions and applications must apply in Magistrates' Courts proceedings, with appropriate variations, until such time as procedural rules are made for the Magistrates' Courts by the Rules Board.[1860] It would be best if such procedural rules were the ones specifically dedicated to all eviction matters, for the efficient stream-lining of the aspects raised in this paragraph.

7.2.4.3 Inclusion of new features in eviction-related legislation

LTA, ESTA, PIE and REHA **introduce many new features or requirements, substantive and procedural**, not hitherto included in the current civil court rules, some desirable and others not.[1861] As such, the particular Act itself, instead of the rules, becomes a constant reference point whenever eviction proceedings are sought to be launched or opposed. Some of those features have already been touched upon above. It would have been easier to regulate the process if a uniform set of eviction rules existed, infusing elements of the different procedures contained in the four main Acts under consideration.

Here are some further illustrations. ESTA provides that proceedings may be instituted in a Magistrate's Court or Land Claims Court and only by consent of the parties in the High Court where the land in question is situated.[1862] This can be potentially confusing to a prospective litigant as the Act leaves the choice of *court* wide open but without any degree of certainty or determination.

The definition of 'court' in ESTA is unusual, whereby 'court' means "a competent court having jurisdiction in terms of this Act, including a Special Tribunal established under section 2 of the Special Investigating Units and Special

[1858] *Occupiers of Erven 87 and 88 Berea* [22].
[1859] Section 17(3) of ESTA.
[1860] Section 17(4) of ESTA.
[1861] Chapter 5.
[1862] Sections 17(1) and (2) of ESTA.

Tribunals Act, 1996 (Act No. 74 of 1996)"! None of the other three eviction-related statutes refer to the stated Special Tribunal as a 'competent court'. It is highly unlikely that Special Tribunals would have any role in the design or development of eviction rules. At this stage the only 'tribunal' that can be included is the Rental Housing Tribunal, whose ruling is equivalent to an order of a Magistrate's Court.[1863]

PIE defines some concepts uniquely, such as 'consent'; 'owner'; 'person in charge'; and 'unlawful occupier'. However, and as alluded to earlier,[1864] with 'person in charge' a comprehensive definition would have been better, instead of leaving it to the courts to interpret the categories of people or the nature and extent of legal authority required to qualify such non-owners to be 'in charge'.[1865] Further, it took the SCA in *Ndlovu* to interpret and clarify that PIE is not applicable where the property concerned is used for business or commercial purposes as the Act is instead concerned with (home) dwellings.[1866]

On the positive side though, REHA introduces unique concepts, previously unknown to the common law or contained in rental legislation,[1867] such as 'unfair practice'[1868] and the establishment of Rental Housing Tribunals, with a view to the investigation, adjudication and mediation of complaints concerning alleged unfair practices.[1869] Any contemplated eviction court rules should embrace these concepts.

7.2.5 Reflections on UK and US eviction law

A distinctive feature in the legal systems of South Africa, UK and the USA[1870] is that they all seek to conform to international human rights standards, particularly in the spheres of security of tenure, housing rights and evictions. Secondly, the evaluation of the relevant legal processes and regulatory framework in the UK and the US firmly illustrates and confirms that it is indeed possible, and perhaps

[1863] Section 13(13) of REHA.
[1864] See paragraph 6.2.4.1.2 above.
[1865] Parker and Zaal 2018 *THRHR* 289.
[1866] *Ndlovu* [20].
[1867] *Kendall* [65].
[1868] As defined in section 1 of REHA.
[1869] Rental Housing Tribunals are regulated under Chapter 4 of REHA, sections 6 to 15.
[1870] Documented in chapter 6.

desirable, to have a set of laws and procedural rules dedicated specifically towards the governance of eviction matters. Such laws and rules should be geared towards avoiding the possible inhumane consequences of evictions, whilst simultaneously seeking to safeguard the interests of property owners or landlords. In the UK and US applicable primary legislation is complimented by procedural rules regulating repossessions and evictions. This confirms two things:

First, the inclusion, in primary legislation, of provisions that prescribe certain aspects concerning the conducting of eviction proceedings, including the execution of eviction orders, is not a bar to the development of court rules dedicated to various aspects in the eviction process. For instance, sections 4(2) and (3) of PIE currently provide as follows:

> (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
> (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

However, if eviction rules are introduced, these PIE provisions can be amended to read as follows:

> (2)(a) An owner or person in charge shall serve an unlawful occupier with written notice to vacate the land in question within 14 days of service of such notice, prior to commencing eviction proceedings in court.
> (b) A copy of the notice contemplated in paragraph (a) shall also be served on the municipality having jurisdiction.
> (3) The procedure for the serving of notices and filing of papers is as prescribed by the applicable eviction rules.

Then the envisaged eviction rules can outline the alternative acceptable methods for the service of such notices and other documents in the proceedings. In this way, a procedural clause such as the one contained in sub-section 4(4) of PIE, dealing with effective service, can be removed from the Act and regulated in the eviction rules instead. It provides:

> Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

Secondly, both substantive eviction laws and procedural rules can indeed be mutually inclusive harmoniously to the benefit of prospective litigants, just as shown in the preceding paragraph. Further, in the UK in particular, the eviction rules are categorised into two of the separate spheres in which evictions occur, namely: landlord-tenant rentals and mortgage foreclosures. Clearly then, it can be deduced that, as an alternative to having one uniform set of rules covering all eviction spheres, there can possibly be separate sets of rules regulating the different areas of evictions, informed also by pertinent legislative instruments. For instance, in South Africa there can be one set of rules regulating categories of evictions envisaged under PIE and REHA, and another set of eviction rules in respect of areas covered under ESTA and the LTA. The latter option would seem ideal as a start, for a smooth transition and a simplified process beneficial to prospective litigants.

In the US a 2003 federal law, the Servicemembers Civil Relief Act (SCRA), imposes certain procedural requirements in all civil cases (including eviction cases) to protect members of the armed services and their families.[1871] These requirements apply to any court of any state, including the States of Arizona and Texas discussed herein. The SCRA imposes special requirements prior to entering a default judgment in any case (including an eviction matter) in which the defendant fails to make an appearance, in order to protect military service members. In certain instances the court must grant a stay of proceedings for a minimum of 90 days. It would therefore seem prudent to include a related special dispensation for national army personnel in eviction-related laws (such as PIE and REHA) and the suggested eviction rules, along the lines of the SCRA.

7.3 Recommendations

7.3.1 General

An examination of the different eviction-related laws[1872] leads to **a conclusion that a one-stop set of eviction rules can consolidate processes across all spheres where evictions prevail**. Presently, to appropriately commence and finalise an eviction a person must be familiar with the specific area of the law and

[1871] See chapter 6.
[1872] In chapters 4 and 5.

the applicable regulatory framework within which to operate, which can be cumbersome. There is no straightforward, easy reference point. The *status quo* seems undesirable and has the potential of leading to confusion and unintended consequences or frustrations for litigants in the eviction sphere. Different sets of laws and rules have to be accessed and comprehensively applied by those intending to institute or defend eviction proceedings. In determining which aspects of the different statutes, rules and directives can be utilised a cue can also be taken from the findings of the comparative evaluation of the regulatory framework for evictions in foreign jurisdictions.[1873]

It would be easier to regulate eviction proceedings if a uniform set of eviction rules were to be formulated, incorporating elements of the different procedures contained in the four main Acts under consideration, namely LTA; ESTA; PIE; and REHA. Currently, all of these Acts in one way or another make reference to the Magistrates' Courts, the High Court plus applicable procedures, legislation or rules. This indicates that the existing civil court rules or procedures are capable of playing a pivotal role in the recommended creation of uniform eviction rules, and cannot be ignored. Simply put, a leaf can be taken from aspects of the existing civil courts rules when carving out a set of uniform eviction rules. Instances where the four eviction-related statutes refer to existing court rules or civil procedural legislation include the following:

- a notice whereby the Director-General informs a landowner of an application[1874] by a labour tenant to acquire ownership of the portion of land he is entitled to occupy may be given by way of registered mail or through service in the manner provided for the service of summons in the Rules of Court made in terms of the Magistrates' Courts Act, read with section 6(3) of the Rules Board for Courts of Law Act;[1875]

[1873] This is the focus of chapter 6.
[1874] In terms of section 16 of the LTA.
[1875] Section 17(3) of the LTA, read with section 17(2)(a) or (d).

- section 13(13) of REHA determines that a ruling by a Rental Housing Tribunal is deemed to be an order of a Magistrate's Court and is enforced in terms of the Magistrates' Courts Act, 1944;[1876]

- in terms of section 17(3) of ESTA the Rules Board can make rules governing the procedure in the High Court and the Magistrates' Courts in terms of ESTA. The Rules Board is therefore empowered to craft eviction-related rules in respect of ESTA matters for adjudication in the High Court and Magistrates' Courts;

- the President of the Land Claims Court may also make rules to govern the procedure in that Court in terms of ESTA, plus the procedure for the automatic review of eviction orders in terms of section 19(3).[1877] As a result there is already an enabling clause for the making of eviction-related rules in the Land Claims Court;

- section 1 of PIE defines 'court' to mean any division of the High Court or the Magistrate's Court in whose area of jurisdiction the land in question is situated; and

- lastly, section 4(3) in PIE stipulates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

The stated provisions in the LTA, ESTA, PIE and REHA thus confirm that it is possible to have a uniform set of eviction rules made under the auspices of the Rules Board, which can also work hand in hand with the civil rules governing procedures in both the High Court and the Magistrates' Courts. As mentioned in chapter 1 the main aim with a set of eviction rules would be to streamline legislative processes essential for the efficient adjudication of eviction matters. Access to courts as enshrined in the Constitution can thus also be enhanced from a procedural context.

[1876] On the other hand, section 13(11) of REHA currently stipulates that Magistrate's Court may, where proceedings before the court relate to a dispute regarding an unfair practice, at any time refer such matter to a Tribunal.

[1877] Section 20(4) of ESTA.

7.3.2 Recommended formats of eviction rules

The study confirms that there is a lacuna for procedural rules of court dedicated to evictions in South Africa. If an endeavour is made towards the development of such rules, then at least two alternative formats can be recommended.

7.3.2.1 First suggested format

The first format will be one consisting of a single comprehensive set of rules infusing (procedural) elements from LTA, ESTA, PIE and REHA. This set can be divided into various chapters depending on the categories of topics covered. A chapter will consist of different rules each covering a specific topic to be regulated. A specific chapter or two will address miscellaneous matters. Different rule topics under miscellaneous items may include:

1. Definitions;
2. Service of documents;
3. Types of proceedings;
4. Urgent applications;
5. Default judgments;
6. Enrolment of matters;
7. Evidence;
8. Discovery;
9. Hearing of trials or applications;
10. Mediation;
11. Settlement, withdrawal, removal, or postponement of matters;
12. Execution of eviction orders;
13. Costs;

and so forth.

Other chapters can separately regulate evictions specifically against the following categories of occupiers:

1(a) Farmworkers;
1(b) Occupiers of land in rural and peri-urban areas;

2. Tenants holding over;
3. People whose occupation of land has been rendered unlawful subsequent to sales in execution proceedings (foreclosures); and
4. People who settle on property without any right, permission or licence to do so, commonly referred to as ‘squatters’.

7.3.2.2 Second alternative suggested format

The second alternative format is one whereby the eviction rules are divided into two sets, namely:

1. a set of rules regulating cases falling under LTA and ESTA; and
2. another set dealing with matters under PIE and REHA.

Both sets of rules will have a chapter or chapters dedicated to miscellaneous matters cited under the first suggested format in 7.3.2.1 above. However, each set will also have separate chapters grouped into different categories of specific legislation covered, being either PIE or REHA on the one set, or LTA or ESTA on the other.

Whilst the second format may mean that the sets of rules will be shorter, less cumbersome and easy to use, the first format, although possibly voluminous, will ensure that there is one uniform procedural regulatory framework and the reference point for all categories of evictions in the land.

7.3.3 Way forward

Irrespective of the format preferred the recommended eviction rules may contain an annexure at the end containing specimen forms for summons, affidavits and pro-forma orders to be used. Some of those forms can be drawn from the practice directives discussed in chapter 2.

One way in which the suggested eviction rules may be established is for statutory amendments to be effected whereby each of PIE, LTA, ESTA and REHA will contain a provision mandating that eviction proceedings must be conducted in accordance with the eviction rules developed by the Rules Board. Then in the development of such eviction rules of court, whichever format is followed,

procedural components currently premised in all eviction-related substantive laws such as the LTA, ESTA, PIE and REHA will have a pivotal role to play.

Another option is to have both the Superior Courts Act and the Magistrates' Courts Act mandating the establishment of eviction rules in the respective courts, along the lines more or less similar to section 17(3) or 19(3) of ESTA.

7.4 Final conclusions

In *PE Municipality* Sachs J emphasised that that there is a need for special judicial control of evictions. Removal from one's home is a process that is both socially stressful and potentially conflictual. This must, therefore, take place in a situation that adheres to and promotes the values of human dignity and advancement of human rights and freedoms enshrined in the South African Constitution. While certain laws were enacted that are aimed at ensuring that where evictions occur they are conducted in a manner sensitive to constitutional values, the uncertainties, complexities and challenges created by the different legislative provisions, rules, procedures and so forth can negatively impact on their efficacy and value. The recommended manner of addressing this is through the development of a comprehensive set of eviction rules of court. In the preparation of such eviction rules the following, amongst others, should always be the mental torch and guiding spirit:[1878]

> Post-1994 a constitutional dimension was also added to unlawful occupation and eviction… the approach was inverted: unlawful occupation would not be criminalised in future. Instead, *unlawful eviction* would be criminalised and prosecuted… In future, eviction would be regulated and monitored strictly, on the basis of humanity, resulting in a complex grid of measures regulating, impacting on and placing limitations on eviction. While the contravention paradigm has been replaced by a human rights paradigm, this area of law is still characterised by complexity: particular statutory measures have particular scopes and applications, with further implications for which court (or forum) to approach, jurisdictional issues, processes and requirements. Interestingly, despite a human rights paradigm… the pre-1994 conventional response, which embodied forced eviction and relocation, basically remains intact… The complexity factor is compounded by the number and variety of role players involved in regulating unlawful occupation and eviction… Accordingly, it is fair to state that this area of law has been characterised by some innovative solutions and a generally much more hands-on approach, which has resonated in structural interdicts and engagement and report orders, which are not all equally effective or successful in practice.

[1878] Pienaar 2014 *TSAR* 444–445.

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