

Eviction Management in South Africa: Implications for Sustainable Housing Provision

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ABSTRACT On the 9th of October 2012, the Constitutional Court of South Africa, once again, in the case of Schubart Park Residents' Association and others v City of Tshwane Metropolitan Municipality and Another (CCT 23/12) [2012] ZACC 26 (9 October 2012) herein referred to as (Schubart case) handed down a groundbreaking judgment on arbitrary eviction of people from their homes without the authority making proper arrangement for alternative accommodation for the evictees. This paper contributes to the ongoing debate on the improper handling and failure of leadership in the management of eviction processes by those who bear the constitutional responsibility to protect the socio-economic right to access to adequate housing. The paper highlights government's strategic interventions and various legal frameworks that have been put in place to manage eviction. The paper presents an argument for reform and emphasizes the need for eviction management. To this end, the paper reviews numerous decisions of the courts and presents reasons why the courts should continue to be proactive by denying the request of evictors to evict people from their land and homes

INTRODUCTION

In South Africa, the Constitutional Court which is the apex court in the country continues to emphasise the importance of developing effective and, if necessary, innovative remedies for the infringement of constitutional rights (Chenwi 2009). Proper oversight, management and being proactive are some of the innovative and effective administrative remedies that the courts have developed over time. The application of these remedies is apparent in decisions being handed down by the Constitutional Court in eviction cases. Considering the fact that the poor and less privileged are usually caught up in the battle involving eviction, the Constitutional Court has impressed on the judges, especially those presiding in the lower courts, to be pro-poor and proactive by ensuring that the poor's rights are protected regarding any contestation on social economic rights and basic amenities (Liebenberg 2008).

According to Wilson (2006), being proactive does not only mean contributing to the pro-poor vision of the Constitution in order to keep the promise of section 26(3) of the Constitution of the Republic of South Africa, (1996) which provides that "*No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may*

permit arbitrary evictions." The Pro-poor judges are also needed to enforce the constitutional mandate. Wilson emphasises that it is not only the poor who suffer for a lack of such judges, but so does the very legitimacy of the law and the new social contract it purports to embody.

Circumstances in which evictions occur vary. These may be in respect of vacant land or built up property, in individual or group cases, between State and citizens or private citizens, and other cases. The concern is that someone is removed or deprived from enjoying the right to access to housing as a result of being evicted from his or her abode; it could be outright physical eviction or constructive eviction (Ramphela 1993). It is pertinent to mention that this paper does not attempt to postulate that eviction in all ramifications is repugnant and bad provided it is done within the ambit of the law. However, it is submitted that no matter what the circumstances are, before any eviction, it is incumbent on the responsible authority to ensure that it is managed in such a way that it will not jeopardise the rights of the people or lead to homelessness. Management in this sense connotes that, before any eviction, even if it is sanctioned by the court, the would-be-evictees must have been engaged thoroughly and be duly informed of the reasons why eviction will take place. Pursuant to this, the would-be-evictees must have a say and be able to come up with suggestions on

how to be assisted so that they don't become destitutes after the eviction must have been executed. The responsible authority has the constitutional obligation to consider all these concerns and have a viable plan that will provide necessary assistance to the people prior and after the eviction. This is important since eviction usually affects the indigents and poorest of the poor in the society who, in most cases, do not have the wherewithal and financial muscle either to rent or build their own houses. One of the viable and reliable assistance is to provide alternative accommodation for those to be evicted. In the recent case of Schubart, the Constitutional court emphasised vehemently the need for provision of alternative accommodation for those to be evicted. Pursuant to this, this paper, taxonomically identifies some eviction situations and examines how the affected persons should be treated under the law in order not to violate their constitutional right and entitlement to housing on the grounds of executing eviction. Demonstration of how to manage the situations should they arise or manifest in whatever forms is also well articulated. In essence, the paper highlights that while applying the law and policy prior or during eviction, other rights should not be transgressed or violated. Hence, with proper management and genuine oversight, this paper accentuates that eviction can be executed without violating the rights of the evictees. This paper demonstrates workable insights into how this could be achieved considering the fact that eviction implicates a range of Government mandates including housing, land tenure, social services, and policing.

It is pertinent to mention that different dimensions of evictions have been addressed in several international and local legal instruments. In addition to the constitutional rights provisions on housing, land rights and the right of children, there are local laws that regulate eviction processes in South Africa. They include: Extension of Security of Tenure Act 62 of 1997 (ESTA); The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); Land Reform (Labour Tenants) Act 3 of 1996 (LRLTA); Rental Housing Act 50 of 1999 (RHA); Restitution of Land Rights Act 22 of 1994 (RLRA); and Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The South African legislative and policy environment on evictions largely accord with the international best

practices (Fobosi 2012.) which are well articulated in this paper.

EVICTION DEFINED

According to West (2009) "eviction may be in the form of a physical removal of a person from the premises or a disturbance of the tenant's enjoyment of the premises by disrupting the services and amenities that contribute to the habitability of the premises, such as by cutting off all utilities services to an apartment. The latter method is known as constructive eviction." Gerald et al. (2005) are of the view that "eviction is a generic word for the act of expelling (kicking out) someone from real property either by legal action (suit for unlawful detainer), a claim of superior (actual) title to the property, or actions which prevent the tenant from continuing to be in possession is tantamount to constructive eviction. This happens in a situation where the landlord does not go through a legal eviction of a tenant, but takes steps which keep the tenant from continuing to live in the premises. This could include changing the locks, turning off the drinking water, blocking the driveway, yelling at the tenant all the time, or nailing the door shut." Virtually all the scenarios highlighted in these descriptive definitions occurred in the Schubart case. The only option left to the evicted victims was to approach the court to seek redress (Roach 2005) such that they could re-occupy their homes in this emergency situation.

Consequent upon this, the court acts proactively as the court of justice and equity in order to protect the rights of the poor evictees and vulnerable. More importantly, it also gives managerial leadership by prescribing what each unit involved in eviction should do and should not do. This is well articulated in the earlier case of Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (PE Municipality) paragraph 39 where the court stated that:

...the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.

EVICTON IN EMERGENCY OR DESPERATE SITUATIONS

The Supreme Court of Appeal in the recent case of City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (735/2011) [2012] ZASCA 116 (14 September 2012) indicates that eviction in an emergency situation arises when there is an urgent need to evict people from their houses based on health and safety reasons especially where the evictees are occupying a building that is unsafe. It can also take place when a private owner needs to use his property especially where such occupiers are negatively impacting the owner's financial activities. An emergency situation may also be as a result of the State having to evict certain occupiers in order to make way for socio economic developments such as construction of roads, shopping malls and so on.

However, before an eviction can take place, there are measures that are expected to be taken by the evictor; these measures are prescribed by laws. By virtue of section 4 subsection (7) of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of (1998) (PIE 1998) provides that:

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

Pursuant to the provision above, an occupant of a piece of land or property for a at least a period of six months is deemed to be entitled to all the inherent rights as prescribed by the constitution, particularly sections 26(1)(2)(3). It is therefore incumbent on the government or the evictor to comply strictly with these provisions. Failure to do so will amount to a flagrant violation of the right to have access to adequate housing and other ancillary rights such as the provision of alternative accommodation or emergen-

cy housing. This assertion and the need to protect the right of an evictee in this situation have been given judicial approval in the case of Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) where the court held at paragraph 27 that:

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.

Similarly, in terms of Section 5 of PIE, which provides for the procedure to be followed when illegal occupants have to be evicted in an emergency or desperate situation. It clearly stipulates that notice must be given of such an intention to evict to the illegal occupants by the party seeking to evict. It also provides that, even in an emergency situation, there cannot be any eviction without a court order; there must be at least an interim court order hence preventing self-help arbitrary eviction. All these measures are germane in order to preserve, promote, and protect the evictee from being subjected to inhuman treatment and prevent the violation of fundamental rights.

In terms of section 26 subsection (3) of the Constitution, the right not to be evicted no matter what the circumstances is well protected. Consequently, in coming to a decision on whether to grant an eviction order or not one of the things that the court will take into consideration is whether the State has made provision for alternative accommodation or emergency housing for the illegal occupiers.

Section 25 of the Constitution subsection (5) provides that:

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.

The implication of this provision is that illegal occupants cannot just be evicted from a particular piece of land or a house without an effort being made to assist them in the realization of their right to shelter and property. This places a constitutional obligation on the State to provide these illegal occupations with land and housing so that they can also enjoy their right of access to land and housing. In the same vein, by virtue of section 25 of the Constitution subsection (6) it is stated that:

A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

The above provision further places an obligation on the State to ensure that subsequent alternative land or shelter should ensure and guarantee the evictees security of tenure in order to prevent the possibility of facing any further eviction in the future. This is reinforced by the Housing Act 107 of 1997 which defines the housing development Act as follows:

the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to-

- (a) *permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*
- (b) *potable water, adequate sanitary facilities and domestic energy supply.*

This definition places an obligation on the State to ensure that any development it seeks to establish is carried out with the need to protect all other socio-economic rights of the illegal occupants or evictees. This position is supported by the decision of the African Commission on Human and Peoples' Rights in the case of Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/96, 2001 AHRLR 60, paragraph 60 even though housing is not explicitly provided for in African Charter on Human and Peoples' Rights. The Commission has been vocal on the right to housing and prohibition on unjust evictions. These are well articulated in articles 14 (right to property), 16 (right to the best attainable state of physical and mental health) and 18(1) (protection of the family).

It is pertinent to mention that 'The Emergency Housing Programme' was published in April 2004, at least in part as a response to the Grootboom declaration that state housing policy was failing to cater for people living in crisis situations. Kruuse (2008) indicates that the main ob-

jective is to provide temporary but secure access to land, housing and basic municipal services to people who have been left without a home through no fault of their own. The people referred to by Kruuse are evicted persons, or victims of fire, flood or other natural disasters. They can access assistance through grants from the municipalities, administered, like all other subsidies, through provincial housing departments (Kruuse 2008).

Meaningful engagement in eviction situations whether before, during and after is essential inevitable. This is considered as a step towards getting the work done, but at the same time ensuring that the rights and dignity of the evictees are protected and observed as provided for by the constitution and other related laws and policies. The court has elaborated on what meaningful engagement should be in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) 2008 by providing an encompassing and all inclusive meaning to engagement which entails that all the relevant departments that are usually involved and actively take part in executing eviction in whatever forms are brought together and are involved from the inception by interacting with those people that their actions will affect and alter their positions in different ways. The court held that:

The various departments in a municipality have to work together. They cannot function separately, with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided.

Similarly, in the case of *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) Citation 2004 (5) SA 39 (C), the court provided an insight into what ought to be done in the case of an emergency or desperate situation by holding that the housing policy must make short-term provision for people in a crisis or desperate situation until a long term solution is achieved. The essence of this is to prevent a situation in which the evictees will be left homeless as a result of a desperate situation which they never contemplated or prepared for.

Desperate and emergency situations also extend to people living in intolerable situations or in crisis caused by natural disasters. In the

case of the Minister of Public Works and others v Kyalami Ridge Environmental Association and others 2001 (3) SA 1151 (CC), the court held that the State's obligation in this situation, includes the need to facilitate access to temporary relief for people who are living in intolerable conditions and for people who are in crisis due to natural disasters.

The facts and decisions of the court in this case are very significant because the case carefully considered various competing interests. This case was a challenge to the government's decision to house people who had been displaced by severe floods. As a temporary measure, the government wanted to assist the affected people by establishing a transit camp on state-owned land, with the aim of moving the people to permanent housing once it became available. This decision was made without discussions with residents near the area of the transit camp. The residents' association in the vicinity where the flood victims were to be housed challenged the government's plan on the ground that it was not supported by legislation, it contravened a town planning scheme, land and environmental legislation, and infringed their constitutional right to just administrative action and to certain environmental rights. The Constitutional Court found the government's decision to be lawful, as it was intended to give effect to its constitutional obligation to take reasonable legislative and other measures aimed at the progressive realisation of rights. Even if the residents were living in the dilapidated buildings without the permission of the true owner and regarded as unlawful occupiers within the definition contained in the PIE they would, as such, be entitled to the protections therein.

According to Wilson (2011) eviction without the provision of alternative accommodation by an organ of State in circumstances in which it has no emergency housing policy in place, as required by the court in Grootboom, would be unlawful in itself. The Constitutional court re-emphasised this assertion in the Schubart case.

EVICTON OF SLUM DWELLERS

The tragedy and persistent conflict in housing problems, particularly with people living in the slums, is the fact that the plans and policies have continuously alienated them (Gray 1946). The reality on the ground in the slums has shown

that people occupy land and put up structures in the form of shacks just to have roofs over their heads (Tissington 2010). Hence, they are unable to meet the various requirements of housing codes. This has continuously exposed them to violent attacks by the authorities who have evicted them by demolishing their houses. This is tantamount to a refusal to recognize the people's right to housing and a denial of slum-dwellers right to participate in the drafting of the various policies and programs for them (Nijman 2008).

In describing the huge inequalities that exist in South Africa, Huchzermeyer (2007) expressed the view that almost half of the population is condemned to living in slum conditions, whether in an unlawful occupation under the threat of eviction because they are very poor to build their houses. Eviction as a social concern therefore needs to be addressed. Against this backdrop, PIE defines slums as overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons. The people in a slum live in overcrowded or squalid conditions; they are desperate people who live in dire circumstances and are burdened. They have no security of tenure and are subjected to threats of or outright eviction by the authority.

According to Tissington (2010), in trying to deal with the situation of slum clearance, the province of Kwazulu-Natal enacted the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 which deals with land tenure and evictions in the province. This Act met stiff opposition from civil society and NGOs (COHRE 2008) but it receives tacit support from the Provincial Government of KwaZulu-Natal as a response to housing conditions. Its purpose is to eliminate sub-standard housing conditions by giving the provincial Housing MEC authority to prescribe a time in which it would be compulsory for municipalities to evict unlawful occupiers of slums when landowners failed to do so. It is also a means of forcing private landowners to evict shack dwellers. It was meant to be replicated in all other South African provinces (Tissington 2010).

Tissington (2010) also emphasised that the Act was vigorously criticised by the civil society organisations and academics who argued that it was in conflict with the South African Constitution and the PIE Act. It was considered to be repressive, anti-poor legislation that does

not have a people orientated approach and seeks only to eradicate slums without any consideration of perhaps upgrading them and providing the necessary amenities to make them formal settlements. It encourages the carrying out of eviction by both public and private sectors as its main aim is to eliminate and prevent the re-emergence of slums. In this regard, it is in conflict with PIE. To all intents and purposes it is contrary to international instruments that South Africa has ratified such as The African Charter on Peoples' and Human Rights which guarantees the right to adequate housing and prohibits forced evictions.

The other serious defect with the Act is that it criminalises any illegal occupation of land with the offence punishable by either payment of a fine of up to R20 000 or imprisonment for 5 years. Such provision is contrary to the Constitution that obligates the States to provide adequate housing.

Furthermore, the concern is that the Act does not take into consideration the need to provide people with security of tenure which would afford occupiers the opportunity to enjoy rights of access to land. Failure to guarantee security of tenure presupposes that the evictees will be forced to occupy other land as illegal occupiers which would subsequently lead to eviction (Odeku 2012).

One of the reasons usually propounded by the authorities to perpetrate eviction is the concern for the health of the occupiers. However, the court has constitutively held that the city is not genuinely concerned for the health and safety of urban slum dwellers. If it were, it would provide alternative accommodation and/or invoke its health and safety powers in respect of at least some of the several hundred thousand shacks within its area of jurisdiction outside the inner city where living conditions are just as unhealthy and unsafe. Its failure to do so discriminates against the inner city poor without rational justification.

According to Wilson (2008) the mass eviction of hundreds of poor people from urban slums in circumstances where they have no alternative accommodation which is better and safer would not be just and equitable in terms of the PIE Act. Even though the occupants might be occupying unlawfully, this presupposes that they are in possession of either the land or house. The implication of this is that they are protected by section 26(3) of the constitution and as

such cannot be arbitrarily evicted. They have to be protected and provided with alternative accommodation. Any attempt to evict them will be an affront to the Bills of Rights in the Constitution.

DISCOURAGING ARBITRARY EVICTION

Section 26(3) of the Constitution provides 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. In South Africa, there is no legislation in existence that promotes and permits arbitrary eviction. This provision was judicially interpreted in the case of *Government of the Republic of South Africa v Grootboom and others* 2001 (1) SA 46 (CC). The case disapproves of any state action which could lead to the deprivation of access to shelter for the desperately poor and make them extremely vulnerable to judicial censure.

The overarching importance of this is to discourage desperate individuals (van der Walt 2005) or overzealous officials from employing innovative and speedy processes necessary in order to ensure that eviction orders could be obtained, and subsequently executed, with the minimum of controversy. Even if eviction is inevitable, it must be done in accordance with the Bill of Rights in the Constitution and other related laws. The court is now saying that eviction must be managed in such a way that all parties act reasonably and in good faith. Consequently, though meaningful engagement is essential, the end result is that the people facing eviction must be provided with alternative accommodation. This is an obligation imposed on the State by virtue of section 26(2) of the Constitution which says that eviction sought by the state should not occur without the provision of alternative housing as established in the case of *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 at paragraph 170. This position is in line with the rule of law. Anything done contrary to this will amount to a blatant breach of the rule of law.

THE SIGNIFICANCE OF MEANINGFUL ENGAGEMENT

Meaningful engagement is provided for in section 26 subsection (2) of the Constitution in

that the State must act reasonably to ensure realisation of the right to housing. This presupposes that the authority must engage with those about to become homeless and communicate meaningfully together in order to achieve certain objectives.

The Approach in the South African courts supports and encourages the need for meaningful engagement. The courts have repeatedly insisted that there must be meaningful engagement between the stakeholders and role players before considering whether there should be an eviction or not. In the case of *Occupiers of 51 Olivia Road, Berea Township, and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC), the court aptly held that the Constitution places a duty on a municipality to engage meaningfully with people who would become homeless if evicted. Therefore, when a municipality is trying to evict people, a court must take into account whether there has been meaningful engagement in terms of section 26(3) of the Constitution (Roux 2004).

Froneman J, in the recent case of *Schubart*, emphasised the importance of meaningful engagement by saying that many provisions in the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives. Of particular relevance here are the cases dealing with the right to have access to adequate housing in terms of Section 26(1) and (2), and protection from arbitrary eviction or demolition of their homes under the Constitution in terms of Section 26(3). The significant of these provisions is to enable responsible authority and people to appreciate the interrelation between different rights and interests as observed in the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC) and that the exercise of these often competing rights and interests can best be resolved by engagement between the parties.

The importance of engagement without preconceptions about the worth and dignity of those participating in the engagement process should also be recognised. Thus, as stated in the *Schubart* case, paragraph 46:

Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such

a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency.

Similarly, Section 7 of PIE provides that the municipality must at all times facilitate mediation between any parties that are going to be affected by any order of eviction. This then emphasizes the importance of engagement and adds the State as a third party to an eviction involving private land as it must ensure that the parties engage in dialogue and such dialogue can only be valid if the State is a party since it has constitutional obligation to provide housing for everyone. It is against this background that all levels of government are required to consult meaningfully with individuals and communities affected by housing development and municipalities are required to promote the resolution of conflict arising in the housing development process.

The relevant circumstances listed in section 6 of PIE (the manner in which the occupation took place, its duration and the availability of suitable alternative accommodation or land) are not exhaustive. Other circumstances considered to be important include: the particular vulnerability of occupiers (the elderly, children, disabled persons and households headed by women); the extent to which serious negotiations have taken place with equality of voice for all concerned; the reasonableness of offers made in connection with suitable alternative accommodation or land; the timescales proposed relative to the degree of disruption involved; and the willingness of the occupiers to respond to reasonable alternatives put before them.

Various departments of government have to work together in an eviction situation from the inception up until alternative shelter is provided for the evictees. They cannot function separately, with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided.

In paragraph 47 of *Schubart* case, the court emphasised that those who bear constitutional

responsibility for providing access to adequate housing under the Constitution should act responsibly and humanely:

[M]unicipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect.

Municipality that evicts people from their homes without first meaningfully engaging with them acts in a way that is against the spirit and purpose of its constitutional obligations. Section 26(2) of the Constitution states that a municipality must respond in a reasonable way to potentially homeless people with whom it engages.

The Breaking New Ground policy of 2004, A Comprehensive Plan for the Development of Sustainable Human Settlements (BNG), accentuates that consultation and community participation are important parts of housing developments in South Africa. In the same vein, the Social Housing Policy for South Africa reveals that the beneficiaries should be involved in administering and managing their housing options. It also places a duty on social housing institutions to consult with residents through meaningful participation. Meaningful engagement is an important requirement when evictions are sought under the PIE Act (Ray 2009).

The court however expects reciprocity regarding meaningful engagement and has warned that both sides must act reasonably and in good faith as aptly put in paragraph 48 of the Schubart case:

It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be

regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the people's claims should preferably facilitate the engagement process in every possible way. Finally, it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy. Moreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejection order.

In their work, Chenwi and Tissington (2010) have indicated that a number of international standards also support the concept of meaningful engagement by insisting on engagement with right-holders or communities in the realisation of socio-economic rights. The General Comments of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) are good examples. These General Comments interpret the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR). They also interpret what states must do to realise the rights in the ICESCR. South Africa has signed the ICESCR, meaning that it has committed itself to respect the ICESCR's principles (Chenwi and Tissington 2010).

Pursuant to the General Comment 4 on the right to adequate housing (1991) paragraphs 8 and 12; General Comment 7 on the right to adequate housing in the context of forced evictions (1997) paragraphs 13 and 15, international law is in support of extensive genuine consultation when it comes to the right to adequate housing and in respect of proposed evictions and proposed resettlement. The law demands that representations from affected persons and communities must be invited and considered (Chenwi and Tissington 2010).

In addition, the United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement (2007) says that all groups and persons who might be affected have the right to relevant information and ‘full consultation and participation’ throughout the entire eviction process. Special measures must be taken so that all affected persons, including women and vulnerable and marginalised groups, are included in the consultation process.

Commenting on the guidelines, Chenwi and Tissington (2010) observed that the guidelines and principles stipulate that development processes which may lead to people being displaced from their homes must have certain things built into them. For example, the authorities must distribute relevant information in advance. Public hearings must be held on the proposed plans and alternatives. These would provide opportunities to challenge the eviction decision or present alternative proposals, and to articulate different demands and development priorities.

Pursuant to General Comment 19 on the right to social security (2008) paragraph 78 and General Comment 15 on the right to water (2003) paragraph 56, the International Covenant on Economic and Social Rights (ICESCR) also encourages genuine consultation around the rights to social security, water, health and work. It emphasises that:

Before the state or any other third party takes any action that interferes with the rights of an individual to social security and to water, there must be an opportunity for ‘genuine consultation’ with those affected. Full and complete information on the proposed measures must be provided in good time.

The intrinsic role of international law regarding vulnerable groups was vigorously canvassed by Chenwi and Tissington (2010). They submitted vehemently that:

International law emphasises the right of the specific vulnerable groups mentioned in the PIE Act (such as women and the elderly) to participate in policy development and implementation. For example, article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) provides that women have the right to participate, on an equal basis, in development planning at all levels. South Africa has ratified CEDAW and is therefore bound by it. Also, the CESCR emphasises the right of the elderly to

take part in formulating and implementing policies that directly affect their well-being. This is in General Comment 6 on the economic, social and cultural rights of older persons. Regarding African continent, they have this to say; at the African regional level, the African Commission on Human and Peoples’ Rights has said that states must give meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities. This is a requirement of the African Charter on Human and Peoples’ Rights and that South Africa has ratified the African Charter and so it is bound by it.

THE INTRINSIC ROLE OF THE COURTS IN EVICTION MANAGEMENT

The courts have been playing and should continue to play multidimensional roles such as the dispensation of justice, ensuring equity and, by extension, providing judicial direction on how to manage eviction whether arbitrary or justified. While the court is expected to uphold the rule of law by ensuring that justice is done, the court must also ensure that it acts equitably in view of the competing interests inherent in eviction. It is therefore incumbent on the court to ensure that it devises and establishes innovative ways of dealing with this challenging issue of eviction. One of such ways is to prescribe normative standards and directions regarding how to go about managing the situation so that, through sincere engagement by the parties, an acceptable position is reached by all the parties in line with the constitution and best practices in order to achieve sustainable reconciliations of the different interests involved in a proactive and honest endeavour to find mutually acceptable solutions.

The courts have had to play an active and significant role in ensuring that in any eviction proceedings the need to engage meaningfully with the parties to be evicted and rendered homeless is not overlooked at any point in time. Thus, in many cases, the courts have refused to make an order of eviction without any proof before them showing that efforts have been made to engage all the necessary stakeholders. Decisions have been suspended pending the return of the State with proof that it has engaged with each person individually and in a group as circumstances differ from person to person.

Another manner in which the courts have taken a very active managerial role in eviction proceedings is by requiring the State to show on papers the plans that it has which will be implemented in trying to relocate the illegal occupants. It is only after a comprehensive programme of action has been provided that the courts may give an order for eviction.

In the case of *City of Cape town v Rudolph and others* 2003 (11) BCLR 1236 (C) the Court found that the policy of the City was not justified in that it failed to give adequate prioritisation to those in desperate need and, in so doing, failed to comply with the requirements of the Constitution. The order granted by the Court included a declaration of a constitutional breach together with a requirement that the City deliver a report to the court stating what steps it had taken to comply with the court order and what future steps it would take. Thus, the Court in effect asked the City to come back to show the Court what provision it had made for people, such as the present respondents, in a crisis situation.

According to Chenwi and Tissington (2010), in the *Abahlali* case, the Constitutional Court said that no evictions in terms of the PIE Act should occur until the results of the proper engagement process had been made known. It states that proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction. So, eviction or relocation should always be the last resort, and only after all competing interests and the rights of the evictees have been properly taken care of whereby they will not be disadvantaged in any way even if eviction is ordered at the end of the day (Chenwi and Tissington 2010).

CONCLUSION

Vulnerable people who live in various places classified as unlawful face threats of evictions on a daily basis. Jurisprudence from the courts have shown that no matter the situations or circumstances, no eviction should be executed without firstly engaging with the people who will be rendered homeless. More importantly, the

courts have consistently pronounced that alternative accommodation must be provided. This is in line with the Bill of Rights in the Constitution. The courts are now being effectively proactive by issuing orders which seek to ensure that evictions are properly managed. This is in addition to ensuring that the rule of law is upheld and the various competing interests of the parties are equitably considered to the extent that the inherent rights of the people faced by imminent evictions are protected under the constitution and by the responsible authority.

RECOMMENDATIONS

Section 26(3) requires the courts to exercise a broad equitable jurisdiction. This requires a court to make a value judgment, but it must not do so in a vacuum. Interpreting s 26(3) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In so doing, the interest of the people should be paramount.

Pursuant to the above backdrop, before eviction, appropriate notice must be given to all people likely to be affected that an eviction is being considered and that there will be public hearings on the proposed plans and alternatives including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups and the people to be rendered homeless. Reasonable time must be allowed for deliberation and the raising of objections, if any, to the proposed plan. Affected groups must be allowed to challenge the eviction decision or to present alternative proposals and to articulate their demands and development priorities.

In situations where eviction must be executed, there must be total disclosure of interest and status of all the people that will be involved from different sectors including independent international or local observers for purposes of transparency and accountability. The rights of the people and particularly the vulnerable must be protected. If there is any need for the use of force, this must be in line with the basic principles on the use of force and firearms by law enforcement officials and any national or local code of conduct consistent with international law enforcement and human rights standards. For eviction to take place presupposes that there is just compensation and sufficient alternative

accommodation with basic social amenities and rights, or restitution when feasible by states and other parties responsible for doing so. In the circumstances, the court should continue to play the judicial and managerial administrative roles until it is satisfied that everything has been done as ordered. This requires close monitoring, evaluation and reporting. The report to be submitted to the court should detail all activities, including video coverage, which occurred during the process.

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