

An assessment of the constitutionality of section 7(1)(c) of the Domestic Violence Act

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Opsomming

An Assesment of the Constitutionality of section 7(1)(c) of the Domestic Violence Act

Gesinsgeweld is 'n ernstige sosiale probleem wat beveg moet word op elke moontlike wyse. Om hierdie uiteinde te bereik het die wetgewer die *Wet op Gesinsgeweld* (hierna verwys na as die "*Wet op Gesinsgeweld*") geskryf ten einde 'n vinnige en toeganklike proses daar te stel waardeur 'n slagoffer van gesinsgeweld 'n interdik kan bekom om hom- of haarself te beskerm teen verdere dade van geweld. Artikel 7(1)(c) van die *Wet op Gesinsgeweld* maak dit moontlik vir die hof om 'n bevel te gee dat die respondent die gemeenskaplike woning verbied word. Artikel 7(1)(d) maak dit moontlik vir die hof om 'n bevel te gee in terme waarvan die respondent verbied word om enige bepaalde gedeelte van die gemeenskaplike woning te betree. Die argument word gemaak dat artikels 7(1)(c) en (d) *de facto* daarop neerkom dat die respondent uit die gemeenskaplike woning uitgesit word. 'n Uitsetting is 'n traumatiese proses vir die individue betrokke en bring 'n groot aantal fundamentele regte in gedrang. Dit moet daarom met die uiterste omsigtigheid benader word ten einde te verseker dat geen menseregte skendinge plaasvind nie. Artikel 26(3) van die *Grondwet van die Republiek van Suid Afrika*, 1996 (hierna verwys na as die *Grondwet*) bepaal dat geen persoon uitgesit mag word uit sy of haar woning sonder 'n bevel van die hof, wat gegee is nadat al die relevante omstandighede in ag geneem is, nie. Spesifieke wetgewing is geskryf om die uitsettingsproses te reguleer, en stel prosedurele en ander vereistes daar. Wanneer daar bevels in terme van artikels 7(1)(c) en (d) van die *Wet op Gesinsgeweld* gegee word word hierdie prosedures nie nagekom nie, en het dit onwettige uitsettingsbevele tot gevolg. Hierdie bevels kan ook inbreuk maak op die respondent se fundamentele regte, soos onder andere sy/haar eiendomsregte en die reg op toegang tot die hof. Die betrokke artikels van die *Wet op Gesinsgeweld* kan in terme van artikel 36 van die *Grondwet* geregverdig word. Dit word egter verder geargumenteer dat die *Wet op Gesinsgeweld* in die praktyk gereeld misbruik word deur applikante, tot so 'n mate dat dit in der waarheid 'n instrument van mishandeling word, direk in stryd met die doel van dié Wet. Wanneer 'n voorsittende beampte 'n aansoek vir 'n bevel onder

atrikels 7(1)(c) of (d) van die *Wet op Gesinsgeweld* oorweeg moet dit met die uiterste versigtigheid benader word.

Sleutelwoorde: *Gesinsgeweld; Uitsetting; PIE; ESTA; Grondwetlike eiendomsregte*

Abstract

An assessment of the constitutionality of section 7(1)(c) of the Domestic Violence Act

Domestic Violence is a pervasive social evil which must be combated with every means possible. To this end, the legislator enacted the *Domestic Violence Act*, 116 of 1998 (hereafter referred to as the DVA) to provide for a fast and accessible process by which the victims of domestic abuse can obtain an interdict to protect themselves against further acts of violence. Section 7(1)(c) of the DVA allows for a court, when considering an application made for a protection order in terms of the Act, to make an order prohibiting the Respondent from entering the shared residence of the Applicant and Respondent. Section 7(1)(d) allows for a court, when considering an application as mentioned, to make an order prohibiting the Respondent from entering any specific part of the shared residence. It is argued that the orders provided for in sections 7(1)(c) and (d) amounts, *de facto*, to an order that evicts the Respondent from the shared residence. Evictions are a traumatic procedure for the person(s) concerned, and endangers a large variety of human rights. It should therefore be approached with extreme caution to ensure that no person's fundamental rights are infringed. Section 26(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*) determines that no person(s) may be evicted from their home without a valid order of court, which order should be granted only after taking into consideration all the relevant circumstances. Specific pieces of legislation have been enacted to regulate the eviction process, prescribing specific procedures and setting requirements for a legal eviction. When an order is given in terms of section 7(1)(c) of the DVA, these procedures are not followed and the requirements are not met, resulting in illegal evictions. These orders may further infringe upon certain fundamental rights of the Respondent, such as the constitutional property rights set out in section 25, and the right of access to the courts. The concerned sections of the DVA can be justified under section 36 of the *Constitution*. However, it is argued that the DVA is in practice frequently misused by applicants, to such an extent that it becomes a tool of abuse, defying the whole purpose of the Act and extreme caution should be used by

presiding officers when considering applications for orders in terms of sections 7(1)(c) and (d) of the *DVA*.

Keywords *Domestic Violence; Eviction; PIE; ESTA; Constitutional Property law*

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List of Abbreviations

<i>DVA</i>	Domestic Violence Act
<i>ESTA</i>	Extension of Security of Tenure Act
<i>LTA</i>	Land Reform (Labour Tenants') Act
<i>PIE</i>	Prevention of Illegal Eviction and Occupation of Land Act
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALRC</i>	South African Law Reform Commission
<i>TRHR</i>	Tydskrif vir die Romeins-Hollandse Reg

1. Introduction

1.1 *The social scourge of domestic abuse*

On 3 December 1999, the Constitutional Court handed down judgment in the matter of *S v Baloyi*.¹ Mrs Baloyi contended that her husband, an army officer, had kicked and shoved her, violating the terms of an interim protection order that she had earlier obtained against him in the domestic violence court. Mr Baloyi in turn testified that he had been thrown with a bottle and that Mrs Baloyi's brother had tried to strangle him.

The Court, by way of Sachs J, remarked:

All crime has harsh effects on society. What distinguishes domestic violence is its *hidden, repetitive character* and its *immeasurable ripple effects on our society* and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished.²

As is clear from the Baloyi matter,³ domestic violence cuts across social, economic, religious, ethnic, cultural, racial and geographical boundaries.⁴

In South Africa, a survey by the Department of Health indicated that thirteen per cent of men and seven per cent of women have experienced some form of physical assault in the twelve months preceding the survey. Of these cases, forty-eight per cent of the female respondents indicated that they were attacked while at home.⁵ According to the survey, the most common type of violent attack against women proved to be cases where the perpetrator is an intimate partner, and occurred within the home.⁶

¹ 2000 (1) SACR 81 (CC) (hereafter referred to as the Baloyi matter).

² At 86G (Own emphasis).

³ *Supra*.

⁴ James *Crisis Intervention* 256.

⁵ Department of Health *Health Survey* 209.

⁶ Department of Health *Health Survey* 209.

It was furthermore found that over twenty per cent of the injuries treated in South African hospitals every year are as a result of intentional injury, being the result of, for example, assault or self-harm. Women are especially at risk of violent attacks from intimate partners.⁷ Females in non-urban areas have a ninety per cent higher rate of hospitalisation or treatment for “intentional” injuries than those in urban areas.⁸

It would be a disservice, however, to imply that only women are at the receiving end of this scourge. Both males and females can be the aggressor, and both males and females could find themselves as victims of domestic abuse.⁹ Domestic violence is often portrayed as mostly confined to incidents of wife-beating, and are frequently blamed on traditional male and societal patriarchal beliefs. But, as James writes:

Violence ... is not something that develops only in families. It involves a complex interplay of social, cultural, and psychological factors, and to say that a patriarchal system alone is responsible for battering would seem to fall far short of the mark.¹⁰

Domestic abuse has serious consequences not just for the battered individuals concerned, but also for the larger family group and the community as a whole. There is no shortfall of research giving a strong indication that children who were abused in childhood or who have witnessed abuse between their parents, become adults who commit intimate partner violence or commit themselves to abusive relationships.¹¹ A report by the World Health Organisation¹² indicates that domestic violence is one of the main causes of ill health among women in the world.¹³ It can cause physical injuries, lead to the development of mental health issues, affect reproductive and sexual health, and inspire suicide.¹⁴

Domestic violence is theorised to be a never-ending cycle with phases, consisting of a calm period, then a build-up of tension followed by a violent outburst, followed by a

⁷ Department of Health *Health Survey* p 209.

⁸ Department of Health *Health Survey* p 208.

⁹ Taub 1980-1981 *Hofstra Law Review* 95.

¹⁰ James *Crisis Intervention* 259.

¹¹ James *Crisis Intervention* 261. Also see Taub 1980-1981 *Hofstra Law Review* 96.

¹² Hereinafter referred to as WHO.

¹³ Garcia-Moreno et al *Domestic Violence and Women's Health* vi.

¹⁴ Garcia-Moreno et al *Domestic Violence and Women's Health* xv.

return to normalcy.¹⁵ In some cases, the cycle will continue to escalate in severity, ending only in the death or serious injury of one of the partners at the hands of the other.¹⁶

In South Africa recently, the world-famous athlete Oscar Pistorius was charged with the murder of his late girlfriend Reeva Steenkamp. This event, as well as the ongoing Dewani trial, has focused renewed attention and debate on the occurrence of intimate partner violence within the South African society.

While there are some highly publicised cases, every day in South Africa thousands of other women are most likely killed, maimed, injured, humiliated or forced to bear economic dependency or emotional slights, in deafening silence, at the hands of an intimate partner or relative.

1.2 Legal strategies aimed at curbing abuse

Before December 1993, South Africa did not have any legislation specifically formulated to combat domestic violence. Abused women had to seek redress through the cumbersome criminal law system, or seek to obtain High Court interdicts, an often costly process.¹⁷

The *Prevention of Family Violence Act*¹⁸ came into effect on 1 December 1993, meant to provide an easy and cost-effective way for battered individuals to obtain legal relief against their abusers. The *Family Violence Act*, for the duration of its existence, was widely criticised: in particular, there were concerns about the provisions which provided for the exclusion of the respondent from the matrimonial home.¹⁹

¹⁵ James *Crisis Intervention* 266; Taub 1980-1981 *Hofstra Law Review* 96.

¹⁶ Taub 1980-1981 *Hofstra Law Review* 96.

¹⁷ Van der Hoven *Acta Criminologica* 19.

¹⁸ *Prevention of Family Violence Act* 133 of 1993 (hereafter referred to as the *Family Violence Act*).

¹⁹ This was provided for in section 2(1)(b) of the *Family Violence Act*, which provided that a court may give an order prohibiting the respondent from entering the matrimonial home or any specified part of the matrimonial home.

The *Domestic Violence Act*²⁰ came into effect six years later in December 1999, replacing the *Family Violence Act*. Amongst other changes, it broadens the scope of relationships brought within the ambit of the Act.

The *DVA* was enacted with the aim of addressing the high levels of intimate violence prevalent in South Africa and seeking to ensure that victims of domestic violence receive the maximum protection of the law.²¹ To this end the *DVA* includes protection for a wide range of persons, places certain positive duties on members of the South African police force to assist complainants, grants the courts broad discretion with regard to the types of orders it can issue and the steps it can take to combat abuse, and makes provision for extraordinary remedies such as granting an order for emergency monetary relief.

Section 2(1)(b) of the *Family Violence Act* reads as follows:

2(1) A judge or magistrate in chambers may, on application in the prescribed manner by a party to a marriage (hereinafter called the applicant) or by any other person who has a material interest in the matter on behalf of the applicant, grant an interdict against the other party to the marriage (hereinafter called the respondent) enjoining the respondent -

...

(b) not to enter the matrimonial home or other place where the applicant is resident, or a specified part of such home or place or a specified area in which such home or place is situated.²²

The *DVA*, despite the criticism that was levelled against its predecessor, retained the provisions that allows for a court to grant an order against a respondent that *de facto* evicts him from the shared residence. These provisions will be discussed more fully in Chapters 2, 4 and 5 below. Briefly, it can be stated that sections 7(1)(c) and 7(1)(d) of the *DVA* makes provision for the court to make an order that prohibits the respondent from entering the shared residence or any part of the shared residence.²³

²⁰ *Domestic Violence Act* 116 of 1998 (hereafter referred to as the *DVA*).

²¹ Preamble to the *DVA*; Artz and Smyth "Bridges and Barriers" 200.

²² S 2(1)(b) of the *Family Violence Act*. Van der Hoven *Acta Criminologica* 21.

²³ See ss 7(1)(c) and 7(1)(d) of the *DVA*.

The problem with provisions such as those provided for in sections 7(1)(c) and 7(1)(d) of the *DVA* can be illustrated with the following case study:

Mr A and Ms B had been living together for a period of seven years. They have two small children aged four and two. Mr A and Ms B are not married. The home in which they reside is registered to Mr A's name. Ms B had never worked and has no formal qualifications beyond Grade 10. Mr A and Ms B have frequent fights, and Mr A often physically abuses Ms B. One evening during a fight, Ms B confronts Mr A about keeping another girlfriend. She picks up a kitchen knife and holds it out in front of her, threatening to stab Mr A if he should try to assault her. The next morning, Mr A approaches the domestic violence court, alleging that Ms B had threatened to kill him with a kitchen knife. Mr A swears under oath that he is scared of his life and wants Ms B to leave his home in order to safeguard himself from physical harm. He asks for a protection order in terms of section 7(1)(c) of the *DVA*, and the magistrate in chambers – having only Mr A's side of the story – grants an interim order to that effect. The order is served on Ms B by the police, who inform her that she has to vacate the home forthwith. Ms B has no living relatives and is forced to spend the night with her two small children in an abandoned and run-down warehouse nearby, where they are subjected to the elements and criminal activities. Ms B has no money to hire a lawyer, and Mr A is already being represented by the local Legal Aid Board, who must turn Ms B away in order to avoid a conflict of interest. Ms B approaches the clerk of the domestic violence court a week after being turned out of her home. The clerk informs her of her right to oppose the granting of a final protection order on the return date, but due to a very busy and chaotic day at court, he neglects to inform her of her right to have the return date anticipated with 24 hours' notice. The set return date is still three weeks away, and in that time Ms B and her children are effectively homeless.

What had happened in this instance is that Mr A had used the *DVA*, and the provisions that is meant to safeguard vulnerable persons against abuse, and had turned it into a tool of abuse, punishing Ms B for confronting him about his other girlfriend.

A further example can be supplied here to illustrate how the *DVA* can be used as a tool of abuse, this time in order to settle a property dispute:

Mr Y is mentally disabled and is unable to work. He lives with his mother Mrs Z and his niece Mrs X in a house that Mrs Z had inherited from her late husband. When Mrs Z passes away her estate – which includes the house in which she had been living – devolves in equal parts onto her heirs, Mrs X and Mr Y. Mrs X does not want to share the house with her uncle, Mr Y, who can be prone to aggressive outbursts due to his mental incapacity. Mrs X further wants to rent out the spare rooms in the house. She approaches the domestic violence court and applies for a protection order against Mr Y, citing the numerous occasions on which Mr Y have broken doors or lamps or chairs, swore at her, and threatened to kill her. She alleges that she is in fear of her life. She however fails to mention that Mr Y is a co-owner of the house in question or that Mr Y suffers from a mental disability which renders him incapable of looking after himself. The court, having only Mrs X's application form and affidavit in front of it, makes an interim order in terms of section 7(1)(c), prohibiting Mr Y from entering the shared residence. The policemen serving the order on Mr Y are young and inexperienced and they force Mr Y out of the house when he fails to leave on his own. They mistake his mental disability for drunkenness and get involved in an altercation with him, which results in Mr Y spending the night in the cells at the local police station. He is released in the morning and, unable to go back to his home, ends up wandering the streets until he is taken in by a non-profit care facility, who engages attorneys to appoint a curator to look after Mr Y's legal interests.

The above case studies are merely examples – they are purely fictional, albeit containing elements from real life cases that the writer hereof had come across during extensive experience litigating in the domestic violence courts. They however serve to illustrate the problem which inspires this dissertation, namely the possibility for the misuse and abuse of certain sections of the *DVA* in order to further the ulterior motives of the applicant in an application for a protection order.²⁴ This may

²⁴ See *inter alia* paragraph 1.5 below.

result in court orders that amount to *de facto* evictions,²⁵ where the proper process for evicting a person had not been followed.²⁶

1.3 The trauma of eviction

A United Nations Fact Sheet on forced evictions reads:²⁷

[T]o be persistently threatened or actually victimised by the act of forced eviction from one's home or land is surely one of the most supreme injustices any individual, family, household or community can face.

An eviction can be defined as the removal of a person against his or her will from land or a building or structure which he or she has been occupying, whether temporarily or permanently.²⁸

According to Chenwi²⁹ evictions are a procedure which has the potential to encroach on a large variety of human rights. It should therefore be approached with the utmost caution to ensure that no person's fundamental rights are intruded upon. Evictions furthermore normally affect the most vulnerable members of a society, including the poor and women and children.³⁰

Sections 7(1)(c) and 7(1)(d) of the *DVA*, which sections enables a magistrate presiding over an application brought in terms of the *DVA* to grant orders prohibiting a respondent in such an application from entering a shared residence or any specified part of a shared residence,³¹ results in *de facto* evictions – as will be argued in paragraph 2.2 below.

²⁵ In this regard, see paragraph 2.3 below.

²⁶ See *inter alia* paragraph 1.4 as well as Chapters 3 and 4 below.

²⁷ Commission on Human Rights Fact Sheet No 25, Forced Evictions and Human Rights (hereafter referred to as Fact Sheet No. 25).

²⁸ See also s1 of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998, hereafter referred to as *PIE*, and s1 of the *Extension of Security of Tenure Act* 62 of 1997, hereafter referred to as *ESTA*. Evictions in general will be discussed at paragraph 3 in Chapter 2 below. The provisions of *PIE* and *ESTA*, together with case law on these subjects, are discussed at paragraphs 3.1 and 3.2 respectively of Chapter 4 below.

²⁹ Chenwi *Evictions* 2.

³⁰ Chenwi *Evictions in South Africa* 2.

³¹ See paragraphs 1.5 and 2.2 of this dissertation, wherein these orders are discussed in more detail.

It should be pointed out at this stage that the orders given in terms of sections 7(1)(c) and 7(1)(d) of the *DVA* differs somewhat from traditional orders for the eviction of an unlawful occupier, in that the orders given in terms of sections 7(1)(c) and 7(1)(d) are not intended to result in the permanent eviction of an unlawful occupier. The orders are in fact not meant to be eviction orders at all, and their primary goal is to protect an applicant from domestic abuse and any harm resulting therefrom. The fact that these orders in fact result in something akin to eviction (if not always an actual permanent eviction in the traditional sense) should however be kept in mind at all times.

1.4 Evictions and the South African Constitution

In terms of section 26(3) of the *Constitution of the Republic of South Africa*³² no person(s) may be evicted from their home without a valid order of court, which order should be granted only after taking into consideration *all relevant circumstances*.³³ In furtherance of this, specific pieces of legislation³⁴ also prescribe procedures and requirements for a legal eviction.³⁵

The orders granted in terms of sections 7(1)(c) and (d) of the *DVA* are often given as *interim* orders, thus *ex parte* orders, meaning that the other party to the dispute is not given a chance to state his case at that time, but only later when it needs to be decided whether or not to make the order final. At the time the *interim* order is granted the court is consequently often not in a position to consider *all relevant circumstances*, as there may be facts or situations that are within the peculiar knowledge of the respondent, or that the applicant chose not to disclose in his or her application. The court is often only made aware of these circumstances after the interim order has been served on the respondent and the parties return to court to hear the respondent's reasons for not making the order final.

³² *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*).

³³ Own emphasis. The concept of "relevant circumstances" is discussed in full at paragraph 4.2.1.2 of Chapter 4 below.

³⁴ Including (but not limited to) the *Extension of Security of Tenure Act* 62 of 1997 (*supra*, referred to hereinafter as *ESTA*) and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (*supra*, hereinafter referred to as *PIE*).

³⁵ *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA).

Legislation such as the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*³⁶ and the *Extension of Security of Tenure Act*³⁷ provide for eviction proceedings, including urgent eviction proceedings. In the case of *Ndlovu v Ngcobo; Bekker and Bosch v Jika*³⁸ the judge ruled that all evictions of *unlawful occupiers* fall under the provisions of *PIE*.³⁹ The eviction of persons occupying land outside of a registered township, and who has a monthly income of less than R 5000.00 and who at any one time had permission from the owner or the person in charge of the concerned land to occupy said land must be done through the provisions of *ESTA*.⁴⁰ Certain instances of the eviction of occupiers who had been employed on the land on which they reside must be dealt with in terms of the *Land Reform (Labour Tenants' Act)*.⁴¹ The only eviction applications that can still be launched using the common law are evictions relating to “business, industrial or trade premises only.”⁴²

It can clearly be seen that all evictions are regulated by law, whether it be the common law or legislation such as *PIE* or *ESTA* or the *LTA*. Every eviction has to be handled in accordance with the law applicable to it. Thus, *de facto* evictions orchestrated through means of the *DVA* must comply with the rules and requirements set for such eviction by the relevant law.

If it is found that an order given in terms of section 7(1)(c) or 7(1)(d) of the *DVA* indeed amounts to the eviction of an unlawful occupier, it follows that the provisions of *PIE* (or, as the case may be, *ESTA* or the *LTA* or the common law) must be applicable to such an order. Therefore, before an order is given in terms of section 7(1)(c) or 7(1)(d) of the *DVA*, where the respondent is an unlawful occupier, the procedural and substantive requirements prescribed in the relevant legislation dealing with the specific type of eviction need to be complied with.

³⁶ 19 of 1998 (hereafter referred to as *PIE*).

³⁷ 62 of 1997 (hereafter referred to as *ESTA*).

³⁸ *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) (hereafter referred to as *Ndlovu*).

³⁹ Pienaar *Land Reform* 691.

⁴⁰ Smith *Evictions Seminar* 3-5.

⁴¹ Act 3 of 1996 (hereafter referred to as the *LTA*). See in this regard Smith *Evictions Seminar* 5-6.

⁴² Pienaar “Unlawful occupier” 318.

The fundamental rights of the respondent may be impacted by sections 7(1)(c) and (d) of the *DVA*. These include the right to property, protected by section 25(1) of the *Constitution*, since the respondent may well be evicted from property to which he has some kind of right. The right to access to the courts is also infringed upon, since the respondent is evicted from his or her dwelling before he or she has had a chance to be heard by the court. Other fundamental rights that will be briefly touched upon include the right to human dignity and the rights of children.⁴³

1.5 Evictions and the Domestic Violence Act

In practice it can be seen that the domestic violence courts are often used by parties to get the upper hand in personal, marital or property disputes.⁴⁴ Artz and Smythe⁴⁵ writes:

... [A] constant refrain expressed by all criminal justice personnel [is] that applicants, and particularly women, are using the Act instrumentally to obtain both relief and revenge.

It cannot be guaranteed that the applicant is necessarily always the innocent victim and the respondent the wrongdoer. Respondents may frequently also be women (often women with children) and persons with disabilities: so-called “vulnerable persons” whose rights may be affected adversely in the extreme by an eviction order granted *ex parte* in terms of the *DVA*. Artz⁴⁶ writes:

Far from providing the type of protection envisaged in the Act, in these cases the protection order becomes a weapon to be used by one partner against another (...)

This runs contrary to the aims and spirit of the *DVA*, which was actually written exactly to safeguard the rights of persons that are vulnerable to domestic abuse.

In terms of section 7(1)(c) of the *DVA* an applicant in a domestic violence court may apply for a protection order in terms of which a respondent may be prohibited from

⁴³ The various rights that may be infringed upon is discussed in paragraph 2.4.2 below.

⁴⁴ See *inter alia* Artz and Smythe “Bridges and Barriers”.

⁴⁵ “Bridges and Barriers” 210.

⁴⁶ Artz and Smythe “Bridges and Barriers” 216.

“entering a shared residence shared by the complainant and the respondent.”⁴⁷ Section 7(1)(d) provides for an order wherein the court can prohibit a respondent from entering a specified *part* of a shared residence.⁴⁸

Section 7(1)(c) itself is textually limited, in that a magistrate can only give an order in terms of it if he/she is convinced that such an order is “in the best interest of the complainant.”⁴⁹ However, this still leaves the court with a wide discretion.

Because of the serious consequences that such orders as the ones presently under discussion may have, magistrates have been shown, in a study conducted by Artz *et al.*,⁵⁰ to be hesitant to grant such orders, especially at the interim stage where the respondent is not present to argue his side.

It is hypothesised that the type of orders provided for in section 7(1)(c) and section 7(1)(d) of the *DVA* often amounts to *de facto* evictions.⁵¹ This is because the results of these orders are typically what one would classify under the definition of an “eviction.”⁵²

The relevant parts in the *DVA* are however an extremely necessary aspect of our domestic violence legislation which cannot be abolished without considerably hampering the powers of our courts in domestic violence cases.

Taking an approach focusing on the respondent’s rights – what Artz refers to as the “conservative approach”, which is focused on the respondent’s right to continue occupying the shared residence may infringe as severely upon the applicant’s constitutional rights as the types of orders envisioned by sections 7(1)(c) and (d) of

⁴⁷ S 7(1)(c) of the *DVA*.

⁴⁸ The *Protection from Harassment Act 17* of 2011, an act very similar to the *DVA* in its scope, object and implementation, contains no corresponding clauses.

⁴⁹ S 7(1)(c) of the *DVA*.

⁵⁰ Artz and Smythe “Bridges and Barriers” 215-216.

⁵¹ Artz and Smythe “Bridges and Barriers” 215; Chenwi *Evictions in South Africa* 63 and SALRC *Project 100 Discussion Paper 70* 119-120. See also par 2.2 and 2.3.1 below.

⁵² See par 2.3.1 below.

the DVA.⁵³ This is because allowing an abuser to stay in the shared residence when the only effective remedy for the abuse is his or her removal from said shared residence means that the abuse is allowed to continue, which could infringe upon the abuse victim's constitutional rights.

The rights identified in this process will be thoroughly evaluated from the view point of a "vulnerable person." Throughout the years, many people have been deemed vulnerable by courts. With regard to evictions specifically, the court seemed to consider in the matter of *Brookway Property 30 (Pty) Ltd v The People Who Intend Invading Portion 150 of The Farm Zandfontein 31*⁵⁴ "women, children or vulnerable persons by virtue of age, infirmity or disability." In the matter of *Government of the Republic of South Africa and Others v Grootboom and Others*,⁵⁵ the court considered the question of the state's obligation to provide alternative accommodation for evictees, and stated: "The poor are particularly vulnerable and their needs require special attention."⁵⁶ Attention will briefly be paid to how the legislator had sought to protect the rights of vulnerable persons through the *Constitution* as well as in the DVA.

Women, their dependent children, people with disabilities and others lacking the means to support themselves – such as the impoverished - may be left homeless and destitute by such orders as envisioned above. They may be denied access to their children or their possessions. In some circumstances, sections 7(1)(c) and (d) of the DVA might thus contribute to the very things it seeks to avoid, namely infringements of the basic human rights of the victims of domestic violence.

1.6 Conclusion

⁵³ Think of, for example, the impact on the applicant's rights to life, to human dignity, to safety and security or physical and emotional integrity, the right of access to the courts, property rights and so forth.

⁵⁴ *Brookway Property 30 (Pty) Ltd v The People Who Intend Invading Portion 150 of The Farm Zandfontein* 2010 JDR 1183 (GNP).

⁵⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (hereafter referred to as the *Grootboom* matter).

⁵⁶ 1189.

The question that this study will seek to answer involves an enquiry as to the constitutionality of sections 7(1)(c) and (d) of the *DVA*. It will be asked if sections 7(1)(c) and 7(1)(d) of the *DVA* can survive constitutional scrutiny. This question has not yet been answered authoritatively.⁵⁷

The study will seek *inter alia* to examine the fundamental rights that are impacted by sections 7(1)(c) and (d) of the *DVA*, and to assess the justifiability, if any, of these infringements - especially in the light of the stated purpose of the *DVA* and the potential for the provisions to be misused.

To this end the study will examine whether sections 7(1)(c) and 7(1)(d) are in line with, mainly, section 25 and section 26(3) of the *Constitution*. Section 25 seeks to protect a wide variety of property rights – importantly, this includes the right not to be deprived of property arbitrarily.⁵⁸ Section 26(3) protects a person against arbitrary eviction and/or evictions perpetrated without an order of court. Section 25 is discussed more thoroughly in chapter 3 below, and section 26(3) in chapter 4.

Pursuant to the above, this dissertation will, firstly, look at the *DVA* and examine the concept of an eviction and its social and legal history in South Africa, putting it into context against the orders provided for in sections 7(1)(c) and (d). Thereafter, the changes wrought by the *Constitution* will be examined in detail. In particular, attention will be paid to the importance of sections 25(1)⁵⁹ and 26(3)⁶⁰ and to their impact, both on South African national legislation, and on the interpretation of said legislation by South African courts.

Finally, the orders provided for in section 7(1)(c) and 7(1)(d) of the *DVA* will be critically analysed to establish, firstly, if these can be said to be eviction orders; and secondly, if so, whether or not these eviction orders comply with the procedural and substantive requirements that South African law sets for specific eviction orders of its kind – in this regard, reference will be made to the provisions of, *inter alia*, the common law, *PIE*, *ESTA*, and the *LTA*. The legislation will be thoroughly analysed

⁵⁷ SALRC *Domestic Violence* 120.

⁵⁸ Section 25(1) of the *Constitution*.

⁵⁹ See chapter 3.

⁶⁰ See chapter 4.

and the important case law discussed in order to identify the specific requirements that the legislation prescribes for any eviction order that is sought under the circumstances that the relevant legislation caters for.

2. The *Domestic Violence Act 116 of 1998* and possible infringements on human rights

2.1 Introduction

This chapter will seek firstly to examine the origins and the purpose of the *DVA*.⁶¹ This is necessary in order to provide a social context to the discussions that will follow later on in this dissertation.⁶² Particular focus will then be placed on sections 7(1)(c) and (d) of the *DVA*, which allow for a court to order that a respondent be prohibited from entering a shared residence or any particular part of a shared residence. These are the sections of the *DVA* that are placed under scrutiny in this dissertation.

It is hypothesised in Chapter One of this dissertation that sections 7(1)(c) and (d) provide for orders that amount to an order for eviction of the respondent,⁶³ and that in the process several basic human rights – as set out in the Bill of Rights of the *Constitution* – are infringed upon.⁶⁴ This hypothesis holds that section 7(1) of the *DVA* provides for the granting of *de facto* eviction orders that may be both procedurally and substantively unlawful and unconstitutional. The hypotheses described in this paragraph will be tested in the following chapters.⁶⁵

In order to determine whether or not such orders are indeed unconstitutional, it is first necessary to scrutinise these provisions carefully, taking into regard the context in which they are designed to function. To this end, a discussion of the *DVA* and the domestic violence courts follows, wherein specific reference will be made to the impugned provisions. Thereafter, the South African law pertaining to evictions will be studied to determine what may be considered an eviction. The history of evictions in South Africa will also be set out to provide the reader with a background that will aid in understanding the social, economic and historic factors informing South Africa's

⁶¹ *Domestic Violence Act 116 of 1998* (hereafter the *DVA*).

⁶² See for example paragraph 5.3.3, where sections 7(1)(c) and 7(1)(d) are weighed up against the limitations clause.

⁶³ See paragraph 1.5 above.

⁶⁴ See paragraphs 1.4 and 1.5.

⁶⁵ See *inter alia* paragraphs 2.3.1 and 2.4.2 as well as Chapters 3 and 4.

eviction laws. Lastly, the fundamental rights that sections 7(1)(c) and (d) may be said to infringe upon are also subjected to closer scrutiny.

2.2 The Domestic Violence Act

The precursor to the *DVA*, the *Family Violence Act*,⁶⁶ was enacted in 1993. The *DVA*⁶⁷ was enacted five years later in order to, *inter alia*, “(...) afford the victims of domestic violence the maximum protection from domestic abuse (...)”⁶⁸ According to Artz it was meant as a “legal tool to stop certain abuses taking place in domestic relationships.”⁶⁹

An application for a protection order in terms of the *DVA* is lodged with the Clerk of the Court in the prescribed form.⁷⁰ The Clerk of the Court then submits the application, together with any and all affidavits accompanying it, to the court.⁷¹ The court will then decide whether or not to grant an interim order.⁷² In a study, previously mentioned,⁷³ it was found that in the group of sample magistrates, “almost every interim protection order applied for was granted.”

It was further found, during the above-named study, that the procedure for applying for a protection order was, in practice, “sloppy” due to the heavy caseloads with which clerks of the domestic violence court and magistrates are burdened.⁷⁴ As a result, the information presented to the presiding magistrate in the application for a protection order was “sketchy.”⁷⁵

⁶⁶ *Family Violence Act* 133 of 1993.

⁶⁷ 116 of 1998 (hereafter referred to as the *DVA*).

⁶⁸ Preamble to the *DVA*.

⁶⁹ Artz *Issues of Interpretation* 7.

⁷⁰ S 4(1) of the *DVA* read with s4(7) of the *DVA*. The relevant form is provided in the regulations issued under the *DVA* and is attached hereto as Annexure “A” – see footnote 108 in this regard.

⁷¹ S 4(7) of the *DVA*.

⁷² The issuing of an interim order is regulated by s 5 of the *DVA*.

⁷³ Artz *Issues of Interpretation* 8. See footnote 66.

⁷⁴ Artz *Issues of Interpretation* 14.

⁷⁵ Artz *Issues of Interpretation* 15.

The court should consider the application as soon as possible.⁷⁶ If the court is satisfied that act(s) of domestic violence is/are being committed or has/have been committed in the past, and that undue hardship will follow for the complainant if an order is not granted forthwith, the court *must* grant an interim protection order.⁷⁷

The respondent need not have been notified of the application against him/her in order for a valid interim order to be granted – thus the *DVA* provides for the granting of *ex parte* interim orders.⁷⁸

After an interim order has been granted, a copy of such order must be served upon the respondent, and he must be notified of a return date.⁷⁹ If the court exercises its discretion and decides *not* to issue an interim order, a copy of the application must still be served upon the respondent, and he must be notified of the date upon which the court will decide upon a final order – on which date he has the burden of proof to show the court why a final order should not be granted.⁸⁰

Section 7 of the *DVA* describes the court's powers with regard to the types of orders it can grant. Section 7(1)(c) of the *DVA* authorises a court to grant an order prohibiting a respondent from “entering a shared residence shared by the complainant and respondent”.⁸¹ Textually, the power to grant a section 7(1)(c) order is qualified: it can only be granted if the court regards it as in the best interest of the complainant.⁸² In terms of section 7(1)(d), an order can also be granted to the effect that the respondent may not enter a specific part of the shared residence.⁸³

According to Artz, most orders pertaining to access to the shared residence (in other words section 7(1)(c) and (d) orders) were amended on the return date.⁸⁴ This

⁷⁶ S 5(1) of the *DVA*. In a study conducted by Artz *Issues of Interpretation* 18 it was found that not all applications were always processed on the same day they were received, due to a high case load.

⁷⁷ S 5(2) of the *DVA*.

⁷⁸ S 5(2) of the *DVA*.

⁷⁹ S 5(3) of the *DVA*.

⁸⁰ S 5(4) of the *DVA*.

⁸¹ S 7(1)(c) of the *DVA*.

⁸² S 7(1)(c) of the *DVA*.

⁸³ S 7(1)(d) of the *DVA*.

⁸⁴ Artz *Issues of Interpretation* 8.

means that where such an order has been granted at the interim stage, it would often end up not being included in the final order.

In terms of the *DVA*, a complainant is a person:

(...) who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant.⁸⁵

In turn, the respondent is defined as a person who is (or used to be) in a domestic relationship with the complainant and who has committed, or is alleged to have committed, an act of domestic violence.⁸⁶

“Domestic relationship”, a concept occurring in the definition of both complainant and respondent, is itself defined in section 1 of the *DVA*, and entails a wide range of human relationships – mainly biological or romantic, but also including persons who share or shared parental responsibilities for the same child, whether at the same time or not, and persons who merely live or have in the past lived together in the same residence, for whatever reason.⁸⁷

The problems that could possibly be identified with the type of orders envisioned in sections 7(1)(c) and section 7(1)(d) are manifold.

Firstly, it can be argued that sections 7(1)(c) and 7(1)(d) clearly allow for the granting of *de facto* eviction orders on an *ex parte* basis.⁸⁸ It will be shown in Chapter 4 below that specific pieces of legislation dealing with evictions do not provide for the granting of *ex parte* orders even on an urgent basis.⁸⁹ Furthermore, the *Constitution* prohibits the eviction of any person from his/her home without a court order that is issued after *all relevant circumstances* have been considered.⁹⁰ In *Bergboerdery v*

⁸⁵ S 1 of the *DVA*.

⁸⁶ S 1 of the *DVA*.

⁸⁷ S 1 of the *DVA*.

⁸⁸ S 7(1)(c) and (d) of the *DVA* read with s(5)(2) of the *DVA*.

⁸⁹ See the discussion of *PIE*'s s 5(2) in paragraph 4.3.1 below.

⁹⁰ S 26(3) *Constitution of the Republic of South Africa*, 1996. A discussion of what “relevant circumstances” entail will follow at paragraph 4.2.1.2 below.

Makgoro,⁹¹ the Land Claims Court was extremely critical of a magistrate that issued an eviction order – albeit an interim one – on an *ex parte* basis:

An application is typically brought *ex parte* where a litigant approaches the court for relief affecting his or her rights only and not those of anyone else. Clearly this was not the case here.⁹²

The court in this instance was of the opinion that the rights of the respondent in the situation were very significantly affected, and the applicant should have served him with notice of the action, even if only on a very urgent basis.⁹³

Secondly, it should be noted that the *DVA* does not require of a complainant to allege or prove that he/she is the owner of the property in question, or even that he/she has a right to reside on the property, before a section 7(1)(c) or (d) order can be granted. It should thus be assumed, in the light of the above, that it is possible for an unlawful occupier, by making use of the *DVA* and the domestic violence courts, to obtain a *de facto* eviction order against a respondent who may be in lawful occupation of the property concerned, and/or who might even be an owner or co-owner thereof.

The *DVA* further does not require of applicants to reveal whether they, or the respondent, “[a]re subject to any court orders binding themselves or the other party, including (...) eviction (...).”⁹⁴ The respondent is of course free to bring the fact of any court orders to the attention of the court on the return date, and presumably it will impact on the final order granted. The respondent could also in the interim apply for an eviction order himself, in terms of *PIE* or *ESTA* or other relevant legislation.

In the time that lapses between the granting of the order *nisi* and the final order, or until he/she can obtain a lawful eviction order against the complainant, the respondent could be lawfully rendered homeless and be arbitrarily deprived⁹⁵ of his

⁹¹ *Bergboerdery v Makgoro* 2000 (4) SA 575 (LCC) (hereafter referred to as the *Bergboerdery* matter).

⁹² At 583A.

⁹³ At 582G-583A.

⁹⁴ Artz and Smythe “Bridges and Barriers” 210.

⁹⁵ The meaning of the concept “arbitrary” is discussed at paragraph 3.2.1.1 in Chapter 3 below.

property, even if only temporarily, at the hands of a complainant that may not even be in lawful occupation of the property concerned.

Thirdly, in deciding whether or not to grant an interim order, a court is enjoined only to consider:

(a) whether or not an act of domestic violence can be said to have occurred;⁹⁶

and

(b) whether undue hardship will follow for the complainant if an order is not granted.⁹⁷

Although the court enjoys wide discretion with regard to the *type* of orders it may impose on a respondent,⁹⁸ it has no discretion to *refuse* to grant an interim protection order in favour of the applicant if the court is satisfied of the above two requirements, since section 5(2) of the *DVA* states “If the court is satisfied (...) the court *must* (...)”⁹⁹ Conceivably, this would mean that even if the court is made aware of circumstances pointing to hardship suffered by the *respondent* – such as for example that he or she might be rendered homeless or have his or her property rights limited or violated - the court can still not refuse to grant an order once the requirements of section 5(2)(a) and (b) are satisfied and/or remain satisfied. As stated previously, Artz found that, in a sample group of magistrates, most of the interim orders applied for were granted.¹⁰⁰

Under the *DVA*, a court may also not refuse to grant any specific order merely because there are other remedies available to the complainant.¹⁰¹ This would mean that even should the court be of the opinion that the complainant may be better off

⁹⁶ S 5(2)(a) of the *DVA*.

⁹⁷ S 5(2)(b) of the *DVA*.

⁹⁸ See s 7 of the *DVA*, in which a wide range of orders is set out, including, in section 7(1)(h): “Committing any other act as specified in the protection order.”

⁹⁹ Own emphasis.

¹⁰⁰ Artz *Issues of Interpretation* 8.

¹⁰¹ S 7(7)(a) of the *DVA*.

seeking a proper eviction order (through procedures provided for in other legislation such as *PIE*), the court cannot refuse to grant a complainant an order in terms of sections 7(1)(c) and (d) merely for this reason alone. Once again, as long as the requirements in section 5(2)(a) and (b) are satisfied, the court no longer has the discretion to refuse to grant an interim order.¹⁰²

The preamble to the *DVA*¹⁰³ states that “victims of domestic violence are among the most vulnerable members of society.” The Act aims to provide such victims with “maximum protection” against acts of domestic abuse.¹⁰⁴ It can therefore be argued that the *DVA* is specifically aimed at protecting the rights of the weak and the vulnerable within the context of domestic relationships. From the wide-ranging powers the *DVA* grants courts and other officers of the peace in the prevention of incidents of domestic violence, and from the broad scope of relationships and forms of abuse the *DVA* covers, it can be inferred that the legislator is very serious about providing adequate protection for victims of domestic abuse.

Amongst other things, the concept of a “domestic relationship” is defined in such a way as to bring the broadest possible scope of human relationships into the ambit of the Act. This includes relationships such as that of “persons who have or had parental responsibility for [a] child (whether or not at the same time) (...)”¹⁰⁵ and persons who are merely living in the same residence, or have lived together in the same residence recently.¹⁰⁶ Since “residence” in the *DVA* is defined to include “institutions for children, the elderly and the disabled”¹⁰⁷ this could conceivably mean that an applicant who is a resident of for example an old age home, can apply for a protection order against a live-in nurse or care-taker even though no other form of relationship exists between them.

The Act further allows for the bringing of applications by unrepresented minors.¹⁰⁸

¹⁰² See footnote 96 above.

¹⁰³ 116 of 1998.

¹⁰⁴ Preamble to the *DVA*.

¹⁰⁵ S 1 of the *DVA*.

¹⁰⁶ S 1 of the *DVA*.

¹⁰⁷ S 1 of the *DVA*.

¹⁰⁸ S 4(4).

Section 6(3) allows for a court to take the extraordinary step of preventing, at its own discretion, an unrepresented respondent from putting questions to the complainant directly during cross examination.

The range of orders a court can issue is equally far-reaching, with the most controversial probably being those provided for in section 7(1)(c) and (d), which form the subject matter of the present research. Section 7(1)(c) provides for the giving of an order that prohibits the respondent from entering a residence that he/she shares with the complainant.¹⁰⁹ Section 7(1)(d) on the other hand provides for a respondent to be restricted to accessing only certain parts or areas of a joint residence.¹¹⁰

The prescribed form that an application for a protection order must take is set out in regulation 4 to the *DVA*.¹¹¹ The Department of Justice accordingly issued its J480 form, which is in the format prescribed in regulation 4, and is used in the domestic violence courts. A copy of this form is attached hereto as Annexure “A”.

The form provides space for the complainant to list persons other than him/herself living in the shared residence (if any) that are affected by the alleged abuse, and requires the complainant to disclose if any of these persons suffer from a disability. The form also provides an opportunity for the ages (and, indirectly through the names, the sexes) of these persons to be enumerated. In this way, the form at least ensures that the existence of some vulnerable persons is brought to the court’s attention at the application stage already, albeit looked at from the perspective of the complainant’s point of view.

The form, however, does not at any point require of the complainant to divulge details – other than the name, address, sex, age, occupation and place of employment - of the respondent, that could assist the court in determining whether he or she may be a vulnerable person. The complainant is, for example, not required to state whether the respondent suffers from any disabilities, or whether he or she

¹⁰⁹ S 7(1)(c) of the *DVA*.

¹¹⁰ S 7(1)(d) of the *DVA*.

¹¹¹ In GN R1311 in GG 20601 of 5 November 1999.

may be the primary caregiver of minor children that would be adversely affected by an order in terms of sections 7(1)(c) and (d) of the *DVA*

As will be argued in paragraph 5.3.2 below, vulnerable persons require special consideration in our legal system.

The application for a protection order, together with a copy of any interim court order the court may have issued, is served on the respondent together with a J523 form, which calls on the respondent to show cause why a final protection order should not be granted.¹¹² A copy of this form, issued in accordance with the provisions of regulation 7 of the *DVA*, is attached hereto as Annexure “B”. The respondent is duly notified of his right to have the matter heard at an earlier date upon 24 hours’ written notice to the court and to the applicant, but no space (for example in the form of a pre-drafted notice attached to the form and which the respondent can complete with his or her particulars) is provided where an unrepresented respondent may quickly and simply provide such notice.

Regulation 8(a)¹¹³ prescribes the form in which the final order should be made in cases where an interim protection order had previously been issued, while regulation 8(b)¹¹⁴ describes the form in which the final order should be made in cases where no such interim protection order had been previously issued. The Department of Justice had accordingly issued their forms J551 and J566 respectively. Copies of these forms are attached as Annexures “C” and “D”.

A respondent can apply for the variation or setting aside of a protection order in terms of section 10(1) of the *DVA*.¹¹⁵ Regulation 13 of the *DVA* prescribes the form that this application should take – it is contained in the Department of Justice’s J649 form, which is attached hereto as Annexure “E”. This form, after requesting the particulars of applicant, the respondent and the protection order, provides a space

¹¹² S 5(4) of the *DVA* read with Form 5 in regulation 7 in GN R1311 in GG 20601 of 5 November 1999.

¹¹³ In GN R1311 in GG 20601 of 5 November 1999.

¹¹⁴ In GN R1311 in GG 20601 of 5 November 1999.

¹¹⁵ S10(1) of the *DVA*.

where the respondent against whom the protection order had been made can provide reasons why he or she wants the protection order set aside or varied.

The form on which such an application (for variation or setting aside) is launched, in itself does not provide respondents who are laymen any guidelines regarding what may constitute reasonable grounds for variation or setting aside. The form would require the assistance of a properly trained clerk of the domestic violence court or an attorney in order for a respondent to adequately set forth the reasons why he or she would want an order – such as an order provided for in section 7(1)(c) or 7(1)(d) – to be set aside or varied.

2.3. South African law pertaining to eviction

2.3.1 Definition of eviction

Eviction is a traumatic process which has often, historically, been fraught with the abuse of power and the entrenchment of inequalities.¹¹⁶ According to Van der Walt¹¹⁷ evictions in Apartheid South Africa used to be no neutral process, but “an exercise of social and political power.”

Chenwi¹¹⁸ defines an eviction as the removal of a person against his/her will, whether permanently or temporarily, from a building, structure or piece of land which he/she has been occupying. This would include the deprivation of any of the basic services linked to the occupier’s right of residence, such as water and sanitation.¹¹⁹

This definition accords with that used in statutes such as the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* 19 of 1998,¹²⁰ the *Extension of*

¹¹⁶ Chenwi *Evictions in South Africa* 2.

¹¹⁷ Van der Walt *Property in the Margins* 60.

¹¹⁸ Chenwi *Evictions in South Africa* 2.

¹¹⁹ Chenwi *Evictions in South Africa* 2. This, according to Pienaar *Land Reform* 700, should be termed “constructive eviction” and is not strictly provided for in for example the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 16 of 1998* but had been included in the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill* of 2008.

¹²⁰ Hereafter referred to as *PIE*.

*Security of Tenure Act 62 of 1997*¹²¹ and the *Draft Land Tenure Security Bill, 2011*.¹²²

ESTA defines an eviction as follows:

“evict” means to deprive a person against his or her will of residence of 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.¹²³

The definition in *PIE* is very similar to that in *ESTA* except that it refers to the deprivation of “occupation of a building or structure” or of occupation of the land on which said building or structure was erected.¹²⁴

An eviction need not necessarily be limited to the expulsion of a person from his or her home – disturbing an occupier’s peaceful occupation in other ways (such as through forbidding him or her access to a residence) can also be considered as an eviction in the context of section 26(3) of the *Constitution*.¹²⁵

2.3.2 An overview of eviction laws in South Africa

2.3.2.1 The common law

In the South African common law¹²⁶ – as it was set out in *Graham v Ridley*¹²⁷ and later confirmed in *Chetty v Naidoo*,¹²⁸ - an eviction is effected by use of the *rei vindicatio*. Herewith, eviction would be a relatively simple procedure: the owner

¹²¹ Hereafter referred to as *ESTA*.

¹²² *Draft Land Tenure Security Bill, 2011* published in GN 1118 in GG 33894 of 24 December 2010 (hereafter referred to as the *Land Tenure Security Bill*) This Bill aims to repeal *ESTA* and the *Land Reform (Labour Tenants) Act 3 of 1996*.

¹²³ S 1 *ESTA*.

¹²⁴ S 1 *PIE*. See also the definition in s 1 of the *Draft Land Tenure Security Bill, 2011* where “evict” is defined as: “(...) to deprive a person against his or her will of residence in land or the use of land or access to services linked to a right of residence in terms of this Act (...)”

¹²⁵ *Motswagae and others v Rustenburg Local Municipality and another* 2013 (2) SA 613 (CC) (hereafter referred to as the *Motswagae* matter) at 617C.

¹²⁶ Based on the Roman and Roman-Dutch legal systems – See Mohamed *Tenant and Landlord* 4-5 for an exposition of the roots of the South African common law.

¹²⁷ *Graham v Ridley* 1931 TPD 476.

¹²⁸ *Chetty v Naidoo* 1974 (3) SA 13 (A).

needs only to allege (and prove) ownership of the property and the evictee's possession thereof to succeed in his action.¹²⁹

In *Graham v Ridley*,¹³⁰ the court summarised it as follows:

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.¹³¹

The *onus* would then be on the evictee to prove circumstances that would allow him to stay in possession of the property.¹³² To defend him or herself against the *rei vindicatio*, a defendant would typically have to challenge the *facta probanda* on which the application is based.¹³³

In common law, such defences would include the existence of a lease agreement or a lien over the property, the establishment of a *negotium gestor* or *bona fide* possessor, or prescription.¹³⁴ Under certain circumstances, a non-owner could also sue for the eviction of an occupier from property. This would be the case where the non-owner had been granted possessory rights, such as when he had concluded a lease agreement with the owner, or had obtained such rights through session.¹³⁵

It can clearly be seen that in the Roman and Roman-Dutch law, eviction was not intended as a one-sided process, but that both owner and occupier had rights and obligations against and towards each other. These rights and obligations protected the occupier from being unfairly evicted. It should be noted, however, that it can be argued that the Roman and Roman-Dutch laws are based on the premise that the parties are of equal stature. The Roman and Roman-Dutch law does not take into account that the parties may be on an unequal footing with regard to social and economic standing.

¹²⁹ Mostert and Pope *Sakereg* 244; Smith *Evictions and Rental Claims* Par 1.2; see also *Chetty v Naidoo* (*supra*); Van Zyl *Romeinse Privaatreg* 163.

¹³⁰ *Graham v Ridley* (*supra*).

¹³¹ 479.

¹³² Mostert and Pope (eds) *Sakereg* 243, 245-246; Smith *Evictions and Rental Claims* Par 1.3.

¹³³ Mostert and Pope (eds) *Sakereg* 245.

¹³⁴ Mostert and Pope (eds) *Sakereg* 245; Smith *Evictions and Rental Claims* Par 1.5.

¹³⁵ Smith *Evictions and Rental Claims* Par 1.4; Mostert and Pope (eds) *Sakereg* 245.

2.3.2.2 Apartheid land law

In South Africa, evictions had long been an unequal process, entrenching and enforcing Apartheid's social and political hierarchies.¹³⁶ In the words of Sachs J in the *Port Elizabeth Municipality v Various Occupiers* case:¹³⁷

...[t]he principles of ownership in the Roman-Dutch law (...) gave legitimisation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies.¹³⁸

The *Natives' Land Act*¹³⁹ that came into effect in 1913, as well as the *Natives (Urban Areas) Act*¹⁴⁰ that came into effect ten years later, sought to segregate ownership of property along racial lines as well as to minimise the occurrence of non-labour related tenancies by indigenous people on white-owned farms and prevent the acquisition of farming land by non-white people.¹⁴¹ The 1913 *Land Act* forbade the entering into of land-related transactions between so-called "natives"¹⁴² and other persons without the approval of the Governor-General.¹⁴³ The 1913 *Land Act* further made provision for the establishment of a commission to identify and set aside segregated areas of land for use by "natives" and "non-natives".¹⁴⁴ Only about seven per cent of land in South Africa was eventually set aside for the use of "natives" under this Act.¹⁴⁵

¹³⁶ See, *inter alia*, Van der Walt *Property in the Margins* 60.

¹³⁷ *Port Elizabeth Municipality v Various Occupiers* Case CCT 53/03 (hereafter referred to as *PE Municipality* case).

¹³⁸ At par 10.

¹³⁹ *Natives' Land Act* 27 of 1913 (hereafter referred to as the 1913 Land Act).

¹⁴⁰ *Natives (Urban Areas) Act* 21 of 1923 (hereafter referred to as the 1923 Urban Areas Act).

¹⁴¹ Carey Miller and Pope *Land Title* 20-21; Giliomee and Mbenga *New History* 233; Pienaar "Unlawful Occupiers" 311. See also Pienaar's discussion of the reasons for the promulgation of the *Native Land Act* in *Land Reform* 81-82.

¹⁴² S10 *Natives' Land Act*. S10 held that: "native" shall mean 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 unincorporated [sic], if the persons who have a controlling interest therein are natives".

¹⁴³ S 1(1) *Natives' Land Act* 27 of 1913.

¹⁴⁴ Ss 2 and 3 *Natives' Land Act* 27 of 1913.

¹⁴⁵ O'Regan 1989 *SAJHR* 363; Gibson *Overcoming Historical Injustices* 11. Pienaar *Land Reform* 83 puts the figure at an initial 7.3%, later extended to about 8.3%.

The amount of land set aside for use by “natives” was extended in 1936 to about thirteen per cent¹⁴⁶ under the new *Native Trust and Land Act* of 1936.¹⁴⁷ This Act favoured a system of tenure for black South Africans whereby land put aside for their use was held in trust for them by the government’s South African Native Trust, and private land ownership by black individuals was made nearly impossible.¹⁴⁸ Furthermore, the rights of black people to reside within urban areas were severely restricted.¹⁴⁹

The 1913 *Land Act* and its sequel, the 1923 *Urban Areas Act*¹⁵⁰ is sometimes referred to as the first and second pillars of the Apartheid state.¹⁵¹

The process of land segregation gained momentum with the enactment of the *Natives (Urban Areas) Consolidation Act*¹⁵² in 1945, which further restricted the rights of black people to reside within urban areas.¹⁵³

Three pieces of legislation known as the *Group Areas Acts*¹⁵⁴ further entrenched the social segregation of racial groups in South Africa along lines of property ownership, by creating strictly separated areas of residence.¹⁵⁵ Persons classified in one racial group could not obtain any right of occupation or ownership in areas set aside for

¹⁴⁶ Pienaar *Land Reform* 92; O'Regan 1989 *SAJHR* 364; Gibson *Overcoming Historical Injustices* 11 puts the figure at 13.6%.

¹⁴⁷ *Native Trust and Land Act* 18 of 1936.

¹⁴⁸ *Native Trust and Land Act* 18 of 1936; Carey Miller and Pope *Land Title* 26-27; Thompson *History of South Africa* 163.

¹⁴⁹ Carey Miller and Pope *Land Title* 241. See also Pienaar *Land Reform* 87-96 for a discussion of the aims of the *Native Trust and Land Act* and its practical implementation.

¹⁵⁰ *Supra*.

¹⁵¹ Carey Miller and Pope *Land Title* 24; Pienaar “Unlawful occupier” 310 refers to the three main pillars of Apartheid as:

(a) the promulgation and strict enforcement of influx-control measures; (b) legislative measures regulating group areas on the basis of race; and (c) measures regulating the unlawful occupation of land or squatting.

¹⁵² See also Pienaar “Unlawful occupier” 311-313; *Natives (Urban Areas) Consolidation Act* 25 of 1945 (hereafter referred to as the 1945 Urban Areas Consolidation Act).

¹⁵³ Pienaar “Unlawful occupier” 311; Pienaar *Land Reform* 105.

¹⁵⁴ Three separate acts under this name successively repealed and followed each other, namely the *Group Areas Act* 41 of 1950; *Group Areas Act* 77 of 1957; *Group Areas Act* 36 of 1966.

¹⁵⁵ Carey Miller and Pope *Land Title* 30; Pienaar *Land Reform* 107.

persons of another racial group.¹⁵⁶ This resulted in the forced removal of thousands of non-white persons from areas designated “white.”¹⁵⁷ Giliomee and Mbenga write:

Neighbourhoods and even families had been broken up in the removals and people were dumped in new areas that lacked infrastructure.¹⁵⁸

These forced removals continued well into the 1980’s.¹⁵⁹

The keystone of Apartheid-era legislation on evictions was the *Prevention of Illegal Squatting Act*.¹⁶⁰ This Act sought to “provide for the prevention and control of illegal squatting”,¹⁶¹ although it did not define either the concept of “unlawful occupation” or “squatting.”¹⁶²

According to Pienaar¹⁶³ other legislative measures dealing with or affecting the regulation of unlawful occupiers and evictions included the *Trespass Act*,¹⁶⁴ the *Slums Act*,¹⁶⁵ and the *Health Act*.¹⁶⁶

Much of the racially discriminatory land laws were repealed by the *Abolition of Racially Based Land Measures Act*.¹⁶⁷ This was followed shortly by the *Upgrading of Land Tenure Rights Act*,¹⁶⁸ which sought to provide for the upgrading of certain types of tenure rights into ownership.¹⁶⁹ The acquisition of land ownership by black people in urban areas had already been made possible by legislative amendments in 1986.¹⁷⁰

2.4. The Constitution of 1996

¹⁵⁶ Pienaar “Unlawful occupier” 312.

¹⁵⁷ See Miller and Pope *Land Title* 32-35 and Gibson *Overcoming Historical Injustices* 11.

¹⁵⁸ Giliomee and Mbenga *New History* 319.

¹⁵⁹ Carey Miller and Pope *Land Title* 37.

¹⁶⁰ *Prevention of Illegal Squatting Act* 52 of 1951 (hereafter referred to as PISA).

¹⁶¹ PISA.

¹⁶² Pienaar “Unlawful occupier” 313.

¹⁶³ Pienaar “Unlawful occupier” 313.

¹⁶⁴ *Trespass Act* 6 of 1959 (hereafter referred to as the *Trespass Act*).

¹⁶⁵ *Slums Act* 76 of 1979 (hereafter referred to as the *Slums Act*).

¹⁶⁶ *Health Act* 63 of 1977 (hereafter referred to as the *Health Act*).

¹⁶⁷ *Abolition of Racially Based Land Measures Act* 108 of 1991.

¹⁶⁸ *Upgrading of Land Tenure Rights Act* 112 of 1991.

¹⁶⁹ See Carey Miller and Pope *Land Title* 252-266 for a discussion of the Act and its implications.

¹⁷⁰ Pienaar “Unlawful occupier” 314.

2.4.1 *The Bill of Rights in context*

When Nelson Mandela was released from the Victor Verster Prison in February 1990, South Africa was at the brink of a new era – historically, politically, socially, and legally. South African constitutional law for most of the twentieth century had followed the model of parliamentary sovereignty, and the courts had virtually no powers of review over legislation passed by it.¹⁷¹ The South African parliament represented only the interests of the white minority while other racial and/or ethnic groups were governed by the executive authority.¹⁷² Consequently, Parliament could – and did – pass discriminatory laws by the dozens, with little or no censure from the executive and judicial branches of government.

As opposition to the Apartheid state and its all-powerful non-representative parliament grew during the second half of the twentieth century, the Government started to wage a campaign of ruthless repression that involved gross human rights abuses.

By the late 1980's, however, the tides were turning and secret negotiations led to the unbanning of previously black-listed political parties, the release of Nelson Mandela (serving a life sentence for treason) and the convening of the Conference for a Democratic South Africa (CODESA).¹⁷³ An *Interim Constitution* was agreed upon on 18 November 1993 – more than three years since the convening of the first negotiating forum and the release of Nelson Mandela.

A final *Constitution* followed in May 1996, signed into law on 10 December 1996 after being certified by the fledgling Constitutional Court in October.¹⁷⁴ The Preamble of the final *Constitution*¹⁷⁵ reads:

¹⁷¹ Currie and De Waal *Bill of Rights* 2-3.

¹⁷² Currie and De Waal *Bill of Rights* 3.

¹⁷³ Currie and De Waal *Bill of Rights* 3-5; Mubangizi *Human Rights in South Africa* 52.

¹⁷⁴ Mubangizi *Human Rights in South Africa* 55; Currie and De Waal *Bill of Rights* 5-7. The certification judgment is reported as *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1 (CC). The final *Constitution* had been sent back to Constitutional Assembly once already by then – the first certification judgment is reported as *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC).

We, the people of South Africa, *recognise the injustices of our past*; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this *Constitution* as the supreme law of the Republic so as 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; Improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.¹⁷⁶

The final *Constitution* adopts the values of human dignity, equality, non-racialism and non-sexism, and legal principles such as a supreme constitution, the Rule of Law and a common adult suffrage¹⁷⁷ and it contains a Bill of Rights that enshrines fundamental rights for all.¹⁷⁸ The Bill of Rights contains traditional freedom rights, such as the rights to equality,¹⁷⁹ life¹⁸⁰ and freedom of expression.¹⁸¹ It also protects political rights¹⁸² and – especially important for the present discussion – property rights and socio-economic rights. A selection of these rights that are especially relevant when it comes to arbitrary evictions and vulnerable persons will be discussed below.

2.4.2 Possible infringements by the DVA

2.4.2.1 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.¹⁸³

¹⁷⁵ *The Constitution of the Republic of South Africa, 1996* (hereafter referred to as the *Constitution*).

¹⁷⁶ Preamble to the *Constitution* (own emphasis added).

¹⁷⁷ S 1 read together with s 7 of the *Constitution*.

¹⁷⁸ Chapter Two of the *Constitution*, comprising of ss 7 to 39.

¹⁷⁹ S 9 of the *Constitution*.

¹⁸⁰ S 11 of the *Constitution*.

¹⁸¹ S 16 of the *Constitution*.

¹⁸² See for example ss 17 (“Assembly, demonstration, picket and petition”), 19 (“political rights”) and 20 (“Citizenship”).

¹⁸³ S 10 of the *Constitution*.

The right to human dignity is one of the cornerstones of the South African *Constitution*.¹⁸⁴ It can be equated to a respect for an inherent human worth.¹⁸⁵ In addition to being an enforceable right in the *Constitution*, it also acts as a norm informing and shaping the interpretation of all other rights in the *Constitution*.¹⁸⁶

The court in the *Grootboom* matter¹⁸⁷ stated that all of the rights in the Bill of Rights should be interpreted with the value of human dignity in mind, otherwise the *Constitution* would be “worth infinitely less than its paper.”¹⁸⁸

The value of human dignity as a shaping force behind our socio-economic rights jurisprudence is demonstrated by Liebenberg, who writes:

...(to) value the inherent dignity of human beings as a society is to ensure that people enjoy civil and political liberties and also have effective access to the social and economic means indispensable to the development of their physical, emotional, creative and associational capabilities.¹⁸⁹

Eviction from one’s home can cause considerable loss of dignity for the person(s) concerned, especially in circumstances where the evictee is forced to find alternative shelter in conditions which may be unsanitary, over-crowded or open to the elements. Circumstances surrounding the eviction or resultant homelessness may force him or her to be absent from work or school, which absence would have to be explained by relating the circumstances which had befallen him or her – this could conceivably be a deeply humiliating experience.

2.4.2.2 Property rights

Section 25 of the *Constitution of the Republic of South Africa, 1996*¹⁹⁰ deals with the right to property. Section 25(1) reads:

¹⁸⁴ S 1 of the *Constitution*; Currie and De Waal *Bill of Rights* 272.

¹⁸⁵ Ackermann *Human Dignity* 4, 97-98.

¹⁸⁶ Currie and De Waal *Bill of Rights* 274-275; Ackermann *Human Dignity* 97-98.

¹⁸⁷ See footnote 55, *supra*.

¹⁸⁸ At Par 83.

¹⁸⁹ Liebenberg 2005 *SAJHR* 7.

¹⁹⁰ Hereafter referred to as the *Constitution*.

No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.¹⁹¹

The remainder of section 25 then deals with the standards for expropriation of property and the state's duty to progressively address past imbalances with relation to access to land.¹⁹² The fundamental rights provided for in section 25 will be discussed fully in Chapter 3 below.

2.4.2.3 Access to housing

Section 26 of the *Constitution* reads:

- (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.

It is relevant to determine what the right of access to adequate housing entails.

Section 26(3), which protects citizens against arbitrary and/or procedurally unfair evictions, is discussed in detail in Chapter 4 of this dissertation. It will thus not be included in the present discussion, which will focus mainly on section 26(1).

The rights in section 26(1) and (2) were one of the main subjects of the Constitutional Court's landmark ruling in *Government of the Republic of South Africa and Others v Grootboom and Others*.¹⁹³ In this matter, the respondents were a group of squatters (including families with young children), who had moved from their homes in the area of Wallacadene in the larger Cape Town metro, where the living conditions were appalling. They subsequently occupied an area of privately owned land without permission from the owner, who sought – and obtained – an eviction order against them. When the respondents failed to vacate the property in terms of

¹⁹¹ S 25(1) of *The Constitution of the Republic of South Africa*, 1996.

¹⁹² The fundamental rights provided for in section 25 will be discussed fully in Chapter 3 below.

¹⁹³ The *Grootboom* matter (*supra*).

the court order, they were forcibly removed by the sheriff. The eviction was carried out in a merciless and brutal fashion, and many respondents were not given enough time even to gather up their personal belongings before their homes were bulldozed. Finding themselves destitute, the respondents sought shelter on a local sports field. An application was made in the Cape High Court to compel the local government to supply them with basic shelter and amenities, in accordance with the provisions of the *Constitution*.¹⁹⁴ An order was made for the municipality to provide those of the respondents¹⁹⁵ that were children, together with their parents, with basic shelter until such time as the parents are able to provide for their children themselves or have found alternate accommodation.

The order of the High Court was challenged by the appellants in the Constitutional Court. The Constitutional Court found that section 26 is at one and the same time both a positive right – subsection (2) enjoins the state to achieve the progressive realisation of this right¹⁹⁶ through legislative and other means - as well as a negative right, in that the state should “desist from preventing or impairing the right of access to adequate housing.”¹⁹⁷ In the case at hand, the state infringed on the respondents’ negative right not to have their access to housing interfered with by demolishing their homes and destroying their possessions.¹⁹⁸ The court further found that the state is obliged to develop a programme or plan of action to provide for the basic shelter needs of persons with no roof over their heads.¹⁹⁹

The Court in *Grootboom* was adamant about the justiciability of socio-economic rights in the South African *Constitution*.²⁰⁰ Such a view is also championed by authors such as Liebenberg.²⁰¹ The phrase “access to” within section 26(1) acknowledges that the right to housing entails more than just a house – it also entails

¹⁹⁴ The High Court’s judgment is reported as *Grootboom v Oostenberg Municipality and Others* [2000 \(3\) BCLR 277](#) (C). The Constitutional provisions relied upon included ss 26(1) and (2) as well as s 28(1)(c), which deals with children’s rights to shelter and is discussed in the text below.

¹⁹⁵ The Applicants in the matter before the High Court. Since the present discussion will centre on the judgment of the Constitutional Court, the various parties will be referred to throughout as they are in front of the Constitutional Court.

¹⁹⁶ S 26(2) of the *Constitution*.

¹⁹⁷ Per Yacoob J at Par 34.

¹⁹⁸ *Grootboom* at Par 88.

¹⁹⁹ The order given by the court can be found at Par 99.

²⁰⁰ At par 20.

²⁰¹ See, *inter alia*, Liebenberg 2006 *Stellenbosch Law Review*.

the provision of infrastructure and a legislative framework that enables access to housing.²⁰²

In the matter of *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of SA as amicus curiae)*²⁰³ the court found that a municipality that forcibly evicted a group of squatters occupying an area of land at risk of developing sinkholes, and who tried to couch the evictions as emergency evacuations in terms of disaster management legislation in order to avoid having to meet the requirements set for an eviction by *PIE*, were guilty of infringing upon the section 26 rights of the occupiers by not providing adequately for the occupiers' relocation, and by destroying the occupiers' homes and building materials completely (rendering them unable to set up homes for themselves again elsewhere).

(a) DVA evictions and section 26

Section 26(1) and (2) have had a mostly vertical application in South African law. That is not, however, to say it cannot also be applied horizontally, since section 8(2) of the *Constitution* states that a provision of the Bill of Rights also binds natural and juristic persons.

The ways in which section 26(3) is violated by the *DVA* are discussed fully in Chapter 4 below and the justifiability of such infringements will be examined more fully in Chapter 5.

2.4.2.4 Children's rights

Where a victim of domestic violence is the primary caregiver of minor children, and she is forced to flee the home, her children – if they follow her - are likely to be exposed to instability and financial hardship.²⁰⁴

²⁰² At par 35.

²⁰³ *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of SA as amicus curiae)* 2012 (4) BCLR 388 (CC).

²⁰⁴ Bonthuys 1999 *SAJHR* 313.

Not only do they leave their home, but also a familiar environment, friends, and perhaps schools.²⁰⁵

The quotation above is a statement that was made discussing the situation of the children of a woman who flees her home to escape from an abuser. It should, however, hold equally true for the children of a mother forced to leave her home due to a court order.

The basic rights of such children are clearly violated through the court proceedings that are taking place between their mother and the court applicant. Should the mother – in cases where she is the primary caretaker - choose to leave her children behind in the care of the respondent, their right to parental care may be infringed upon, as we will see below.

The Bill of Rights contains a special clause that deals with the basic rights of children.²⁰⁶ This does not mean that children's rights are limited to those enumerated in section 28: With the exception of certain political rights specifically restricted to adult citizens, all other rights in the Bill of Rights also protect children.²⁰⁷ Children's rights are also supplemented by rights set out in the *Children's Act*.²⁰⁸

The best interest of the child must be the paramount consideration in any matter concerning a child.²⁰⁹ This is a rule that is almost universally accepted in international law as well as the law of other jurisdictions.²¹⁰

The "best interest of the child" standard is expounded upon in section 7 of the *Children's Act*.²¹¹ It lists factors that need to be taken into account when deciding the best interest of the child. This includes²¹² *inter alia* the nature of the child's relationships with parents, grand-parents, caregivers and other family members; the

²⁰⁵ Bonthuys 1999 SAJHR 311.

²⁰⁶ S 28 of the *Constitution*. S 28(3) provides that a child, for purposes of s 28, is a person under the age of eighteen years.

²⁰⁷ Currie and De Waal *Bill of Rights* 600.

²⁰⁸ S 8(1) of the *Children's Act* 38 of 2005 (hereafter referred to as the *Children's Act*).

²⁰⁹ S 28(2) of the *Constitution*; s 9 of the *Children's Act*; *Fletcher v Fletcher* 1948 (1) SA 130 (A).

²¹⁰ Schäfer *Child Law* 154.

²¹¹ *Supra*.

²¹² Ss 7(1)(a)-(n) of the *Children's Act*.

attitude and competency of the parents; the likely effects a change in environment will have on the child; practical difficulties and the child's development and needs.

The *Children's Act*²¹³ has its own set of additional guidelines set out in section 6 of the Act, listing a variety of principles that have to be kept in mind in any matter concerning the child. Section 6 of the *Children's Act* is only applied when a court is considering a matter flowing out of legislation – it does not apply when considering the principles of the common law.²¹⁴ It does, however, apply to administrative decisions made by government functionaries.²¹⁵ Any rights a child has in terms of the *Children's Act* supplement the rights that he or she has in the Bill of Rights in the *Constitution*.

Included amongst the provisions of section 28, the following is of interest when we look at evictions done in terms of the *DVA*:

(a) Section 28(1)(b)

Section 28(1)(b) states that every child has the right to family or parental care, or – in cases where a child is removed from his family – to suitable alternative care.

In *Jooste v Botha*²¹⁶ it was held that the right to “parental care” pertains to a right held against the custodian parent – it envisages “a child in care of somebody who has custody over him or her. To that situation every child is entitled.”²¹⁷

Should the respondent, a mother, be forced to move out of the shared residence through the terms of an interim protection order obtained against her, she might elect to leave her children behind in the care of the complainant or another person sharing the same residence, where they will at least have a roof over their heads and their education and social life will remain relatively uninterrupted. The complainant or the third person sharing the residence, however, may not be a custodian or parent to the

²¹³

Supra.

²¹⁴

Schäfer *Child Law* 63.

²¹⁵

Schäfer *Child Law* 63.

²¹⁶

Jooste v Botha 2000 (2) BCLR (T).

²¹⁷

At 196.

children – he or she may be an uncle or an aunt or another relative, or entirely unrelated. In such a case the children’s right to parental care, as set out in *Jooste v Botha*,²¹⁸ is infringed upon.²¹⁹

It should be noted that in the matter of *Heystek v Heystek*,²²⁰ two years later, the same court found that the right to parental care should *not* be restricted to a custodian parent, and should include other caregivers such as foster parents, step-parents and adopted parents.

In the matter of *S v M (Centre for Child Law as Amicus Curiae)*²²¹ the court directed that the interests of the child should be considered when deciding whether or not to sentence a custodial parent to imprisonment, thereby infringing upon the children’s right to parental care. It is argued here that, because evicting a custodial parent from the family home may have a similar effect on the children’s right to parental care as when the custodial parent is sentenced to imprisonment, similar considerations should apply when the court is considering evicting a custodial parent from the communal home.

(b) Section 28(1)(c)

Section 28(1)(c) provides that every child has the right to, *inter alia*, basic nutrition, health care, social services and shelter.

“Shelter”, the court in *Grootboom v Oostenberg Municipality and Others*²²² held, means “a right to be protected from the elements in circumstances where there is no need to remove such children from their parents.”²²³

A primary caregiver (such as for example a mother) who is turned out on the streets with no relatives or friends that she could presume upon for help might be forced to

²¹⁸ *Supra*.

²¹⁹ In *Jooste v Botha* the court determined that “parental care” refers to care by a *custodial* parent.

²²⁰ *Heystek v Heystek* 2002 (2) SA 199 (T) (Hereafter referred to as the *Heystek* matter).

²²¹ 2008 (3) SA 232 (CC) (Hereafter referred to as the *S v M* matter).

²²² *Grootboom v Oostenberg Municipality and Others* [2000 \(3\) BCLR 277](#) (C).

²²³ At 287-288.

live without any kind of shelter altogether, and the section 28(1)(c) rights of any children in her care would be violated.

(c) Section 28(1)(d)

Section 28(1)(d) protects children from “maltreatment, neglect, abuse or degradation.” They may suffer any of these harms when turned out of their home with their mother.

(d) Section 28(1)(h)

Section 28(1)(h) provides for children to be legally represented at state expense in civil matters that affect the child, where “substantial injustice” would follow if the child remains unrepresented. The right is echoed in section 14 of the *Children’s Act*, which provides that every child has the right “to bring, and to be assisted in bringing, a matter to court.”

In domestic violence cases, especially where no order is specifically sought on behalf of or entailing the children, the interests of unrepresented children may be overlooked or deliberately misrepresented by their warring parents. Eviction of a primary caregiver from the shared residence would certainly affect a child severely, to such an extent that a “substantial injustice” may follow.

2.4.2.5 The Right of Access to the Courts

Section 34 of the *Constitution* reads:

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.

In the matter of *Omar v The Government of the Republic of South Africa and others*²²⁴ the Constitutional Court handed down a unanimous judgment in an application to declare section 8(1) of the *DVA* invalid.²²⁵ The applicant argued, *inter alia*, that section 8(1) of the *DVA* – which directs the court to issue a warrant of arrest (albeit suspended) along with every single protection order it grants - violated his right of access to the courts by allowing for the issuing of arrest warrants on an *ex parte* basis. The court concluded that the right to access to the courts was in fact not violated, since the *ex parte* procedures provided for in the Act were “established and well-known procedures for dealing with emergency situations (...)”²²⁶ The *Omar* matter will be discussed fully in Chapter 5 below.

2.5. Conclusion

The forms that a complainant in an action in terms of the *DVA* completes do not provide any information – other than gender - that will explicitly disclose all relevant circumstances, including the question whether the respondent falls in any category of “vulnerable persons.” It does not explicitly ask the complainant to reveal if there are any *children or persons in the care of the respondent* that may be affected by the *protection order* – it merely provides room for the complainant to enumerate upon *other members of the household* that are affected by the alleged *abuse*. It provides room for the complainant to enumerate upon disabilities suffered by *other members of the household* – but does not force him to disclose if the respondent suffers any disabilities.

Furthermore, due to a heavy caseload that the clerks in domestic violence courts are burdened with,²²⁷ forms were completed in a “sloppy” manner, providing very little relevant information.

²²⁴ *Omar v The Government of the Republic of South Africa and others* CCT 47/04 (hereafter referred to as the *Omar* matter) – see a full discussion of the facts as well as the court’s findings in Chapter 4 of this dissertation.

²²⁵ This section makes it mandatory for a court to issue a suspended Warrant of Arrest together with every protection order it grants.

²²⁶ *Omar* matter at par 38.

²²⁷ See Artz *Issues of Interpretation* 14.

It was demonstrated that the *DVA* can thus potentially be misused, and become a tool of abuse rather than a tool for protection from abuse. Eviction orders issued in terms of the *DVA* may infringe upon the respondent's right not to be deprived of property arbitrarily (section 25(1) of the *Constitution*); on the right to access to adequate housing (section 26(1) of the *Constitution*); on the right to human dignity (section 10 of the *Constitution*); access to the courts (section 34 of the *Constitution*) and on children's rights to shelter and to parental care, and to be protected from degradation and neglect.

The next chapter will examine how sections 7(1)(c) and 7(1)(d) measure up against the principles of constitutional property law, with specific reference to section 25 of the *Constitution*, which was briefly mentioned above.

3. Constitutional protection of property rights

3.1. Introduction

Section 25 of the *Constitution*²²⁸ provides constitutional protection for property rights. This chapter will closely examine the content of the South African *Constitution*'s property clause, section 25.

The chapter will focus especially on the interpretation of section 25(1), which protects owners and holders of property against interference with their right to the use and enjoyment of such property.²²⁹

Subsequently, sections 7(1)(c) and (d) of the *DVA*²³⁰ will be measured against section 25(1) in order to determine whether or not they constitute an infringement of the constitutional right to property as set out in section 25 of the *Constitution*.

3.2. Section 25

3.2.1 Constitutional protection of property rights

Carey Miller and Pope²³¹ explain why the inclusion of constitutional property rights, such as that included in sections 25 and 26 of the *Constitution*, is unusual:

South Africa's history of discriminatory land practices²³² meant that the writers of the *Constitution* had three main concerns related to property to address:

...(p)rotection of individuals against expropriation of property without compensation; protection of the institution of private property and the right to be a property-holder or not to be prevented from becoming a property-holder; and the goal of making property, particularly land, available and

²²⁸ *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

²²⁹ See s 25(1) of the *Constitution* and Carey Miller and Pope *Land Title* 291-294.

²³⁰ *Domestic Violence Act* 116 of 1998 (hereafter referred to as the *DVA*).

²³¹ Carey Miller and Pope *Land Title* 284-285. See also Van der Walt *Constitutional Property Law* 31-32 in this regard.

²³² Discussed in par 2.3.2 of Chapter 2 above.

accessible so that people can be afforded opportunities to become property-holders.²³³

To this end, section 28 of the interim *Constitution* “represented an attempt to find a middle way between these contending arguments.”²³⁴ Section 28 may still have some relevance to property law, as it acts as an instrument against which pre-constitutional property laws must be measured.²³⁵

In the *Constitution*, the competing property interests are protected by section 25, while section 26 guarantees every person the right of access to basic housing,²³⁶ and prohibits arbitrary evictions and legislation that allows for arbitrary evictions.²³⁷

3.2.2 *The right to property*

The rights in section 25 do not constitute any sort of “positive claim” which entitles all its holders to property.²³⁸ Section 25 of the *Constitution* merely guarantees every person the right not to be arbitrarily deprived of their property,²³⁹ and the right not to have their property expropriated for reasons other than a public purpose or without compensation.²⁴⁰

The section also directs the state to take appropriate measures – legislative and otherwise – to redress past discrimination with regard to land,²⁴¹ to provide access to land on an equitable basis²⁴² and to secure tenure rights for groups with previously

²³³ Carey Miller and Pope *Land Title* 284.

²³⁴ Currie and De Waal *Bill of Rights* 533.

²³⁵ Carey Miller and Pope *Land Title* 287-288; Budlender, Latsky and Roux *Juta’s New Land Law* par 1.3. An example of this is the *Restitution of Land Rights Act* 22 of 1994 – see *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC), in which this Act was under scrutiny.

²³⁶ S 26(1) of the *Constitution*.

²³⁷ S 26(3) of the *Constitution*.

²³⁸ Van der Walt *Constitutional Property Law* 35. See also, for example, Carey Miller and Pope *Land Title* 282-285.

²³⁹ S 25(1) of the *Constitution*.

²⁴⁰ S 25(2) of the *Constitution*.

²⁴¹ S 25(8) of the *Constitution*.

²⁴² S 25(5) of the *Constitution*.

insecure tenure rights.²⁴³ In this sense, constitutional property law stands to be interpreted in the context of the program of land reform and transformation.²⁴⁴

The right to evict a person from one's property was, in the common law, "one of the strongest entitlements that a landowner has".²⁴⁵ Undoubtedly, any restriction upon this right infringes upon the property owner's or holder's rights under section 25(1). *Prima facie*, the right to evict can thus not be limited unless it is done non-arbitrarily, under law of general application.²⁴⁶

It should however be kept in mind that section 25 of the *Constitution* protects not only the rights of the property owner, but also certain other rights to property, such as the State's duty to promote equitable access to land.²⁴⁷

The limitations posed by legislation such as the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*²⁴⁸ and *ESTA*²⁴⁹ were examined at the hand of section 25 in the Constitutional Court judgment of *Port Elizabeth Municipality v Various Occupiers*,²⁵⁰ amongst other cases.

This chapter is, however, concerned more with the rights of the evictee that finds himself evicted under section 7 of the *DVA*. Section 7 of the *DVA* places no limitation on the property owner's or holder's right to evict – only on the property owner's or holder's right to peaceful and undisturbed possession, where such property owner is the respondent in an application in terms of the *DVA*. The following discussion will thus be from this viewpoint only.

²⁴³ S 25(6) of the *Constitution*.

²⁴⁴ Carey Miller and Pope *Land Title* 285.

²⁴⁵ Van der Walt *Constitutional Property Law* 296.

²⁴⁶ S 25(1) of the *Constitution*. See also Carey Miller and Pope *Land Title* 293.

²⁴⁷ See in this regard Currie en De Waal *Bill of Rights Handbook* 535 and s 25(5) of the *Constitution*.

²⁴⁸ 19 of 1998 (hereafter referred to as *PIE*).

²⁴⁹ 62 of 1997 (hereafter referred to as *ESTA*).

²⁵⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

3.2.2.1 The structure of section 25

Section 25(1) “confirms that property may be limited legitimately”²⁵¹ while at the same time looking out for property owners by holding that no person may be arbitrarily deprived of property, and that no law can permit such arbitrary deprivation.²⁵² Sections 25(2) and (3) set out the requirements that have to be met for an expropriation to be constitutional.²⁵³ Section 25(4) functions as a type of internal interpretation clause,²⁵⁴ in that it sets up guidelines for the interpretation of the terms “public interest”²⁵⁵ and “property.”²⁵⁶ It further places constitutional property law firmly within the context of land reform.²⁵⁷

Sections 25(5) to 25(9) deal mainly with issues of land reform – amongst other things, they direct the state to take reasonable measures (legislative as well as otherwise) to promote equitable access to land. For purposes of this dissertation, the focus will be on sections 25(1), (2), (3) and (4), which sections will be discussed in more detail below.²⁵⁸

(a) Deprivations and expropriations

Sections 25(1) and (2) read:

(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.

²⁵¹ Van der Walt *Constitutional Property Law* 17.

²⁵² Van der Walt *Constitutional Property Law* 17; Carey Miller and Pope *Land Title* 293; Pienaar *Land Reform* 176-177

²⁵³ A thorough discussion of these sections can be found in Pienaar *Land Reform* 177-179.

²⁵⁴ Van der Walt *Constitutional Property Law* 20; Pienaar *Land Reform* 179.

²⁵⁵ S 25(4)(a) reads:

(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(...)"

²⁵⁶ S 25(4)(b) holds that property is not restricted to land. See also Carey Miller and Pope *Land Title* 294 in this regard.

²⁵⁷ Carey Miller and Pope *Land Title* 294.

²⁵⁸ Pienaar *Land Reform* 182-185 can be consulted for an exposition of sections 25(5) tot 25(9).

(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

A fair proportion of the law surrounding sections 25(1) and (2) have been clarified by the Constitutional Court in the matter of *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.²⁵⁹ In this case the appellant – First National Bank – was the registered owner of three motor vehicles that were detained by the Commissioner of the South African Revenue Services (hereafter referred to as the Commissioner) for the customs debts of third parties in possession of these vehicles. In detaining the vehicles, the Commissioner relied on section 114 of the *Customs and Excise Act*.²⁶⁰ The court rightly remarked: “Section 114 clearly authorises the detention and sale of the goods of third parties (...)”.²⁶¹ It was argued that the provisions of section 114 amount to an expropriation, without compensation, of the appellant’s property and that it is thus inconsistent with section 25(1) of the *Constitution*. In its judgment, the court expounded in great detail on the provisions of section 25, aspects of which are relevant to the present discussion and will be examined below.

(i) The definition of property

Section 25(4)(b) states that: “property is not limited to land.”²⁶² The concept of property within the constitutional context should be interpreted more broadly than in the private law context,²⁶³ to include incorporeal property and, possibly, such types of rights as unemployment benefits or pension pay-outs.²⁶⁴

²⁵⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services and Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (hereafter referred to as the *FNB matter*).

²⁶⁰ *Customs and Excise Act* 91 of 1964.

²⁶¹ At 783C.

²⁶² S 25(4)(b) of the *Constitution*; See also Pienaar *Land Reform* 180.

²⁶³ Carey Miller and Pope *Land Title* 295.

²⁶⁴ Carey Miller and Pope *Land Title* 296; Pienaar *Land Reform* 180-181.

The court in the *FNB* matter declined to decide upon a comprehensive definition of “property”, but worked on the assumption that corporeal movables and land are certainly included within the definition of “property.”²⁶⁵ Currie and De Waal submit that “property” should not be interpreted either too narrowly or too generously, for too narrow an interpretation would leave much of a person’s property interests unprotected, whilst too generous an interpretation would mire down the state’s ability to govern in a flood of litigation.²⁶⁶ They contend that:

‘Property’ for purposes of s 25 should therefore be seen as those resources that are generally taken to constitute a person’s wealth, and that are recognised and protected by law.²⁶⁷

The inclusion or exclusion of a right(s) as “property” under section 25 will probably be determined on a case by case basis.²⁶⁸ Recently, the court in *National Credit Regulator v Opperman and others*²⁶⁹ declared that the right to restitution of money paid in unfair enrichment constitutes “property” for purposes of section 25.²⁷⁰

(ii) The Distinction between deprivation and expropriation

Within section 25, section 25(1) has mainly to do with “deprivation”, while sections 25(2) and (3) mainly have to do with “expropriation”,²⁷¹ which is a species of deprivation.²⁷² According to Van der Walt²⁷³ the distinction corresponds with two different types of state power – that of policing or regulation (dealt with as

²⁶⁵ At 794D-E. The facts of the case is discussed *supra*.

²⁶⁶ Currie and De Waal *Bill of Rights* 537.

²⁶⁷ Currie and De Waal *Bill of Rights* 539. See also Carey Miller and Pope *Land Title* 295-296 for an exposition of rights that may be included under the concept of “property”.

²⁶⁸ Van der Walt *Constitutional Property Law* 181; Carey Miller and Pope *Land Title* 298.

²⁶⁹ *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC) (hereafter referred to as *NCR v Opperman*).

²⁷⁰ At 21B.

²⁷¹ Pienaar *Land Reform* 177.

²⁷² *FNB* at 769G. See also *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) (hereafter *Minister of Minerals and Energy v Agri SA*) at 10E and *Agri SA v Minister for Minerals and Energy and others* CCT 51/12 [2013] ZACC 9 (hereafter referred to as the 2013 *Agri SA* matter).

²⁷³ Van der Walt *Constitutional Property Law* 192. See also *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa and Others* 2002 (1) BCLR 23 (T), (hereafter referred to as the *Lebowa* matter) where the same view is expressed. The court in the *Lebowa* matter, however, wrongly concluded that mineral rights are not “property” for purposes of s 25 – see in this regard Van der Walt *Constitutional Property Law* 110, 113-128, 125, 145, 403.

“deprivation” in section 25(1)) and that of ownership and acquisition (dealt with as “expropriation” in sections 25(2) and (3)).

In the *FNB* matter, the court held that:

... any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.²⁷⁴

Just because a right has no real value does not mean that right is devoid of content and thus unworthy of protection.²⁷⁵

In the matter of *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 for Local Government & Housing in the Province of Gauteng and Others*²⁷⁶ the court declined to provide a full definition of deprivation, but held that:

at the very least, *substantial interference or limitation* that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.²⁷⁷ (own emphasis)

In a minority judgment in the *Mkontwana* matter, O'Regan J remarks that an owner need not be wholly deprived of his possession or ownership of his property for a deprivation to be said to have occurred. Deprivation of a real right in the property concerned, such as limiting the property's uses or the owner's enjoyment thereof, can be an equally significant impairment of the owner's rights.²⁷⁸

²⁷⁴ At 796F.

²⁷⁵ 2013 Agri SA matter at par 42.

²⁷⁶ *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 for Local Government & Housing in the Province of Gauteng and Others* 2005 (2) BCLR 150 (CC) (hereafter referred to as the *Mkontwana* matter).

²⁷⁷ At par 32. The definition of “deprivation” used in the *Mkontwana* matter has drawn criticism for being too restrictive and for confusing the s 25(1) and s 36 enquiries – see, *inter alia*, Van Der Walt *Constitutional Property Law* 206-209. It was, however, cited with approval by the Constitutional Court in the matter of *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) – see below.

²⁷⁸ At Par 89.

The court in the matter of *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*²⁷⁹ agreed with the judgment in the *Mkontwana* matter, which stated that in order for deprivation of property to have occurred for purposes of section 25 there must at least be a “substantial interference.”²⁸⁰ In the *Offit Enterprises* case the appellants before the Constitutional Court owned property surrounded by an industrial zone being developed by the first respondents as part of a government development scheme. For nine years, the appellants had carried on business on their property under threat of expropriation, which they claimed devalued the property and prevented them from having the full use and enjoyment of said property. The court found that in fact no deprivation had occurred,²⁸¹ since the first respondent did not have the power to effect the expropriation it had been threatening.²⁸² Furthermore, the appellants could not substantiate their claim that the value of the property had decreased,²⁸³ and any possible expropriation was in any case an uncertain future event, the validity of which the court could not yet rule upon.²⁸⁴

The wide definition of deprivation includes expropriation, which the court in the *FNB matter* held to be a specific species of deprivation.²⁸⁵ Expropriation, as a species of deprivation, was explained as follows in the *Harksen v Lane* matter:

The word 'expropriate' is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.²⁸⁶

In this matter, the provisions allowed for the automatic vesting of the assets of a solvent spouse (in a marriage outside of community of property) in the trustees of the insolvent estate of his or her spouse, placing the *onus* on the solvent spouse to

²⁷⁹ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) (hereafter referred to as the *Offit Enterprises* matter).

²⁸⁰ At 307A-C.

²⁸¹ At 307H-308B.

²⁸² At 308A.

²⁸³ 308C.

²⁸⁴ 308B-C.

²⁸⁵ At 796G. This view was also held in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (Hereafter referred to as *Harksen v Lane*) and the *Lebowa* matter (*supra*). In the latter case it was wrongly decided that mineral rights do not constitute property for the purposes of section 25.

²⁸⁶ *Harksen v Lane* at 315D-F.

prove that the assets thus vested does not form a part of the insolvent estate. It was argued that this resulted in an expropriation without compensation of the assets of the solvent spouse.

It should be noted, however, that compensation is a prerequisite for a lawful expropriation, not a defining characteristic that distinguishes expropriation from the wider blanket of deprivation.²⁸⁷ An expropriation involves the acquisition of the property of the person being expropriated by or through the expropriating authority.²⁸⁸ The property rights so deprived must therefore vest in the State in order for a deprivation to constitute an expropriation.²⁸⁹ Whether or not an action constitutes ordinary deprivation or an expropriation needs to be determined on a case by case basis.²⁹⁰ The distinction between deprivation and expropriation is well established, as was pointed out by the Supreme Court of Appeal in *Steinberg v South Peninsula Municipality*.²⁹¹

Because of the relationship between deprivation and expropriation, an expropriation should - in addition to the requirements set in section 25(2) - also adhere to that set out in section 25(1).²⁹² The test for the constitutionality of any act or piece of legislation that amounts to an expropriation should start by being measured against section 25(1).²⁹³ If it passes scrutiny, the section should then be measured against the general limitations clause – section 36.²⁹⁴ If it passes scrutiny once again, it will at that point be determined if the deprivation can be said to amount to an expropriation – if so, it has to pass scrutiny when measured against sections 25(2) and (3) – and then again under section 36.²⁹⁵

(iii) Law of general application

²⁸⁷ *Minister of Minerals and Energy v Agri SA* (supra) at 14E-15D.

²⁸⁸ *Minister of Minerals and Energy v Agri SA* (supra) at 18D. In the 2013 *Agri SA* matter at par 59 the court remarks: "There can be no expropriation in circumstances where the deprivation does not result in property being acquired by the State."

²⁸⁹ *Pienaar Land Reform* 178.

²⁹⁰ *Minister of Minerals and Energy v Agri SA* (supra) at 18E.

²⁹¹ *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) at 1246A-G. See also Van Der Walt *Constitutional Property Law* 194-195. Also see the *FNB* matter and the 2013 *Agri* 2013 SA matter.

²⁹² Van der Walt 2005 *SALJ* 77; Van Der Walt *Constitutional Property Law* 343.

²⁹³ *FNB* at 797C; Van der Walt 2005 *SALJ* 77; Van Der Walt *Constitutional Property Law* 75.

²⁹⁴ Van Der Walt *Constitutional Property Law* 75-76; Carey Miller and Pope *Land Title* 295.

²⁹⁵ Van Der Walt *Constitutional Property Law* 76; Carey Miller and Pope *Land Title* 295.

Property may only be deprived or expropriated from a person in terms of law of general application.²⁹⁶ This is

(...) designed to protect individuals from being deprived of their property by laws which single them out for discriminatory treatment.²⁹⁷

According to Van der Walt, the first stage of this enquiry should be whether the law in terms of which the deprivation or expropriation is done is formally valid.²⁹⁸ The law must further be “generally and equally applicable and ensure parity of treatment (...)”²⁹⁹ and “be non-arbitrary, specific and accessible”³⁰⁰

(iv) The meaning of “arbitrary”

Property may not be deprived arbitrarily.³⁰¹ Van der Walt remarks, rightly:

The law of general application requirement in the first part of section 25(1) already establishes that deprivation cannot be arbitrary in the sense of either being aimed at a specific group or being applied without reference to a discernible standard.³⁰²

This creates a challenge of interpreting the term “arbitrary” in section 25(1) without rendering it superfluous.

In the *FNB* matter, the court held that in order for an action of deprivation to be considered non-arbitrary, there needs to be sufficient reason for it.³⁰³ “Sufficient reason” should be determined with regard to *inter alia* the following factors:³⁰⁴

- a) The relationship between the deprivation in question and the ends which it seeks to achieve.³⁰⁵ In *S v Lawrence*, *S v Negal*, *S v Solberg*³⁰⁶ the court

²⁹⁶ Ss 25(1) and (2) of the Constitution.

²⁹⁷ *Lebowa* matter (*supra*) per Daniels J at par 29.

²⁹⁸ Van der Walt *Constitutional Property Law* 232.

²⁹⁹ Van der Walt *Constitutional Property Law* 232.

³⁰⁰ Van der Walt *Constitutional Property Law* 232.

³⁰¹ S 25(1) of the *Constitution*.

³⁰² Van Der Walt *Constitutional Property Law* 237.

³⁰³ *FNB* at 810G.

³⁰⁴ The court in *FNB* lists these factors at 810H to 812A.

³⁰⁵ *FNB* 810H.

stated that: “(...) there must be a rational connection between means and ends. Otherwise the measure is arbitrary (...)”³⁰⁷

- b) The relationship between the purpose for the deprivation and the person whose property is affected.³⁰⁸
- c) The nature of the property concerned and the extent of the deprivation.³⁰⁹

All the relevant facts of each individual case should be considered when determining whether or not a deprivation is arbitrary.³¹⁰ The court should keep a “complexity of relationships” in mind.³¹¹ According to Budlender, Latsky and Roux, it is thus true that “the core test for arbitrariness is whether there is a rational connection between the means and the ends.”³¹² A law must have standards, which standards must be justifiable.³¹³ The court in the *FNB* matter laid down some rules of thumb when it comes to determining arbitrariness. These include that,

... 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,³¹⁴

and

... 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.³¹⁵

³⁰⁶ *S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (CC).

³⁰⁷ At 1195E.

³⁰⁸ *FNB* at 810I.

³⁰⁹ See the court's comments in *FNB* at 811A to 811E, especially 811C and 811D.

³¹⁰ *FNB* 811E.

³¹¹ *FNB* at 810H.

³¹² Budlender, Latsky and Roux *Juta's New Land Law* par 3.4.

³¹³ Budlender, Latsky and Roux *Juta's New Land Law* par 3.4.

³¹⁴ At 811A to 811B.

³¹⁵ At 811B to 811D.

A law can be both procedurally and substantively arbitrary.³¹⁶ With regard to substantive arbitrariness the following can be said:

The court in the *FNB* matter examined the context in which the term “arbitrary” is used in the *Constitution*, and enquired after similar provisions in the legal systems of countries such as Germany, the United States of America, Australia and the United Kingdom. It came to the conclusion that a deprivation is “arbitrary” when there is not sufficient reason for the deprivation.³¹⁷ This is what Van der Walt calls a test for “substantive arbitrariness” – deprivation can also be procedurally arbitrary.³¹⁸

In determining whether or not a law provides “sufficient reason”, one must have regard to the relationship between the purpose of the deprivation on the one hand and the person whose property is being deprived; the nature of the property being deprived and the extent of the deprivation on the other hand.³¹⁹ The existence or absence of “sufficient reason” must be determined on a case by case basis.³²⁰

The court in *FNB* also lays down some rules of thumb, such as that the reasons for deprivation should generally be more compelling where the property concerned is land or a corporeal movable,³²¹ or when “the deprivation embraces all the incidents of ownership.”³²²

The court in *Mkontwana* confirmed these sentiments when it held:

(...) the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.³²³

According to Roux,³²⁴ this amounts to a rather novel approach to constitutional property law, allowing for infringements to be judged on different levels, related to

³¹⁶ Van der Walt *Constitutional Property Law* 245.

³¹⁷ At 810G.

³¹⁸ Van der Walt *Constitutional Property Law* 245. See paragraph 2.2.1.1(d)(ii) below for a discussion of procedural arbitrariness.

³¹⁹ *FNB* matter at 810H to 811A.

³²⁰ *FNB* matter at 811E.

³²¹ At 811A-B.

³²² At 811B.

³²³ At Par 35.

the number of “incidences of ownership” it affects. Van der Walt condemns the possibility of such a system of differing levels of infringements:

The simplest solution is to assume that every restriction on property, no matter how small or insubstantial, constitutes deprivation in terms of s 25(1) and is therefore subject to its requirements.³²⁵

Delivered *per* Ackermann J, the majority judgment in the *FNB* matter found that section 114 of the *Customs and Excise Act*³²⁶ - although it has a legitimate and important purpose in the recovery of customs debt - allows for the deprivation of property even where the owner of such property has no connection to the customs debt or to the transaction that gave rise thereto.³²⁷ This “casts the net far too wide” and is consequently an arbitrary infringement on the appellant’s property rights.³²⁸

The Constitutional Court in the *Mkontwana* matter,³²⁹ following the reasoning of the court in the *FNB* matter, held that a law that requires an owner of immovable property to obtain a certificate from the municipality - stating that there is no consumption charges or rates outstanding - before a transfer of ownership can be registered by the Registrar of Deeds, constitutes a deprivation. However, the court held that such a deprivation was not arbitrary because there was sufficient reason for it. It would appear that the Constitutional Court, having used a thorough proportionality-type test for arbitrariness in the *FNB* matter, used a less stringent rationality enquiry in *Mkontwana*, based on the differences in the perceived extent of the deprivations.³³⁰

A similar test was applied by the High Court in the *Lebowa Mineral Trust* matter³³¹ where the court connected arbitrariness solely with rationality – the test lies in

³²⁴ Roux *Constitutional Property Law After FNB* 6.

³²⁵ Van der Walt 2005 SALJ 80.

³²⁶ *Customs and Excise Act* 91 of 1964.

³²⁷ At 814G-815B.

³²⁸ At 814H and 815B.

³²⁹ *Supra*.

³³⁰ Van der Walt *Constitutional Property Law* 250. There is uncertainty about whether the *Mkontwana* decision in fact altered the test laid down in the *FNB* – see Van Der Walt *Constitutional Property Law* 282-288 for a discussion on the relevant viewpoints.

³³¹ *Supra*.

determining “whether or not the legislative measures bear a rational relationship to the legislative goal they are intended to achieve.”³³²

With regard to procedural arbitrariness the following can be said:

The court in the *FNB* matter, although not expounding further on the meaning of procedural fairness, held that a deprivation must be procedurally fair in order to escape being arbitrary.³³³ Procedural fairness is a “flexible concept”, that must be determined with regard to the circumstances of each case.³³⁴ According to Van der Walt, a deprivation may be procedurally unfair when it is unfair in terms of “principles that apply in administrative law, but not caused by administrative action” – otherwise it will be superfluous, since the question will then be better settled under the *Promotion of Administrative Justice Act*.³³⁵

(v) Public purpose and compensation

Section 25(2) states that no property may be expropriated except for a public purpose or in the public interest,³³⁶ and with appropriate compensation.³³⁷ The *Expropriation Act*³³⁸ defines “public purpose” as including “any purposes connected with the administration of the provisions of any law by an organ of state.”³³⁹ The term “public interest” must be construed to include a commitment to land reform.³⁴⁰ This means that the “public purpose” requirement in section 25(2) should be interpreted generously³⁴¹ and that an expropriation that takes property from one private party to give it to another private party will not necessarily be unlawful in South African law.³⁴²

³³² *Lebowa Minerals Trust* matter at 29.

³³³ At 810G-H.

³³⁴ Per Yacoob J in *Mkontwana* at Par 65.

³³⁵ 3 of 2000 (Hereinafter referred to as PAJA).

³³⁶ S 25(2)(a) of the *Constitution*.

³³⁷ S 25(2)(b) of the *Constitution*.

³³⁸ *Expropriation Act* 63 of 1975 (hereafter referred to as the *Expropriation Act*).

³³⁹ S 1 of the *Expropriation Act*.

³⁴⁰ S 25(4)(a) of the *Constitution*.

³⁴¹ See Carey Miller and Pope *Land Title* 301.

³⁴² See Van der Walt *Constitutional Property Law* 462-466.

Property may not be expropriated without the payment of compensation.³⁴³ Section 25(3) of the *Constitution* sets out the factors that need to be taken into consideration when determining the amount of compensation payable. It states:

(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.³⁴⁴

In the *Ex Parte Highlands Residents; In Re Ash and others v Department of Land Affairs*³⁴⁵ matter, the Land Claims Court sought guidance on the interpretation of section 25(3) in international and foreign law.³⁴⁶ The court found that the market value of the property was a central enquiry in most foreign jurisdictions. Consequently, when a court applies section 25(3), it will be most useful to determine the market value of the property first and foremost, and thereafter take into consideration how the other factors listed may increase or decrease the amount to be paid – adding or subtracting from the market value accordingly.³⁴⁷

Since evictions effected through section 7 of the *DVA* will rarely – if ever - amount to an expropriation, this discussion will be confined to the above overview.

(b) DVA evictions and section 25

In the *FNB* matter, Ackermann J said:

³⁴³ S 25(2)(b) of the *Constitution*.

³⁴⁴ S 25(3) of the *Constitution*.

³⁴⁵ *Ex Parte Highlands Residents; In Re Ash and others v Department of Land Affairs* 2000 (2) All SA 26 (LCC) (hereafter referred to as the *Highlands Residents* matter).

³⁴⁶ *Highlands Residents* matter at Par 26.

³⁴⁷ *Highlands Residents* matter at Par 34-35.

Dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense.³⁴⁸

It should be clear that preventing an owner or resident from entering his or her house (both in the case where such person is the owner of the house, as well as the case where she is but an occupier), dispossesses him or her of “all rights, use and benefit” of said house, and constitutes a deprivation of property. Similarly, preventing a respondent from entering his or her house, whether or not he or she is the registered owner of said house, deprives him or her of a home and of the use and benefit of the items of his or her property still in the house, and similarly constitutes a deprivation in terms of section 25 of the *Constitution*, since “property” is not restricted to land. As a deprivation, it needs to comply with the requirements set forth in section 25, in that it has to be done in terms of a law of general application, and it cannot be arbitrary.

There can be little doubt that the *DVA* is indeed formally valid, dispensing with one of the legs of the “law of general application” rule. In the *FNB* matter, the court determined that there has to be sufficient reason for a deprivation in order for the deprivation to be non-arbitrary. With the types of orders the court issues in terms of sections 7(1)(c) and 7(1)(d) of the *DVA*, the court is seldom informed of all the relevant circumstances during the initial application phase.³⁴⁹ However, if the court issues the order on the basis of the information contained in the applicant’s affidavit, and such information is sufficient to convince the court that it is in the applicant’s best interest to grant an order in terms of section 7(1)(c) or 7(1)(d), then there can be little grounds to argue that such an order is arbitrary. As was said in the *FNB* matter, though,³⁵⁰ each case has to be judged on its own merits.

If an eviction order is given in terms of section 7(1)(c) or section 7(1)(d) of the *DVA*, then it needs to be determined if the infringement on the respondent’s rights under section 25 rights are justifiable. Whether or not such deprivation can be justified is discussed in Chapter 5 below.

³⁴⁸

At 797D.

³⁴⁹

See discussion in Chapter 2 hereof.

³⁵⁰

See discussion above.

3.3. Conclusion

In the main, and as far as is relevant to this dissertation, section 25 of the *Constitution* guarantees the right against arbitrary deprivation of property and against expropriation of property without sufficient reason or compensation.

Deprivations and expropriations must be distinguished from one another. Expropriations are a sub-type of deprivation - all expropriations can be said to be deprivations, but not all deprivations are expropriations. A deprivation consists of an interference with the “use, enjoyment or exploitation” of private property by the owner or holder of private property.³⁵¹

The definition of “property” in this regard should not be restricted to land and/or corporeal movables, but should be interpreted more freely to include, *inter alia*, incorporeal property. This would mean that “property” can be said to be any and all resources that contribute to a person’s wealth, provided that these resources are not only recognised but also protected by law.³⁵²

Deprivation need not be a complete interference in order for section 25 to be applicable – interference with only a part of the owner or holder’s rights in property will still be considered a deprivation for purposes of section 25.

An expropriation is a deprivation caused by the State. In order for an expropriation to be constitutionally valid it must be done for a public purpose, and the owner or holder of the expropriated property or rights in property must receive adequate compensation.

Property may only be deprived or expropriated lawfully in terms of a law of general application. No expropriation or deprivation may be done arbitrarily. “Arbitrary” can point to substantive arbitrariness as well as procedural arbitrariness.

³⁵¹ FNB matter at 796F.

³⁵² Currie and De Waal *Bill of Rights* 539.

To determine whether or not a deprivation or expropriation of property is arbitrary or not, a number of factors should be considered, such as the relationship between the deprivation and the purpose thereof; between the deprivation and the owner or holder that is being deprived; between the purpose and the extent of the deprivation and so forth. Each deprivation should be judged on its own, by its own unique facts and circumstances.

Sections 7(1)(c) and 7(1)(d) clearly may deprive a person of the use, enjoyment and exploitation of property to which he or she may have some sort of right, whether as an owner or as a holder.

Each individual case must be judged on its own merits, and in some instances it may be possible to make out a case for arbitrariness, although in the overwhelming amount of cases, if the magistrate considering the application finds that there is sufficient *prima facie* evidence on the papers in front of him or her to warrant an order in terms of section 7(1)(c) or 7(1)(d), the case for arbitrariness is likely to fail.

The next chapter will focus on the right of a person not to be evicted from property arbitrarily in terms of section 26(3) of the *Constitution*.

4. Constitutional right to housing and eviction laws in South African context

4.1. Introduction

In this chapter, sections 7(1)(c) and (d) of the *DVA*³⁵³ are measured against section 26(3) of the *Constitution*.

A thorough analysis of section 26(3), its history and interpretation, is followed by an in-depth discussion of the various pieces of legislation enacted partly as a result of section 26(3). These include the *Prevention of Illegal Eviction from and Occupation of Land Act*,³⁵⁴ *ESTA*,³⁵⁵ and the *Land Tenure Security Bill, 2011*³⁵⁶ (which Bill aims to repeal both *ESTA* and the *Land Reform (Labour Tenants) Act 3 of 1996*.³⁵⁷

4.2. Section 26

Section 26(1) of the *Constitution* declares that every person has the right to adequate housing, while 26(2) directs the state to progressively realise this right. Sections 26(1) and (2) have been discussed in detail in Chapter Two.

4.2.1 The right to housing

Section 26(3) reads as follows:

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.³⁵⁸

³⁵³

Domestic Violence Act 116 of 1998 (hereafter referred to as the *DVA*).

³⁵⁴

Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998 (hereafter referred to as *PIE*).

³⁵⁵

Extension of Security of Tenure Act 62 of 1997 (hereafter referred to as *ESTA*).

³⁵⁶

Supra.

³⁵⁷

Hereafter referred to as the *Labour Tenants Act*.

³⁵⁸

S26(3) of the *Constitution of the Republic of South Africa, 1996*.

The right includes the right of an occupier not to be disturbed in the peaceful possession or occupation of his or her home without an appropriate court order.³⁵⁹ This section has had a very significant influence upon the accepted common law position with regard to evictions.³⁶⁰

The exact extent of this influence is not universally agreed upon.³⁶¹ The uncertainty stems from the conflict between, firstly, the common law's fulsome protection of property owners' property rights; secondly, the prohibition in the *Constitution* against arbitrary deprivation of property in section 25(1) as well as against arbitrary evictions in section 26(3), and thirdly the various procedural and substantive requirements that have been set for evictions by the various pieces of related laws.³⁶²

4.2.1.1 Section 26(3) and its impact on the common law

Throughout the years, many commentators have ventured to describe section 26(3) as a "never again" clause – otherwise put, a direct reaction against Apartheid-era mass evictions and forced removals, arbitrary land-grabs and the general abuse of power in this regard.³⁶³ In the words of Roux, "so much is textually uncontroversial."³⁶⁴

Delivered on 3 September 1999, the judgment in the matter of *Ross v Southern Peninsula Municipality*³⁶⁵ set the tone for all subsequent discourse surrounding the interpretation of section 26(3). In this matter, a summons was issued for the ejectment of the occupier, one Mrs Ross, from property belonging to the plaintiff, the

³⁵⁹ *Motswagae* matter (supra) at 617B. When such possession has been disturbed through an eviction, and restoration of possession is offered on condition that certain terms be accepted, such restoration similarly amounts to a breach of the right contained in section 26(3), since the occupiers that refuse to accept the conditions remain dispossessed – see *Schubart Park Residents' Association and others v City of Tshwane Metropolitan Municipality and another* 2013 (1) SA 323 (CC) (hereafter the *Schubart* matter).

³⁶⁰ See *inter alia* Mostert and Pope (eds) *Sakereg* 247-249; Smith *Evictions and Rental Claims* Par 2.2.

³⁶¹ Van der Walt 2002 *SAJHR* 376; Smith *Evictions and Rental Claims* Par 2.2.

³⁶² Van der Walt 2002 *SAJHR* 376.

³⁶³ See Roux 2004 *SALJ* 466-492; *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) at 592C; *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) at 472H-I.

³⁶⁴ Roux 2004 *SALJ* 473.

³⁶⁵ *Ross v Southern Peninsula Municipality* 2000 (1) SA 589 (C) (Hereafter referred to as the *Ross* matter).

Southern District Municipality, in July 1997.³⁶⁶ The summons adhered to the common law requirements and principles of pleading as it was established in the *Ridley-matter*.³⁶⁷

The question to be decided on appeal was whether or not section 26(3) of the *Constitution* placed a burden upon a plaintiff suing for ejectment to place in front of the court all “relevant circumstances” that would justify the court granting an ejectment order.³⁶⁸ The court came to the conclusion that section 26(3) requires of the plaintiff to raise all relevant circumstances justifying an order for ejectment, in its initial pleadings. It would then be up to the defendant to raise additional circumstances weighing against such an order in her own pleadings, upon which the plaintiff can respond in its replication.³⁶⁹ It should of course be only logical to accept that some facts may be within the defendant’s exclusive knowledge, and the *onus* to allege and prove these particular facts will therefore rest upon the defendant.³⁷⁰ The court then ordered that the Municipality be directed to amend its pleadings in such a way as to allege the necessary – albeit still vague and elusive – “relevant circumstances.”³⁷¹

In its closing remarks, the court seems to allude that if the defendant can prove that the property from which she is to be evicted is her “home”, the action of the plaintiff cannot succeed unless they can prove compelling circumstances that nevertheless warrant an order for ejectment.³⁷² This seems like a particularly harsh limitation of a property owner’s common law rights to the use and enjoyment of his/her property, and rightly drew the ire of the Supreme Court of Appeal in the case of *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*.³⁷³

³⁶⁶ 591D.

³⁶⁷ *Supra* at 591E.

³⁶⁸ 593E.

³⁶⁹ 596B-D; 596G-H.

³⁷⁰ 596E-G.

³⁷¹ 599E-G. A Discussion of what is entailed in “relevant circumstances” follows below at paragraph 4.2.1.2.

³⁷² 599C-E.

³⁷³ *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) (Hereafter referred to as *Betta Eiendomme*).

According to Kahanovitz, however, the most significant aspect of the new constitutional dispensation surrounding evictions to emerge from the *Ross* judgment³⁷⁴ is the court's ruling that no eviction order can be granted as a judgment by default by a clerk of the court – every single eviction matter must be brought before a magistrate or judge.³⁷⁵ The view expressed by the court in the *Ross* matter can be equated to the second and third of the possible interpretations cited by Roux, namely that section 26(3) amends the common law pleading requirements³⁷⁶ and the *onus* of proof in an action for ejectment, shifts an additional burden onto the plaintiff that was not present in common law.³⁷⁷

In the matter of *Betta Eiendomme*³⁷⁸ (an unopposed application for the ejectment of tenants defaulting on a lease agreement) the court launched quite a scathing and borderline vitriolic attack on the judgment in the *Ross* matter, and on what the court perceive to be its troubling view that section 26(3) of the *Constitution* represents a radical amendment to the common law position regarding eviction. Even though the *Ross* matter had been a vertical application of section 26(3) and not a horizontal one, the court in *Betta Eiendomme* seemed adamant to protect private property rights aggressively against any possible similar encroachment. Consequently, the court – *per* Flemming DJP – ruled that section 26(3) even by its wording alone can enjoy no horizontal application and thus cannot bind private property owners seeking to exercise their common law rights.³⁷⁹ Instead, the court postulated that section 26(3) was meant only to protect citizens against the type of government-powered evictions that was seen at, amongst others, Sophiatown and District Six during the Apartheid era.³⁸⁰ Thus, according to the court in *Betta Eiendomme*, section 26(3) binds the state only, and leaves the common law property rights of private landowners intact.³⁸¹

³⁷⁴

Supra.

³⁷⁵

Kahanovitz *Urban Slice of PIE* 6.

³⁷⁶

See above.

³⁷⁷

Roux 2004 SALJ 474.

³⁷⁸

Supra.

³⁷⁹

472J-473A.

³⁸⁰

472H-472I.

³⁸¹

475C.

Van der Walt argues that the court's interpretation is based upon a "conservative and restrictive reading of s 26(3)"³⁸² and "a conservative attitude to transformation and land reform in general."³⁸³ Roux remarks that the court, in choosing to interpret section 26(3) as it has done, it "succeeds in divesting it of all content."³⁸⁴

In the matter of *Ellis v Viljoen*³⁸⁵ an application for the ejectment of the defendant was brought in the Cape High Court. It was based upon the common law remedy of *rei vindicatio*. The order was granted, and subsequently appealed. Upon appeal, the full bench of the Cape High Court declined to find that section 26(3) places any *onus* whatsoever on an owner to allege or prove "relevant circumstances" when applying for an eviction order.³⁸⁶ It held that section 26(3) did not change the common law to such an extent that it limited the right of an owner to evict an unlawful occupier of his land, if ownership and unlawful occupation are the only relevant factors put before the court.³⁸⁷ The interpretation of the court in the *Ross* matter is rejected in *Ellis v Viljoen*, and Thring J rightly points out that such an interpretation in reality amounts to an arbitrary deprivation of property, infringing upon the owner's property rights as set out in section 25(1) of the *Constitution*.³⁸⁸ In the words of Roux:

In essence, this interpretation juxtaposes s 26(3) alongside s 25(1) and finds in the latter provision a prohibition against the arbitrary deprivation of property strong enough to counterbalance any doctrinal impact that s 26(3) might have had on the common law.³⁸⁹

The judgment overall agrees with that reached by the court in *Betta Eiendomme*, but comes to its conclusions by way of legally sound arguments and "measured tones",³⁹⁰ representing a much more neutral and balanced view.

In the matter of *Brisley v Drotsky*,³⁹¹ the owner of immovable property sought the eviction of his tenant due to frequent late and/or incomplete payment of rent. The

³⁸² Van der Walt 2002 SAJHR 401.

³⁸³ Van Der Walt 2002 SAJHR 399.

³⁸⁴ Roux 2004 SALJ 480.

³⁸⁵ *Ellis v Viljoen* 2001 (5) BCLR 487 (C) (hereafter referred to as *Ellis v Viljoen*).

³⁸⁶ 497.

³⁸⁷ 497.

³⁸⁸ 497.

³⁸⁹ Roux 2004 SALJ 484.

³⁹⁰ Roux 2004 SALJ 482.

³⁹¹ *Brisley v Drotsky* 2002 (12) BCLR 1229 (SCA) (Hereafter referred to as *Brisley v Drotsky*).

parties had entered into a written lease agreement, which agreement was subsequently lawfully cancelled by the lessor in the face of the lessee's non-compliance with its terms. The application for eviction was granted by the High Court, which decision was appealed by the lessee (hereafter the appellant).

In the Supreme Court of Appeal the appellant sought to rely, amongst other things, on section 26(3) of the *Constitution*. It was argued on behalf of the appellant that it was determined in the *Ross*-matter that section 26(3) had amended the common law in such a way that the owner of immovable property no longer had an automatic right to evict unlawful occupiers of such property.³⁹² *In casu* it was argued that the court first had to consider the socio-economic circumstances of the appellant's mother and daughter, as well as the circumstances under which the lease agreement had been cancelled before an order for eviction could be granted.³⁹³ Writing on behalf of the majority, Harms, Streicher and Brand JJA decided that the *Ross* judgment had been wrongly decided. They contended that section 26(3) does not grant the court a discretion to refuse an eviction order in cases where there is an owner with a clear right to evict an unlawful occupier from his property.³⁹⁴ The situation, the court in *Brisley v Drotzky* says, is clearly different from an eviction done in terms of *PIE*, where the court is given discretion to grant an eviction order if such an order will prove to be just and equitable after taking into consideration all the relevant circumstances.³⁹⁵

4.2.1.2 What are "relevant circumstances"

Turning to the question of what relevant circumstances should be raised by the plaintiff seeking the order for ejection, the court in the *Ross* matter determined that the old common law pleading requirements - of ownership and illegal occupation - alone would not be sufficient.³⁹⁶ The court however declined to apply its mind to the question of what additional circumstances would have to be alleged by the plaintiff, and only vaguely noted that the provisions of *PIE* – an Act that came into being only

³⁹² 1241 par 35.

³⁹³ 1241 par 35.

³⁹⁴ 1242 par 42; Pienaar *Land Reform* 689.

³⁹⁵ 1242 par 42-43.

³⁹⁶ *Ross v Southern District Municipality* 596H.

after the action between Mrs Ross and the Southern District Municipality was set into motion - could serve as guideline in future matters.³⁹⁷

In the case of *Ellis v Viljoen* the court of course found that section 26(3) places no burden on the plaintiff to prove relevant circumstances.³⁹⁸ In the words of Thring J:

(...) [if] nothing more is known than that the plaintiff is the owner and that the defendant is in possession, it is right and proper that an owner should be granted an ejectment order against a defendant who has no business interfering with the plaintiff's possession of his own property. If those are the only "relevant circumstances" placed before the court, surely the owner must be entitled to an eviction order. If there are other "relevant circumstances" upon which the defendant wishes to rely in justifying his continued occupation, the onus must, on all recognised principles of pleadings and evidence, rest on him to allege and prove them (...)³⁹⁹

At the time of judgment in *Ellis v Viljoen* there was uncertainty in the law as to whether *PIE* applied to all eviction matters not done in terms of *ESTA*, or if there are still classes of occupiers that should be dealt with in terms of the common law.⁴⁰⁰

The court in *Ellis v Viljoen* treated the matter in hand as a situation featuring an occupier not covered by *PIE* and instead ruled by the common law, and thus did not consider the circumstances set out in section 4 of *PIE*. According to Pope, even in such cases - if they do exist - the court, due to its obligation to develop the common law, should consider "relevant circumstances" as prescribed in section 26(3) so as to:

.... include an exploration of more than the bare requirements of the particular common law remedy so that injustice or unfairness does not result.⁴⁰¹

The judgments in the *Betta Eiendomme* and *Ellis v Viljoen* matters represent a view on the opposite side of the spectrum from that expressed in the *Ross* matter. This latter view, in the words of Roux, holds that:

³⁹⁷ *Ross v Southern District Municipality* 596H-I.

³⁹⁸ *Ellis v Viljoen* 497.

³⁹⁹ 497.

⁴⁰⁰ See Pope 2002 SALJ 709, 713-714. The position had since changed, with the court in the matter of *Ndlovu v Ngcobo* (*supra*) ruling on a wider all-encompassing interpretation of the term "occupier" in *PIE*. A discussion of this ruling follows below at paragraph 4.2.1.

⁴⁰¹ Pope 2002 SALJ 720.

... the phrase “all the relevant circumstances” means the circumstances that were relevant at common law, in which case s 26(3) would have no impact at all on the common law, other than to cast it in constitutional stone.⁴⁰²

“Relevant circumstances” should differ between cases where the court has discretion to grant an order (such as that in *PIE*) and cases where the court has no discretion to refuse an order.⁴⁰³

In the former, relevant circumstances would consist of any and all factors that are relevant to the court’s exercising of its discretion – in other words, factors that would help the court determine whether or not granting an eviction order would be just and equitable.⁴⁰⁴ But in the latter situation, where the court has no discretion to refuse an eviction order, the only circumstance that could be raised that would be legally relevant is circumstances that point to the occupier having a right to occupation.⁴⁰⁵ In the matter of *Brisley v Drotsky*, the court determined that the socio-economic circumstances of the defendant is not relevant, since these were not exceptions in law: the only relevant circumstances in law would be the fact that the plaintiff was the owner and the defendant was in unlawful occupation of the property concerned.⁴⁰⁶

According to Van der Walt:

[Relevant circumstances] are not specified in the provision, and have to be construed with reference to other constitutional provisions, other land reform laws or the general legislative history, background and purpose of these provisions.⁴⁰⁷

In the matter of *Groengras Eiendomme (Pty) Ltd and others v Elandsfontein Unlawful Occupiers and Others*⁴⁰⁸ a group of persons had invaded property in which amongst other organisations, Transnet and Eskom had interests. The court in this matter considered factors such as the danger of the terrain the illegal occupiers had

⁴⁰² Roux 2004 SALJ 473.

⁴⁰³ *Brisley v Drotsky* 1242 -1244.

⁴⁰⁴ *Brisley v Drotsky* 1242 par 42.

⁴⁰⁵ *Brisley v Drotsky* 1243-1244 par 44-45.

⁴⁰⁶ See Pienaar “Unlawful occupier” 316-317.

⁴⁰⁷ Van der Walt 2004 *Law and Critique* 337-338.

⁴⁰⁸ *Groengras Eiendomme (Pty) Ltd and others v Elandsfontein Unlawful Occupiers and Others* 2002 (1) SA 125 (T) (Hereafter *Groengras Eiendomme*).

invaded (which included exposed high voltage electricity cables, open railway tracks and an underground fuel transport pipeline) and the various safety hazards their presence there had caused both to themselves and to surrounding communities (including the removal of fences and the potential exposure of the flammable fuel-containing pipelines through the digging of foundations and sewerage systems); the occupiers' short stay on the property; the relative ease with which they could be relocated; and the public interest in seeing illegal squatting and land-grabbing being discouraged in the strongest terms to be "relevant circumstances" to take into consideration when exercising its discretion to grant an eviction order under section 4 of *PIE*.

Per Rabie J the court in *Groengras Eiendomme* opined:

The Legislator [in drafting *PIE*] did not limit the circumstances which the court should consider and neither did it arrange the circumstances in order of priority. It referred to 'all the relevant circumstances' and left it to the court to determine which circumstances are relevant and to consider all those in conjunction.⁴⁰⁹

Various pieces of legislation set out circumstances to be considered by a court before deciding to grant an eviction order. The requirements set out in *PIE* and *ESTA* will be discussed below, and the way these requirements will be affected by the *Land Tenure Security Bill* will be examined.

4.3. Post-1994 statutes regulating evictions

Theunis Roux, in an article on the impact of section 26(3) of the *Constitution* on the common law of evictions, writes:

The actual legal position after *Ndlovu*, therefore, is that there is very little area left for the application of the common law in proceedings for eviction. In every circumstance in which an owner wishes to evict a person from his or her home, either the Informal Protection of Land Rights Act, the Labour Tenants Act, the *ESTA* or the *PIE* act will apply. The only residual area of application of the common law is in respect of the eviction of a person, including a legal person, from premises not occupied as a home.⁴¹⁰

⁴⁰⁹

At 142J-143A.

⁴¹⁰

Roux 2004 SALJ 491.

It is thus essential that one considers these various acts and the requirements they set for a lawful eviction.

4.3.1 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

Harms AJ, writing the majority judgment in the *Ndlovu* matter,⁴¹¹ remarked: “*PIE* has its roots, *inter alia*, in s 26(3) of the Bill of Rights (...)”.⁴¹² This can be clearly seen from the preamble to *PIE*, which affirms the rights set out in sections 25(1) and 26(3) of the *Constitution*, and states that:

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.⁴¹³

According to De Vos, the Act not only gives effect to the rights in section 26(3), but also “extends the right to protect all those who unlawfully occupy not only homes but also land.”⁴¹⁴ It repeals the whole of the *PISA*,⁴¹⁵ which Act had been one of the corner-stones of Apartheid land law.⁴¹⁶ According to Van der Walt, it also amends the common law clearly and drastically when it comes to squatters invading land illegally.⁴¹⁷ It does so not by preventing the granting of eviction orders against illegal invaders, but setting up requirements to ensure a fair and dignified process.⁴¹⁸

PIE applies to urban and other land throughout the Republic⁴¹⁹ and aims to regulate the eviction of unlawful occupiers, whilst striking a balance between their rights and that of the owners of the property they occupy.⁴²⁰ Unlawful occupiers are defined in

⁴¹¹ *Supra*. See also *Groengras Eiendomme (Pty) Ltd and others v Elandsfontein Unlawful Occupiers and others* 2002 (1) SA 125 (T) at 126J-127A.

⁴¹² *Ndlovu* Par 3.

⁴¹³ Preamble to *PIE*.

⁴¹⁴ De Vos 2013 <http://www.constitutionallyspeaking.co.za/city-of-cape-town-acting-like-vigilantes-and-breaching-the-rule-of-law>.

⁴¹⁵ S 11(1) of *PIE* read with Schedule I to *PIE*.

⁴¹⁶ See in this regard Pienaar *Land Reform* 687.

⁴¹⁷ Van der Walt 2002 *SAJHR* 377.

⁴¹⁸ Van der Walt 2002 *SAJHR* 385.

⁴¹⁹ S 2 *PIE*.

⁴²⁰ Preamble to *PIE*.

section 1 of *PIE* as persons occupying land without consent, whether the consent is expressed or tacit.⁴²¹

For the first few years after *PIE* had come into being, there was great uncertainty about the exact extent of its reach.⁴²² It was initially uncertain if all classes of occupiers were covered by either *PIE* or *ESTA*, or if there was a certain class of occupiers that remained under the regulation of the common law, namely in cases where initial occupation was lawful, but had since become unlawful – such as when a lease agreement lapses and the occupier does not vacate the property.⁴²³

In the *Ndlovu* matter, the Supreme Court of Appeal considered the meaning of the term “unlawful occupier” and determined that the provisions of *PIE* are applicable not only to squatters and invaders, but also to those that once occupied residential property lawfully, but whose right to occupation had since lapsed or had been terminated, and who now continued to reside on the property unlawfully.⁴²⁴

From the above, it can thus be seen that any eviction of unlawful occupiers from land that is not commercial property and which is not expressly covered by another act is covered by *PIE* and not the common law, and should be dealt with accordingly.

With regard to eviction proceedings against unlawful occupiers in terms of *PIE*, where such proceedings are brought to court by the owner or the person in charge of the occupied land, section 4 requires that the unlawful occupier(s) be given at least fourteen days’ notice of the hearing.⁴²⁵ The notice must state the grounds for the

⁴²¹ S 1 of *PIE*; Pienaar *Land Reform* 688. See also the matter of *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 (3) SA 454 (CC) for a thorough discussion of the concept of an “unlawful occupier”. Occupiers in terms of the *Extension of Security of Tenure Act* and those whose informal right to land is protected by the *Interim Protection of Informal Land Rights Act*, are expressly excluded from this definition within the text of the definition itself.

⁴²² See amongst others Pope 2002 SALJ 709, 713-714; *Ellis v Viljoen* 492-494;

⁴²³ Pope 2002 SALJ 713; Van der Walt 2002 SAJHR 386-387. In the case of *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W) the Western Cape High Court stated that the legislature did not intend to amend the common law rights of property owners in cases where an initially lawful tenure had lapsed into unlawfulness. It held that the Act sought to deal exclusively with persons occupying land on which informal settlements had been erected, whose occupancy had been unlawful *ab initio*.

⁴²⁴ Pienaar *Land Reform* 703.

⁴²⁵ S 4(2) of *PIE* read with s 4(1) of *PIE*; See also Pienaar *Land Reform* 720.

proposed eviction and inform the unlawful occupier of his right to legal representation.⁴²⁶

According to the court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*,⁴²⁷ this notice is in addition to the standard service of the eviction application required by the court rules. The purpose of this additional notice is to give the respondent(s) a further additional opportunity to put in front of the court all the relevant circumstances upon which they wish to rely.⁴²⁸ Where such notice is not served or is defective, the application for eviction should be dismissed.⁴²⁹

Section 4 distinguishes between unlawful occupiers that have been in occupation unlawfully for more than six months, and those that have been in occupation unlawfully for less than six months.⁴³⁰ In both cases “a court may grant an eviction order if it is of the opinion that it would be just and equitable to do so”.⁴³¹ In determining whether or not such an order would be just and equitable, the court must have regard to all the relevant circumstances, which include “the rights and the needs of the elderly, children, disabled persons and households headed by women.”⁴³² A further factor that must be taken into consideration by the court in those cases where the occupier(s) have been in unlawful occupation for *more* than six months, is whether there is land made available (or if there is the possibility that such land could reasonably be made available) by the municipality, an organ of state, or any other land owner, for the relocation of the unlawful occupier(s).⁴³³ In some instances, the court had ordered the relative local authority to compile a report first on the housing conditions of the persons standing to be evicted before it would

⁴²⁶ S 4(5)(c) and s 4(5)(d) of *PIE*.

⁴²⁷ *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 4 All SA 479 (hereafter referred to as *Cape Killarney*).

⁴²⁸ *Unlawful Occupiers, School Site v City Of Johannesburg* 2005 (4) SA 199 (SCA).

⁴²⁹ *Moela v Shoniwe* 2005 (4) SA 357 (SCA).

⁴³⁰ S 4(6) and s 4(7) of *PIE*.

⁴³¹ S 4(6) and s 4(7).

⁴³² S 4(6) of *PIE*.

⁴³³ S 4(7) of *PIE*.

consider the matter.⁴³⁴ The *onus* for proving these “relevant circumstances” rests upon the unlawful occupier whose eviction is being sought.⁴³⁵

The court can impose any conditions it deems reasonable before granting the eviction order.⁴³⁶

The court in the *Port Elizabeth Municipality v Various Occupiers*⁴³⁷ matter expressed the view that in some instances, the question of whether or not the parties had attempted mediation might be a relevant circumstance. In the matter of the *Davids and others v Van Straaten and others*⁴³⁸ the court considered the age, marital status, employment particulars of the persons evicted in terms of *PIE*.

PIE does indeed provide for the granting of eviction orders on an urgent basis, which orders may be handed down under the following circumstances:

(...) if it [the court] is satisfied that –

(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith 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;

(c) there is no other effective remedy available⁴³⁹

However, it should be noted that the Act still requires that the other party be notified of the proceedings beforehand, in which notification they should be informed of, amongst other things, the grounds on which the order is being sought and their right to legal representation.⁴⁴⁰

⁴³⁴ See in this regard *Occupiers of Mooiplaats v Golden Thread Ltd And Others* 2012 (2) SA 337 (CC); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W).

⁴³⁵ *Smith Evictions and Rental Claims* Par 3.11.

⁴³⁶ S 4(12) of *PIE*.

⁴³⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (Hereafter referred to as the *PE Municipality* matter).

⁴³⁸ *Davids and others v Van Straaten and others* 2005 (4) SA 468 (C).

⁴³⁹ S 5(1) of *PIE*.

⁴⁴⁰ S 5(2) and 5(3) of *PIE*.

The only way in which the notification for urgent proceedings, as envisioned in sections 5(2) and 5(3), differs from that for non-urgent proceedings, as envisioned in sections 4(2) and 4(5), is that the prescribed minimum period of notice is dispensed with. The Act merely requires that the notice for urgent proceedings be “written and effective”.⁴⁴¹ Thus, it should be noted, not even on an urgent basis does *PIE* provide for the granting of *ex parte* eviction orders.

PIE also makes provision for eviction orders applied for at the instance of an organ of state.⁴⁴²

4.3.2 The Extension of Security of Tenure Act

This act stands to be repealed by the *Land Tenure Security Bill*, 2011⁴⁴³ once this bill comes into force.⁴⁴⁴ The SALRC has in fact recommended its repeal, due to concerns over the constitutionality of sections dealing with the right to family life.⁴⁴⁵

ESTA applies to persons living on land that is not inside an established or proclaimed township or encircled by such a township,⁴⁴⁶ and who does not earn more than a certain amount in monthly income.⁴⁴⁷ Section 2(1)(a) of *ESTA* extends the definition to land inside a township that has by law been designated for agricultural purposes.⁴⁴⁸

ESTA was enacted to help protect s 25(6) property rights,⁴⁴⁹ and aims to:

⁴⁴¹ S 5(2) of *PIE* – compared to s 4(2) of *PIE*, in which it is stated that the notice must be given in writing “At least 14 days before the hearing of the proceedings (...)”.

⁴⁴² S 6 of *PIE*.

⁴⁴³ Hereafter referred to as the *Land Tenure Security Bill*.

⁴⁴⁴ SALRC *Discussion Paper 118* 19; *Land Tenure Security Bill* s48.

⁴⁴⁵ SALRC *Discussion Paper 118* 19-20.

⁴⁴⁶ S 2(1) of *ESTA*.

⁴⁴⁷ Mostert and Pope *Sakereg* 249; Pienaar *Land Reform* 395; GN R1632 in GG 19587 of 18 December 1998 puts the amount at R 5 000, 00 – see also Mostert and Pope *Sakereg* 249 in this regard.

⁴⁴⁸ S 2(1)(a) of *ESTA*. It also applies to persons that are living on land that has been declared township after 4 February 1997, if said persons have been residing on said land since before such declaration.

⁴⁴⁹ *Nkuzi Development Association v The Government of the Republic of South Africa and The Legal Aid Board* LCC 10/01 (hereafter referred to as the *Nkuzi* matter) par 4.

.... facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons whose right of residence has been terminated, may be evicted from land (...) ⁴⁵⁰

It presumes that many South Africans are vulnerable to unfair evictions due to insecure tenure-ship, ⁴⁵¹ and that evictions lead “to great hardship, conflict and social instability.” ⁴⁵² It greatly curtails an owner’s common law right to evict. ⁴⁵³

Under *ESTA*, an occupier of land ⁴⁵⁴ has the right ⁴⁵⁵ to receive visitors, to receive postal and other communications, and to the enjoyment of family life. He or she may bury family members residing with him/her at the time of their death on the land if there exists a prior practice of such burial. Occupiers may not be deprived of access to water, or to educational and health services. In turn, the owner of the land on which such occupiers reside, has rights of his own, which is set out in section 7 of *ESTA*. ⁴⁵⁶

Occupiers in terms of *ESTA*, residing on land that falls under the provisions of *ESTA*, may have their right to residence terminated “provided that such termination is just and equitable, having regard to all the relevant factors (...)” ⁴⁵⁷ The caveat is added, in section 8(4) that an occupier of longer than ten years’ standing who is older than sixty years, or who is (or was) an employee of the owner but who is no longer able to

⁴⁵⁰ Preamble to *ESTA*.

⁴⁵¹ Preamble to *ESTA*.

⁴⁵² Preamble to *ESTA*.

⁴⁵³ *Smith Evictions and Rental Claims* Par 5.1; See also Mostert and Pope *Sakereg* 246-249.

⁴⁵⁴ Defined in s 1 of *ESTA* as “(...) a person residing on land which belongs to another person, and who has on 4 February 1997 or thereafter had consent or another right in law to do so(...)”, excluding certain categories of persons such as those with an income exceeding a prescribed amount, or using the land for industrial purposes, mining or commercial farming. According to Pienaar *Land Reform* 396 the question of whether or not an occupier had consent to occupy the concerned land is crucial in determining whether or not an occupier is protected under the provisions of *ESTA*. The *Extension of Security of Tenure Amendment Bill*, 2013 (GN 1035 in GG 36942 of 17 October 2013) proposes changes to the definition of an “occupier” in *ESTA* by omitting the words “has on” in the original definition. See Pienaar *Land Reform* 443 for a discussion on the proposed changes in the definition.

⁴⁵⁵ These rights are set out in ss 6(2)(b) to 6(2)(f) of *ESTA*.

⁴⁵⁶ S 7 of *ESTA*.

⁴⁵⁷ S 8(1) of *ESTA*.

supply labour due to disability, injury or ill health, may only have his right of occupation terminated under certain narrowly defined circumstances.⁴⁵⁸

An occupier in terms of *ESTA* must receive at least two calendar months' notice of the applicant's intention to apply for an eviction order, and such notice must also be given, within the same time limits, to the relevant local municipality and the provincial office of the Department of Land Affairs.⁴⁵⁹ In certain circumstances, *ESTA* makes provision for the appointment of a probation officer to submit a report, regarding *inter alia* the availability of alternative accommodation and the effect of an eviction order on the fundamental rights of the evictees and their families, before an eviction order is granted.⁴⁶⁰

In respect of occupiers in occupation before or on 4 February 1997, the court may grant an order for eviction under a narrow set of circumstances.⁴⁶¹ For occupiers that came into occupation after 4 February 1997 a court may grant an eviction order if it is of the opinion that it would be just and equitable to do so.⁴⁶² In deciding whether such an eviction order would be just and equitable, the court is directed to consider the period of occupation, the availability of suitable alternative accommodation and the fairness of any terms of an agreement between occupier and owner.⁴⁶³ The court must also balance the interests of the owner against that of the occupier.⁴⁶⁴

ESTA also allows for the granting of urgent eviction orders.⁴⁶⁵ In urgent proceedings, it is required that the owner/applicant still give reasonable notice to the relevant municipality and the relevant provincial office of the Department Land Affairs.⁴⁶⁶

⁴⁵⁸ S 8(4) of *ESTA* read with s 10 of *ESTA*; See also Mostert and Pope *Sakereg* 249.

⁴⁵⁹ S 9(2)(d)(iii) of *ESTA* See paragraph 3.3 below for an exposition of the way in which the *Draft Land Tenure Security Bill*, 2011 intends to make the notification requirements even stricter.

⁴⁶⁰ S 9(3) of *ESTA* read with s 9(2)(c), s 10 and s 11 of *ESTA*. According to Pienaar *Land Reform* 406, due to issues experienced with long time delays in this regard, the fact that such a probation report had been *requested*, even if not yet received, is enough to allow a court to grant an eviction order.

⁴⁶¹ As it is set out in *ESTA* s 10.

⁴⁶² S 11(2) of *ESTA*.

⁴⁶³ S 11(3)(a)-(d) of *ESTA*.

⁴⁶⁴ S 11(3)(e) of *ESTA*.

⁴⁶⁵ See in this regard s 15 of *ESTA*.

⁴⁶⁶ S 15(2) of *ESTA*; Pienaar *Land Reform* 408.

It is a criminal offence, punishable by a fine or imprisonment, to evict an occupier without a court order.⁴⁶⁷

In cases where substantial injustice to the respondent would result if he or she were not legally represented, or where he or she would be unable to effectively represent themselves, given the complexities of the facts or the legal procedures, the respondent has a right to legal representation provided by the State.⁴⁶⁸ Should the court fail to inform the respondent of his right to be legally represented at state expense, or should the state fail to provide him with such representation, it would result in a “miscarriage of justice.”⁴⁶⁹

All eviction orders granted by a magistrate’s court under *ESTA* are automatically reviewed by the Land Claims Court.⁴⁷⁰ The Land Claims Court also has the power to review any “act, omission or decision of any functionary acting or purporting to act in terms of this act”⁴⁷¹ The court in *Bergboerdery v Makgoro*⁴⁷² found that the court’s powers of review in terms of section 20(1)(c) of *ESTA* are also applicable to cases where it is clear from the court record that *ESTA* should have been applicable, but the magistrate omitted to deal with the case accordingly.⁴⁷³

4.3.3 *The proposed Land Tenure Security Bill and the Extension of Security of Tenure Amendment Bill.*

The draft *Land Tenure Security Bill*, 2011⁴⁷⁴ was published in the *Government Gazette* on 24 December 2010.⁴⁷⁵ It is stated in section 48 of the Bill that the Bill will eventually repeal both *ESTA* and the *Land Reform (Labour Tenants) Act*.⁴⁷⁶ This is

⁴⁶⁷ S 23(3) of *ESTA* read with s 23(1) of *ESTA*.

⁴⁶⁸ The Nkuzi matter (supra) at par 12; See also Pienaar *Land Reform* 423.

⁴⁶⁹ The Nkuzi matter (supra) at par 11.

⁴⁷⁰ S 19(3) of *ESTA*; See also Mostert and Pope *Sakereg* 249; Pienaar *Land Reform* 409.

⁴⁷¹ S 20(1)(c) of *ESTA*.

⁴⁷² *Bergboerdery v Makgoro* 2000 (4) SA 575 LCC (Hereafter referred to as the *Bergboerdery* matter).

⁴⁷³ At 581A.

⁴⁷⁴ *Supra*.

⁴⁷⁵ GN 1118 in GG 33894 of 24 December 2010.

⁴⁷⁶ *Land Reform (Labour Tenants Act)* 3 of 1996; Dhliwayo *Tenure Security* 38; Pienaar *Land Reform* 440.

due to “some weakness at interpretation, enforcement and general implementation levels.”⁴⁷⁷

The Bill aimed to:

... provide for the continued protection of rights of persons who live and work on farms; to provide for State assistance in the settlement of interested and affected persons on alternative land; to provide measures aimed at security of tenure, sustainable livelihoods and production discipline; to establish a land rights management board; to provide for acquisition of rights in land for resettlement; to provide transitional provisions for the finalisation of applications under Chapter III of the Land Reform (Labour Tenants) Act, 1996; and to provide for matters connected therewith.⁴⁷⁸

It seeks to give effect to sections 25(5), 25(6) and 26 of the *Constitution*.⁴⁷⁹

The proposed legislation will apply to all agricultural land, including land that is used for agricultural purposes – but it does not apply to land that is occupied by traditional communities.⁴⁸⁰

Persons protected by the Bill are defined widely, and will include several categories of persons.⁴⁸¹

The first such category is headed “persons residing on farms”, and is set out in section 7 of the Bill to include persons residing on land⁴⁸² or on a farm⁴⁸³ that they do not own, with permission from the owner or due to having another type of right in the land; or due to having provided labour to the farm owner in reflection of a right in

⁴⁷⁷ *Memorandum on the objects of the Land Tenure Security Bill, 2011* - GN 1118 of GG 33894 of 24 December 2010, p 44 (hereafter referred to as the Memorandum).

⁴⁷⁸ Preamble to the *Draft Land Tenure Security Bill, 2011*. See also s 2 of the aforementioned Bill, in which the objectives of the proposed legislation are couched in similar terms.

⁴⁷⁹ Par 2 of the Memorandum.

⁴⁸⁰ S 3 of the *Draft Land Tenure Security Bill, 2011*.

⁴⁸¹ Pienaar *Land Reform* 443.

⁴⁸² That is, agricultural land or land used for agricultural purposes but not occupied by traditional communities – as defined in s 3 of the *Draft Land Tenure Security Bill, 2011*.

⁴⁸³ The Bill seems to distinguish between “land” (being agricultural land or land used for agricultural purposes) and “a farm”, but the distinction is nowhere made clear. No definition for the concept of “a farm” is provided in the Bill.

land; or due to being a family member to such a person.⁴⁸⁴ It also includes persons who lodged applications in terms of the *Labour Tenants Act* on or before 31 March 2001.⁴⁸⁵ According to Pienaar,⁴⁸⁶ this is the only one of the categories that include persons that actually runs the risk of losing their homes when evicted.

A second category of persons is set out in section 8 of the Bill, headed “Persons working on farms”.⁴⁸⁷ Persons classified in this category are set out as persons who assist in conducting the business of farming or are employed on a farm or “in a home on a farm.”⁴⁸⁸ This makes this a very broadly defined category.⁴⁸⁹

Thirdly, the category of “persons associated with persons residing or working on farms” include spouses of a person in the first two categories (irrespective of whether the union is customary or not and whether or not it is registered);⁴⁹⁰ children or parents or siblings of the persons in the first two categories;⁴⁹¹ nieces and nephews of persons in the first two categories where such nieces or nephews are under the age of eighteen or who are still attending school.⁴⁹² Many of these persons are already included in the first two categories.⁴⁹³

A fourth category, “farm-owners and authorised agents”, includes the owners of a farm and/or agricultural “undertaking” and/or agricultural land or who has interests in a juristic person that is such an owner or who is receiving pecuniary benefits from such a farm, agricultural undertaking or agricultural land.⁴⁹⁴ It also includes a person who acts as a manager, agent or “controlling mind” of a person described in s 10(a) (the persons described immediately here above) of the Bill.⁴⁹⁵

⁴⁸⁴ Ss 7(1) and (2) of the *Draft Land Tenure Security Bill*, 2011. S 1 defines “right in land” as: “(...) any real or personal right in land, including a right to cropping and grazing land.” The concept of “family member” is not defined in the Bill.

⁴⁸⁵ S 7(3) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁸⁶ Pienaar *Land Reform* 443.

⁴⁸⁷ S 8 of the *Draft Land Tenure Security Bill*, 2011.

⁴⁸⁸ Ss 8(1) and (2) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁸⁹ Pienaar *Land Reform* 444.

⁴⁹⁰ S 9(a) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹¹ S 9(b) read with s 9(d) and s 9(e) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹² S 9(c) read with s 9(d) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹³ Pienaar *Land Reform* 444.

⁴⁹⁴ S 10(a) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹⁵ S 10(b) of the *Draft Land Tenure Security Bill*, 2011.

The last category of persons that will be protected by the Bill are persons with consent to reside on land – including cases where the consent was withdrawn but the person has remained residing on the land in question for a continuous period of at least one year.⁴⁹⁶ A presumption of consent is even created where a person has been residing on land openly for a period of at least six months.⁴⁹⁷

Importantly, the Bill stipulates that persons whose rights are covered by it will be left out from the working of *PIE*.⁴⁹⁸ This will mean the eviction of a very broad range of people will no longer be governed by *PIE*. The Bill stipulates that “eviction” includes preventing a person residing on a farm from accessing his residence.⁴⁹⁹ This will include exactly such behaviour as contemplated in sections 7(1)(c) and (d) of the *DVA*.

The Bill, in section 20 thereof, sets out its own range of circumstances under which an eviction of a person residing on land will be lawful.⁵⁰⁰ For purposes of the present discussion, section 20(10) is of special relevance. It determines, *inter alia*, that:

An eviction shall be lawful only where adequate procedural and legal safeguards have been complied with including –

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;

(...)

Even more relevant will be the provisions of section 22(1), which stipulates:

An [*sic*] eviction proceedings may not be instituted, continued or maintained unless the owner has given 3 months [*sic*] notice of his or her intention to make an application to Court in terms of this Act to the affected person, the municipal manager of the municipality in whose area of jurisdiction the land in question is situated, and to the Board.

⁴⁹⁶ S 11(1) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹⁷ S 11(3) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹⁸ S 4(2) of the *Draft Land Tenure Security Bill*, 2011.

⁴⁹⁹ S 19(2)(a) of the *Draft Land Tenure Security Bill*, 2011.

⁵⁰⁰ Pienaar *Land Reform* 446.

The three months' notice contemplated in section 22(1) is in addition to a period of 30 days' notification to vacate the land required from the owner to the person to be evicted.⁵⁰¹ Even after both thirty days' notice to vacate and three months' notice of intention to apply for an eviction order have been given, it seems as if the court will still not be able to grant an eviction order unless and until it has requested a report on the availability of alternative accommodation and an exposition of the hardships that the evictees will suffer and the manner in which their constitutional rights will be breached.⁵⁰² After an order for eviction has finally been granted, it may not be executed for another two months.⁵⁰³

Section 22(2) does make provision for urgent evictions – but section 22(3) still requires that the municipal manager and the Board⁵⁰⁴ be given “reasonable notice”.

Procedurally, the eviction of persons residing on land in terms of the Bill will have to be done according to the rules of the Land Claims Court (even though proceedings may be instituted in the magistrate's court), until such time as rules have been issued by the Rules Board for Courts of Law⁵⁰⁵ for conducting procedures in terms of the Bill in the magistrate's courts.⁵⁰⁶

The *Extension of Security of Tenure Amendment Bill* of 2013⁵⁰⁷ instead focuses on repairing the defects in the existing *ESTA* legislation.⁵⁰⁸ It does not drastically change the existing requirements set for evictions under *ESTA* and the *LTA*.⁵⁰⁹

⁵⁰¹ S 23(1), which reads:

“A court may make an order for the eviction of a person residing on a farm if

- (a) the person residing on farm has not vacated the land within the period of thirty days notified by the owner; and
- (b) the owner has, after the expiry of the thirty days written notice of termination of the right of residence given (...) not less than 3 months' written notice of the intention to obtain an order for eviction (...)

⁵⁰² S 23(2) of the *Draft Land Tenure Security Bill*, 2011.

⁵⁰³ S 25(1) of the *Draft Land Tenure Security Bill*, 2011; Pienaar *Land Reform* 447.

⁵⁰⁴ The Land Rights Management Board which the Bill will establish.

⁵⁰⁵ Established by s 2 of the *Rules Board for Courts of Law Act* 107 of 1985.

⁵⁰⁶ S 42 (4) of the *Draft Land Tenure Security Bill*, 2011.

⁵⁰⁷ *Extension of Security of Tenure Amendment Bill*, 2013 (GN 1035 in GG 36942 of 17 October 2013)

4.3.4 The Labour Tenants' Act

*The Land Reform (Labour Tenants) Act*⁵¹⁰ was assented to in March 1996 and commenced its working that same year. Its aim is to protect the property rights of labour tenants on South African farms.⁵¹¹

In terms of section 5 of the *Labour Tenants' Act* a labour tenant⁵¹² and his or her associates⁵¹³ may not be evicted without an order from the Court,⁵¹⁴ which order may only be made if it would be just and equitable to do so and the labour tenant concerned had either:

- (a) refused or neglected to provide labour to the owner of the farm even after receiving a notice to do so within one calendar month;⁵¹⁵ or
- (b) had committed such a material breach of the labour tenant-owner relationship that it cannot be remedied.⁵¹⁶

⁵⁰⁸ Pienaar *Land Reform* 440-441, 453.

⁵⁰⁹ Pienaar *Land Reform* 454-455.

⁵¹⁰ *Land Reform (Labour Tenants') Act* 3 of 1996 (hereafter referred to as the *Labour Tenants' Act*).

⁵¹¹ See the Preamble of the *Labour Tenants' Act*.

⁵¹² Defined in section 1 of the *Labour Tenants' Act* as a person:

- (a) who is residing or has the right to reside on a farm;
- (b) who has or had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the 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 such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm.

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*;

(own emphasis)

⁵¹³ Defined in section 1 of the *Labour Tenants' Act* as:

... a family member of a labour tenant, and any other person who has been nominated in terms of section 3(4) as the successor of such labour tenant, or who has been nominated in terms of section 4(1) to provide labour in his or her stead.

⁵¹⁴ Being, according to the definitions in section 1, the Land Claims Court.

⁵¹⁵ S 7(2)(a) of the *Labour Tenants' Act*.

A labour tenant over the age of 60 years may not, however, be evicted solely on the grounds of being unable to provide labour to the owner of the farm.⁵¹⁷

The *Labour Tenants' Act* requires that a labour tenant standing to be evicted be given two calendar months' notice of the owner's intention to apply for such an eviction order.⁵¹⁸ The Director-General must also be given two calendar months' notice of the owner's intention to evict a labour tenant, and he or she must convene a meeting between the labour tenant and the owner in order to mediate the disputes.⁵¹⁹ When a labour tenant dies, his or her associates⁵²⁰ may only be evicted after receiving twelve calendar months' notice to vacate the property.

The *Labour Tenants' Act* is the only Act that provides for what amounts to *ex parte* eviction orders on urgent grounds.⁵²¹ Section 15 of the *Labour Tenants' Act* provides that an owner or lessee may:

... may make urgent application for the removal of any person from the farm pending the outcome of proceedings for a final order, and the Court may grant an order for the removal of that person if it is satisfied that-

- (a) there is a real and imminent danger of substantial damage to the owner or lessee or his or her property if the person concerned is not removed from the farm;
- (b) there is no other effective remedy available to the owner or lessee; and
- (c) the likely harm to the owner or lessee if an order for removal is not granted, exceeds the likely harm to the person against whom the order is sought, if an order for removal is granted;
- (d) adequate arrangements have been made for the reinstatement of any person so removed, if the final order is not granted.

⁵¹⁶ S 7(2)(b) of the *Labour Tenants' Act*.

⁵¹⁷ S 9(1) of the *Labour Tenants' Act* read with s 7(2).

⁵¹⁸ S11(1) of the *Labour Tenants' Act*.

⁵¹⁹ S 11(1) of the *Labour Tenants' Act* read with s 11(3).

⁵²⁰ See footnote 489.

⁵²¹ Pienaar *Land Reform* 433 discuss the considerations that needs to be taken into account by the court in determining whether or not to grant an urgent order for eviction.

The section does not require of the applicant in such an application to give the person standing to be evicted any prior notice that he or she will see such an order from the court.

4.4. The lawfulness of evictions done in terms of sections 7(1)(c) and (d)

The *Constitution* prohibits the arbitrary deprivation of property.⁵²² It also prohibits the eviction of any person from his/her home without a court order, which court order was granted after all the relevant circumstances had been taken into consideration.⁵²³

When the eviction of a person from his/her home is being sought, such eviction will fall under the provisions of *PIE*, *ESTA*, the *Interim Protection of Informal Land Rights Act* 31 of 1996 or the *Land Reform (Labour Tenants) Act* 3 of 1996,⁵²⁴ and the procedural and substantive requirements set by these Acts.⁵²⁵

The common law seems to have been entirely turned on its head, since some of these pieces of legislation clearly grant the court an *equitable discretion* when deciding the matter. In the past, under the common law, a plaintiff needed only to prove ownership and unlawful possession to be granted an order for eviction.⁵²⁶ In the case of an order for spoliation, only undisturbed possession needed to be proved. Once these requirements had been satisfied, it was up to the defendant to prove circumstances that militate against an order being granted.⁵²⁷ The only circumstances that could have been raised that would have been successful are those which, under the common law, would give him a right to use or hold the property, such as a lease agreement or a *lien* over the property.⁵²⁸

⁵²² S 25(1) of the *Constitution of the Republic of South Africa*, 1996.

⁵²³ S 26(3) of the *Constitution of the Republic of South Africa*, 1996.

⁵²⁴ This Act, together with *ESTA*, is set to be repealed by the *Draft Land Tenure Security Bill*, 2011.

⁵²⁵ Roux 2004 SALJ 491.

⁵²⁶ Smith *Evictions and Rental Claims* Par 1.2; See also Mostert and Pope *Sakereg* 244, who states that in order for the *rei vindicatio* to be used, the respondent needs to be in possession of the property concerned.

⁵²⁷ Mostert and Pope *Sakereg* 246; Smith *Evictions and Rental Claims* Par 1.3.

⁵²⁸ Mostert and Pope *Sakereg* 245-246; Smith *Evictions and Rental Claims* Par 1.4.

Constitutional-era legislation such as *PIE*, however, requires that a court may now only grant an eviction order if it is satisfied that it would be “just and equitable” to do so.⁵²⁹ Legislation embroiders upon the section 26(3) requirement of the “relevant circumstances” that need to be taken into consideration by listing the rights and needs of the elderly, children and women-headed households amongst the factors to be taken into consideration.⁵³⁰ The use of the word “including” in this particular section of *PIE* points to it not being an exhaustive list, and the courts have at times added other factors that may or may not be relevant in any given case.⁵³¹

The *DVA* allows for a court to give an order that prohibits a respondent to enter a shared residence or any part of a shared residence.⁵³² This type of order deprives the respondent of both access to and use of his home, and in this sense it amounts to an eviction as it is defined in *Chenwi*⁵³³, and - depending on where the property is situated, whether rural or urban – it will also qualify as an eviction under either *PIE* or *ESTA*. As such, it needs to adhere to both the procedural and substantive requirements set for evictions in the *Constitution* as well as in the relevant applicable legislation.

PIE requires that a respondent in an eviction matter under it must be given fourteen days’ written notice of such proceedings against him.⁵³⁴ If the proceedings are urgent, the required notice period of fourteen days are dispensed with – but “written and effective notice” is still needed.⁵³⁵

Similarly, *ESTA* requires two calendar months’ notice to be given both to the respondent and to the relevant local municipality.⁵³⁶ In urgent applications, the notice seems to be only needed for the local municipality.⁵³⁷ No notice to the respondent is required for an interim order to be made under section 7(1)(c) or section 7(1)(d) of

⁵²⁹ Ss 4(6), 4(7), 6(1) of *PIE*.

⁵³⁰ Ss 4(6) and 4(7) of *PIE*.

⁵³¹ See for example the *PE Municipality* case (*supra*) at 35.

⁵³² *DVA* s7(1)(c) and 7(1)(d).

⁵³³ *Chenwi Evictions in South Africa*. See also Par 4.2.1 above.

⁵³⁴ S 4(2) of *PIE*.

⁵³⁵ S 5(2) of *PIE*.

⁵³⁶ S 9(2)(d) of *ESTA*.

⁵³⁷ S15(2) of *ESTA*.

the *DVA*,⁵³⁸ thus making it an unlawful order in terms of both *PIE* and *ESTA*. Those cases in which *ESTA* would be applicable should furthermore be sent to the Land Claims Court to be reviewed.⁵³⁹

However, the *Labour Tenants' Act*, as was seen above⁵⁴⁰ does not require a notice period if urgency can be proven, taking into regard the requirements for urgency set out in section 15 of the *Labour Tenants' Act*.

Furthermore, whereas section 26(3) requires a court to consider all relevant circumstances before granting an eviction order, the *DVA* in fact leaves the court with no discretion to refuse an order if the court is satisfied that an act of domestic violence has occurred or is occurring,⁵⁴¹ and the complainant will suffer undue hardship if an order is not granted.⁵⁴² Thus even if a court did know of other relevant circumstances, and might after learning of such circumstances be secretly convinced that an order incorporating either section 7(1)(c) or 7(1)(d) will not be “just and equitable”, it will still have no discretion to refuse such an order as long as it is satisfied of the requirements set in section 5(2)(a) and section 5(2)(b). The court will also not be able to refuse granting an order solely by reason of being of the opinion that the complainant has other remedies, such as bringing a proper application for eviction under *PIE*.⁵⁴³

Lastly, the type of orders envisioned in sections 7(1)(c) and 7(1)(d) of the *DVA* may result in an arbitrary deprivation of property, contrary to section 25(1) of the *Constitution*, due to the court not being required to consider questions of ownership and/or possessory property rights when considering an application made under section 7(1)(c) or section 7(1)(d).⁵⁴⁴

It is thus clear that the orders provided for in sections 7(1)(c) and 7(1)(d) of the *DVA* result in *prima facie* unlawful and unconstitutional evictions, and in some cases

⁵³⁸ S 5(2) of the *DVA*.

⁵³⁹ Ss 19(3) and 20(1)(c) of *ESTA*; *Bergboerderye v Makgoro* at 581A.

⁵⁴⁰ See par 4.3.4.

⁵⁴¹ S 5(2)(a) of the *DVA*.

⁵⁴² S 5(2)(b) of the *DVA*.

⁵⁴³ S 7(7)(a) of the *DVA*.

⁵⁴⁴ See the discussion of this point in par 2.2 below.

possibly in an unconstitutional and arbitrary deprivation of property. The next chapter will examine whether or not such orders can be justified.

4.5. Conclusion

Section 26(3) of the *Constitution* prohibits arbitrary evictions and directs the courts to have regard for all relevant circumstances before granting an eviction order. Various pieces of legislation have been written in order to provide effect for section 26(3). These include *PIE*, *ESTA*, the *Draft Land Tenure Security Bill*, (which Bill intends to replace *ESTA* and the *Land Reform (Labour Tenants) Act*.)

The courts regard evictions in such a serious light, that, in the *Nkuza* matter (see above) it even ordered that legal representation had to be provided for the respondents in eviction matters done in terms of *ESTA* to prevent a “miscarriage of justice”⁵⁴⁵

In this chapter, as well as in chapters 2 and 3, it has been clearly shown that sections 7(1)(c) and 7(1)(d) of the *DVA* may infringe upon several rights of the Bill of Rights in the *Constitution*. These include the rights to human dignity, property, access to housing, access to justice and children’s rights. Chapter 5 will examine the justifiability, if any, of these infringements.

⁵⁴⁵ *Nkuzi Development Association v The Government of the Republic of South Africa and the Legal Aid Board* LCC 10/01 pars 11 & 12.

5. Section 7(1)(d) of the *DVA* and the limitation clause

5.1. Introduction

It has been established in the previous chapters that the type of orders provided for in sections 7(1)(c) and (d) of the *DVA* violates not only the provisions of section 26(3) of the *Constitution*, but also limits many other fundamental rights enshrined in the *Constitution's* Bill of Rights such as the right to property (section 25(1)), the right to access to the courts (section 34), the right to human dignity (section 10) and the rights of children to shelter and family life.

This chapter will examine, based on section 36 of the *Constitution*, whether or not the limitations placed upon fundamental rights by sections 7(1)(c) and (d) can be justified. The purpose and nature of limitations clauses in general will be explored, after which a brief breakdown of section 36 will follow. Thereafter, sections 7(1)(c) and (d) will be analysed on the basis of section 36 and applicable case law.

The chapter will further investigate specifically how illegal evictions perpetrated within South Africa – especially those done in terms of sections 7(1)(c) and (d) of the *DVA* - impact upon the rights of vulnerable persons. To this end, a selection of the provisions of the Bill of Rights in the *Constitution* will be explored, in order to determine if these rights are being violated. At the outset of this chapter, therefore, the concept of the “vulnerable person” in the South African legal system, and the special considerations which must be taken into account when vulnerable persons are involved in litigation, will be explained

The other side of the coin is the rights of the victims of domestic abuse that are being violated by the perpetrators of domestic abuse. The question is asked whether or not these rights can still be adequately protected without the provisions of sections 7(1)(c) and (d).

5.2 Vulnerable persons in the South African legal system

5.2.1 Vulnerable persons

[Evictions] affect the most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of the society (...)⁵⁴⁶

The question to be asked is who these “disadvantaged and vulnerable sectors” of society might be.

In a volume on vulnerable persons and human rights, edited by Weissbrodt and Rumsey,⁵⁴⁷ it is interesting to note the wide variety of vulnerable groups – in an international context - identified by the contributors in their articles and essays. These include refugees, asylum seekers and migrant workers, children, linguistic minorities, the elderly, people suffering from HIV/Aids and those with disabilities.

5.2.1.1 Women and children

Chenwi, with regard to evictions in particular, identifies “(...) including the poor, women and children (...)”⁵⁴⁸ The Constitutional Court in the Omar matter⁵⁴⁹ goes so far as to describe women and children as “disempowered and vulnerable members of society”. Children are particularly vulnerable members of society. Smith writes:

Inherently vulnerable, children depend on others for their well-being in a manner not matched by any other group (...) Secondary violations of human rights can thus occur (...)⁵⁵⁰

In the case of evictions done in terms of the *DVA*, secondary violations of children’s rights occur when their primary caregiver is the one evicted from the home – either leaving the child behind for lack of better options, thus depriving him of the parental care he is entitled to in terms of the *Constitution*,⁵⁵¹ or taking him out of the home with her, subjecting him to the deprivations of a homeless state.

5.2.1.2 The impoverished

⁵⁴⁶ Chenwi *Evictions* 2.

⁵⁴⁷ Weissbrodt and Rumsey (eds) *Vulnerable and Marginalized Groups*.

⁵⁴⁸ Chenwi *Evictions* 2.

⁵⁴⁹ *Supra*.

⁵⁵⁰ Smith “Children’s Rights” 42.

⁵⁵¹ S 28(1)(b) of the *Constitution*.

The poor themselves may be said to constitute a “vulnerable group.” Pogge remarks:

Desperately poor people, often stunted, illiterate and heavily preoccupied with the struggle to survive, typically lack effective means for resisting or rewarding their rulers (...)⁵⁵²

In the matter of *Government of the Republic of South Africa and Others v Grootboom and Others*⁵⁵³ the court described the poor as a particularly vulnerable group in society requiring “special attention”.⁵⁵⁴

The impoverished are often especially hard-hit by eviction,⁵⁵⁵ and they are thus extra vulnerable when it comes to evictions done in terms of the DVA.

5.2.2 *The position of vulnerable persons in the South African legal system*

The court in *Grootboom* stated that the state’s obligation to fulfil socio-economic rights might differ in content between different groups in society – for example, for those that can afford to build their own homes, the state’s duties under section 26 of the *Constitution* is limited to “unlocking the system” by providing the necessary legislative framework while for the poor, questions of “development and social welfare” must be considered.⁵⁵⁶ It is thus argued here that different considerations come into play when dealing with vulnerable persons in the legal system.

5.3. *The limitations clause*

5.3.1 *Limitations of rights*

Rights are not absolute.⁵⁵⁷ Section 7(3) of the *Constitution* proclaims:

The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

⁵⁵² Pogge “Poverty and Human Rights” 286.

⁵⁵³ The *Grootboom* matter (*supra*).

⁵⁵⁴ At par 36.

⁵⁵⁵ *Chenwi Evictions in South Africa 2*.

⁵⁵⁶ At par 36-37.

⁵⁵⁷ Currie and De Waal *Bill of Rights* 185.

Rights have to be weighed against each other when exercised - in the words of Mogoeng CJ in the *Satawu and another v Garvas and others*⁵⁵⁸ matter: “The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised.”⁵⁵⁹

5.3.2 Contents of section 36

Section 36 of the *Constitution* reads as follows:

(1) 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, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the *Constitution*, no law may limit any right entrenched in the Bill of Rights.⁵⁶⁰

Goldstone describes the limitation clause in the interim *Constitution* (the equivalent of section 36) as the “second inquiry” of a two-legged approach to enforcing the Bill of Rights – the first being determining whether or not an infringement has occurred.⁵⁶¹

According to the court in the matter of *S v Makwanyane*:⁵⁶²

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.⁵⁶³

5.3.2.1 A law of general application

⁵⁵⁸ 2013 (1) SA 83 (CC). Hereafter the *Satawu* matter.

⁵⁵⁹ At 102C.

⁵⁶⁰ S 36 of the *Constitution*.

⁵⁶¹ Goldstone 1997 *Texas International Law Journal* 462.

⁵⁶² *S v Makwanyane and another* 1995 (3) SA 391 (CC) (hereafter *S v Makwanyane*).

⁵⁶³ At 436B-D.

According to Currie and De Waal, there are two components to this requirement: firstly, in order for a right to be lawfully limited, the action or infringement that limits it should be done in terms of a law.⁵⁶⁴

In the matter of *August and Another v Electoral Commission and others*⁵⁶⁵ the court considered a limitation of the right to vote, which right was limited by circumstance alone.

In this instance prisoners found themselves unable to register as voters for the 1999 national elections because the National Electoral Commission had made no arrangements for incarcerated persons to register in prison. The court found that this imposed a limitation on the right to vote that could not be lawful, since the limitation was not imposed by any law. According to Currie and De Waal, the term “law” should be interpreted widely to include all legislation.⁵⁶⁶

In the matter of *Larbi-Odam and others v Member of the Executive Council for Education (North West Province) and another*,⁵⁶⁷ the court held that subordinate legislation – such as for example Regulations – were held to be legislation as well.⁵⁶⁸ Law also includes customary law and the common law.⁵⁶⁹ In the matter of *President of the Republic of South Africa and another v Hugo*⁵⁷⁰ Mokgoro J, in a minority judgment, remarks that a presidential act is also a “law” for purposes of constitutional limitation.⁵⁷¹

⁵⁶⁴ Currie and De Waal *Bill of Rights* 168. The ambit of the word “law” in this context is discussed more fully below.

⁵⁶⁵ 1999 (3) SA 1 (CC). Hereafter referred to as the *August* matter.

⁵⁶⁶ Currie and De Waal *Bill of Rights* 169.

⁵⁶⁷ *Larbi-Odam and others v Member of the Executive Council for Education (North West Province) and another* 1998 (1) SA 745 (CC) (hereafter referred to as the *Larbi-Odam* matter).

⁵⁶⁸ See the judgment of Mokgoro J at 759H.

⁵⁶⁹ Currie and De Waal *Bill of Rights* 169. See also Goldstone 1997 *Texas International Law Journal* 461.

⁵⁷⁰ 1997 (4) SA 1 (CC) at 42G-43A. Hereafter referred to as the *Hugo* matter.

⁵⁷¹ The *Hugo*-matter was decided under the interim *Constitution*, at the hand of section 33 – the limitations clause - of said *Constitution*, which clause is largely similar to the present limitation clause, section 36 of the *Constitution*.

Secondly, the law that limits a right cannot be just any law – it needs to adhere to certain standards, in that it has to be “of general application.” In the matter of *Larbi-Odam*⁵⁷² subordinate legislation (in the form of a Regulation) which was applicable to all educators in the Republic of South Africa was considered generally applicable.⁵⁷³

5.3.2.2 Reasonable and justifiable

In order for a limitation to pass constitutional muster, such limitation on a fundamental right has to be “reasonable and justifiable in an open and democratic society.”⁵⁷⁴ The latter phrase was used instead of including a list of values, so as not to mire the Constitutional Court down with the task of interpreting concepts such as “public safety,” which have often had a negative connotation in the country’s history.⁵⁷⁵

In short, this part of the limitation clause requires that there should be

(...) sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law.)⁵⁷⁶

This means that the limitation must not only be done for a reasonable purpose but the means which it employs to achieve this purpose must be reasonable as well.⁵⁷⁷ A limitation may not negate the essential content of a right.⁵⁷⁸

Section 36(1) of the *Constitution* lists several factors that need to be taken into account while determining the reasonableness and justifiability of a limitation. These factors will be set out fully below.

(a) The nature of the right⁵⁷⁹

⁵⁷²

Supra.

⁵⁷³

Mokgoro J at 759H.

⁵⁷⁴

Section 36(1) of the *Constitution*.

⁵⁷⁵

Goldstone 1997 *Texas International Law Journal* 462.

⁵⁷⁶

Currie and De Waal *Bill of Rights* 176.

⁵⁷⁷

Goldstone 1997 *Texas International Law Journal* 462.

⁵⁷⁸

Goldstone 1997 *Texas International Law Journal* 462.

⁵⁷⁹

S 36(1)(a) of the *Constitution*.

In the words of Currie and De Waal: “Some rights weigh more heavily than others.”⁵⁸⁰

In considering a limitation on the right to protest and assemble,⁵⁸¹ the Constitutional Court in the *Satawu* matter⁵⁸² took into account the historical importance of the right to protest for the South African society,⁵⁸³ as well as its close association with other fundamental rights such as the right to freedom of expression⁵⁸⁴ in order to illustrate the importance of the right being limited.

(b) The importance and purpose of the limitation⁵⁸⁵

The purpose, in order for the limitation to be reasonable and justifiable, should be one that is “worthwhile and important in a constitutional democracy.”⁵⁸⁶

In the *Satawu* case,⁵⁸⁷ the purpose was held to be for the protection of citizens that “do not have the resources or capability to identify and pursue the perpetrators of the riot damage.”⁵⁸⁸

(c) The nature and extent of the limitation⁵⁸⁹

In the *Satawu* case,⁵⁹⁰ the court considered it important that the limitation placed on the right to assemble did not negate the right entirely, but merely placed strict conditions on the exercise of it.⁵⁹¹ Furthermore, the court pointed out that there is nothing that prevents an organisation or union being held liable for riot damages to

⁵⁸⁰ Currie and De Waal *Bill of Rights* 178.

⁵⁸¹ Protected by s 17 of the *Constitution*.

⁵⁸² *Supra*. In this matter, certain parts of an Act that make Unions and other organisations organising protest marches liable for damages caused by the protesters were challenged as limiting the right ...to protest?

⁵⁸³ AT 99H-100H.

⁵⁸⁴ At 100H-101H.

⁵⁸⁵ S 36(1)(b) of the *Constitution*.

⁵⁸⁶ Currie and De Waal *Bill of Rights* 179.

⁵⁸⁷ *Supra*

⁵⁸⁸ At 102A-102B.

⁵⁸⁹ S 36(1)(c) of the *Constitution*.

⁵⁹⁰ *Supra*

⁵⁹¹ At 102F.

track down the individual culprits and exercise their right to an apportionment of damages.⁵⁹²

(d) The relation between the limitation and its purpose⁵⁹³

This requires that there should be a “causal connection between the law and its purpose.”⁵⁹⁴

Recently, in *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and others*⁵⁹⁵ the court had to consider whether or not provisions of the *Criminal Law (Sexual Offences and Related matters) Amendment Act*⁵⁹⁶ that criminalised consensual sexual acts taking place between children between the ages of twelve and sixteen, infringed upon their fundamental rights. The court found that provisions that were meant to deter adolescents from engaging in sexual conduct actually only served to make them attempt to conceal such sexual conduct for fear of being prosecuted, and prevent open discussion between children and caregivers. The court also found that it may even lead to a failure to report instances of rape or abuse due to a fear of being investigated and prosecuted for earlier consensual conduct, such as kissing.⁵⁹⁷

Thus the limitations under scrutiny did not succeed in their goals, and there could be no rational relationship between said limitations and their purpose.⁵⁹⁸

(e) Less restrictive means to achieve the purpose⁵⁹⁹

In the process of deciding upon the justifiability of the limitation, the court must consider the existence of less restrictive means to achieve the purpose.⁶⁰⁰

⁵⁹² At 103C-103D.

⁵⁹³ S 36(1)(d) of the *Constitution*.

⁵⁹⁴ Currie and De Waal *Bill of Rights* 183.

⁵⁹⁵ *Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and others* CCT 12/13 (Hereafter referred to as the *Teddy Bear Clinic* case).

⁵⁹⁶ *Criminal Law (Sexual Offences and Related matters) Amendment Act* 32 of 2007 (Hereafter referred to as the *Sexual Offences Act*).

⁵⁹⁷ *Teddy Bear Clinic* case at par 89 and at par 93.

⁵⁹⁸ *Teddy Bear Clinic* case par 94.

⁵⁹⁹ S 36(1)(e) of the *Constitution*.

In the case of *S v Manamela and another (Director-General of Justice Intervening)*⁶⁰¹ the court held that the *Constitution* “does not permit a sledgehammer to crack a nut.”⁶⁰²

In the *Teddy Bear Clinic* case the court stated that:

A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends.

A limitation, in order to be valid, must be “appropriately tailored and narrowly focused.”⁶⁰³ The court was not convinced that criminalisation of consensual sexual acts between children was the least restrictive means by which to protect children from dangers such as pregnancy and sexually transmitted diseases, holding that sex education may be much more effective.⁶⁰⁴

5.3.3 *The DVA and section 36*

In the *Baloyi* matter⁶⁰⁵ the court, in determining whether or not certain sections of the old *Family Violence Act*⁶⁰⁶ infringed upon the rights of a respondent in an application for a protection order, remarked:

In dealing with the matter, this Court faces the novel and complex task of establishing the appropriate balance between the state’s constitutional duty to provide effective remedies against domestic violence, and its simultaneous obligation to respect the constitutional rights to a fair trial of those who might be affected by the measures taken.⁶⁰⁷

In this matter the respondent was an army officer who had assaulted his wife, the applicant, which caused her to apply for a protection order under the *Family Violence Act*. An interim order was duly issued, after which the respondent once again

⁶⁰⁰ S 36(1)(e) of the *Constitution*.

⁶⁰¹ *S v Manamela and another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) (Hereafter referred to as *S v Manamela*).

⁶⁰² At par 34.

⁶⁰³ *Teddy Bear Clinic* case at par 95.

⁶⁰⁴ At pars 95 to 101.

⁶⁰⁵ *Supra*.

⁶⁰⁶ Act 133 of 1993.

⁶⁰⁷ *S v Baloyi (supra)* par 1.

assaulted the applicant, threatening to kill her. The applicant took her protection order and its accompanying warrant of arrest to the local police station where she made an affidavit in terms of the *Family Violence Act* regarding the alleged breach of the protection order. The respondent was subsequently arrested and brought before a magistrate, who convicted him of an offence in terms of the *Family Violence Act*, judging on the basis of a balance of probabilities.

The respondent appealed to the then Transvaal High Court, arguing that the relevant sections of the *Family Violence Act* placed a burden on him to prove his innocence on a balance of probabilities,⁶⁰⁸ thereby infringing on his constitutional right to be presumed innocent until proven guilty.⁶⁰⁹ The High Court upheld his contention of unconstitutionality and referred the matter to the Constitutional Court for confirmation.

In this specific instance the Constitutional Court declined to confirm the High Court's finding of unconstitutionality, since it was of the view that the relevant sections can be read and interpreted in a way that does not result in an unconstitutional provision. The court in this instance cited section 39(2) of the *Constitution*, which holds:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

However, in coming to its conclusion the Court repeatedly stressed the importance of the State's duty to provide effective protection against, and remedies for, instances of domestic violence. The court was very vocal about deeming domestic violence somewhat of a social scourge.

⁶⁰⁸ Section 3(5) of the *Family Violence Act* determined:

The provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), relating to the procedure which shall be followed in respect of an enquiry referred to in section 170 of that Act, shall apply mutatis mutandis in respect of an enquiry under subsection (4).

Section 170 of the *Criminal Procedure Act* 51 of 1977 relates to inquiries where an accused had failed to show up for trial after an adjournment or to remain in attendance at court for the duration of his trial, and determines that such an accused shall have to convince the court that his failure to attend or to remain in attendance were not due to a failure on his part – thus shifting the *onus* of proof onto the accused.

⁶⁰⁹ As set out in s 35(3)(h) of the *Constitution*.

In 2008, the Constitutional Court had to decide upon the constitutionality of the domestic violence court's powers to grant arrest warrants in *ex parte* proceedings, which it derived from section 8(1) of the *DVA*. In this case,⁶¹⁰ the section being questioned was section 8(1), which obliges the court to issue a warrant of arrest (suspended) along with every protection order. The Applicant (Mr Omar) was married to the third respondent (Ms Joosab) in terms of Islamic law.⁶¹¹ Subsequently, they became estranged, and Ms Joosab obtained a protection order against Mr Omar in the magistrate's court in terms of the *DVA*. The terms of the final order granted in the magistrate's court were negotiated by the parties' legal representatives, and - as is required by section 8(1) of the *DVA* - it included a warrant for the arrest of Mr Omar, execution of which was suspended pending his good behaviour. The warrant was executed after an alleged violation of the court order on the part of Mr Omar, who then launched a High Court application asking that the court declare section 8 invalid and unconstitutional.

The High Court rejected Mr Omar's application, upon which he applied for leave to appeal to the Constitutional Court.

In the Constitutional Court it was argued, *inter alia*, that section 8(1) violated a respondent's right to access to the courts by making it mandatory for a court to issue a warrant of arrest together with a protection order, even if the proceedings are *ex parte*. It was argued further that section 8(4)⁶¹² of the *DVA* allows for arbitrary arrests in violation of section 12(1)(a) of the *Constitution*,⁶¹³ and bestows ordinary policemen

⁶¹⁰ In the Omar matter (*supra*).

⁶¹¹ The Applicant in front of the Constitutional Court was also the Applicant in front of the High Court, but the Respondent in the Magistrate's Court. Similarly, the Third Respondent was originally the Applicant in the Magistrate's Court. To avoid confusion, the Applicant in front of the Constitutional Court will henceforth be referred to as Mr Omar, and the Third Respondent as Ms Joosab. The other parties in the Constitutional Court application were the Government of the Republic of South Africa and the Minister of Justice and Constitutional Development - as First and Second Respondents respectively - and the Commission for Gender Equality as *amicus curiae*.

⁶¹² Section 8(4) of the *DVA* states that a complainant may hand the suspended warrant of arrest to any police officer, accompanying it with an affidavit alleging a violation or breach of the terms of the protection order, whereupon the police officer - if he or she is satisfied that there is cause to suspect that the order was indeed breached and the complainant may suffer imminent harm because of it - must arrest the Respondent forthwith.

⁶¹³ This section guarantees a person's right not to be deprived of freedom arbitrarily or without just cause.

and policewomen with the powers of a court. It was argued that the process is open to abuse by malicious complainants making false statements, and that police officials are not given discretion to judge the truthfulness of such statements before acting upon the allegations made therein.⁶¹⁴ Lastly, it was argued that section 8 creates a reverse *onus* of proof in criminal proceedings (thereby violating the respondent's right to be presumed innocent until proven guilty) and the possibility of criminal conviction upon a balance of probabilities.

5.4. Sections 7(1)(c) and (d) and the limitations clause

It is specifically argued here that sections 7(1)(c) and (d) have the potential to be misused by applicants who are not actually victims of domestic abuse, and who may in fact be using sections 7(1)(c) and (d) as a tool of abuse, making them the perpetrators and the respondents the victims of abuse. As stated before, there can be no guarantee that the applicants before court are necessarily always the victims, and the respondents the aggressors.⁶¹⁵ Respondents in terms of the *DVA* may also be vulnerable persons, who require special attention and consideration.

5.4.1 The limitations clause

5.4.1.1 The nature of the right

The rights that sections 7(1)(c) and (d) infringe upon include mainly the right against arbitrary eviction, guaranteed in section 26(3) of the *Constitution*, and the right not to be arbitrarily deprived of property, as guaranteed in section 25(1) of the *Constitution*. In addition, it was shown in paragraph 2.3.2.1 that sections 7(1)(c) and (d) of the *DVA* violate several of the fundamental rights of respondents – including the rights to property, access to housing and human dignity, and the basic rights of children.

In the case of *Nkuza Development Association v The Government of the Republic of South Africa and the Legal Aid Board*⁶¹⁶ the Land Claims Court viewed illegal

⁶¹⁴ See par 46.

⁶¹⁵ See par 1.5.

⁶¹⁶ LCC 10/01 (Hereafter referred to as the *Nkuza* matter).

evictions in such a serious light that it ruled that failure to provide respondents in eviction matters done in terms of *ESTA* with legal representation at state expense would result in a “miscarriage of justice.”⁶¹⁷

5.4.1.2 The importance and purpose of the limitation

In an article on domestic abuse in the United States of America, Taub⁶¹⁸ writes about the reason why there is such a need to pay urgent and serious attention to the prevention of domestic abuse:

The consequences of allowing battering to continue can be serious. Experts believe that domestic violence is likely to escalate in a cyclical fashion, at times resulting in the woman’s death. Women caught in the cycle of abuse may, in the process of defending themselves, kill their assailant. Children exposed to such patterns of violence not only may suffer immediate emotional distress, but also may reproduce their parents’ behaviour patterns as adults.⁶¹⁹

Although the above was written in the context of the situation as it stands in the United States of America, the consequences of domestic violence in South Africa are equally severe, its impact spreading outside of the level of the immediate and extended family to the level of the community or society, even affecting the working of the state and its economy.⁶²⁰ It should be clear from the above that domestic violence is a social problem that causes great harm, and needs to be addressed urgently and effectively.

The court in the matter of *Omar* stressed the grave need for an adequate legal response to the problem of domestic violence⁶²¹ and remarked: “Domestic violence brutally offends the values and rights enshrined in the *Constitution*.”⁶²² This includes the rights to human dignity, life, freedom and security of the person, equality and privacy.⁶²³

⁶¹⁷ *Nkuza Development Association v The Government of the Republic of South Africa and the Legal Aid Board* par 11.

⁶¹⁸ Taub 1980-1981 *Hofstra Law Review*.

⁶¹⁹ Taub 1980-1981 *Hofstra Law Review* 96.

⁶²⁰ See in this regard Van der Hoven *Acta Criminologica* 13.

⁶²¹ Par 13.

⁶²² Par 17.

⁶²³ *Omar* at par 17.

The *DVA* was meant, amongst other things, to provide an affordable and accessible means for persons threatened by domestic abuse to remedy their situation speedily.⁶²⁴ Before enactment of the *DVA*, the criminal justice system had failed victims of domestic abuse.⁶²⁵ In the words of Van der Westhuizen J, the *DVA* “serves a very important social and legal purpose.”⁶²⁶

Equally as important for purposes of this dissertation, is the view of the court in the *Omar* matter on the possibility of the *DVA* being misused by malicious complainants. The court in *Omar*, rather naively, reasoned that the consequences of rendering false statements – which results in criminal liability – should for the most part prevent the system from being misused.⁶²⁷ The court did acknowledge that abusing the Act is not impossible, but “the potential to exploit a statute does not render the statute unconstitutional.”⁶²⁸

5.4.1.3 The nature and extent of the limitation

(a) The limitation of the rights to property and housing

In 1997, while considering recommendations for the proposed *DVA*, the South African Law Reform Commission (hereafter the SALRC) wrote:

Where there is a serious risk to life, protection of the applicant and children should take priority over property rights.⁶²⁹

This was the reasoning which the SALRC seems to have had foremost in its mind when it recommended that a clause like that presently contained in sections 7(1)(c) and (d) be adopted.

⁶²⁴ SALRC *Discussion Paper* 70 3.

⁶²⁵ *Omar* matter at Par 14.

⁶²⁶ *Omar* matter at par 18.

⁶²⁷ Par 47. Furthermore, the court found that section 8(4) requires no more of a police officer than is his normal duty – to affect an arrest where there is a reasonable suspicion that a person has committed a criminal offence. The court thus declined to find that section 8(4) allowed for arrests to be made arbitrarily and without just cause.

⁶²⁸ Par 60.

⁶²⁹ SALRC *Discussion Paper* 70 119.

It is important to note that the limitation, although severe, is not necessarily permanent or long-lasting. Although it is possible to give such orders as contemplated in sections 7(1)(c) and (d) on an *ex parte* basis, the respondent is still provided with a return date on which he or she can supply the court with reasons why the order should not be made final.⁶³⁰

Indeed, in a study conducted by Artz,⁶³¹ a large percentage of magistrates surveyed indicated that they are hesitant to give an order for the sections 7(1)(c) and (d) eviction of the respondent on an *ex parte* basis, and will for the most part wait for the return date to hear the respondent's side of the story before deciding on whether or not to grant such an order - this was especially the case where it seemed as if the respondent may be the owner of the property in question, or have some type of right to the property.

As was stated above, a study conducted by Artz⁶³² found that most protection orders relating to access to the shared residence were amended on the return date.

Section 7(1)(c) itself contains somewhat of an internal restriction on the court's discretion to grant an order in terms of it, holding that:

(...) the court may impose this prohibition only if it appears to be in the best interest of the Complainant⁶³³

(b) The limitation of the right to access to the courts

Section 5(3)(a) of the DVA reads:

An interim order must be served on the respondent in the prescribed manner and must call upon *the respondent to show cause* on the return date specified in the order *why a protection order should not be issued*.
[own emphasis]⁶³⁴

⁶³⁰ See par 2.2 and s 5(3) of the DVA.

⁶³¹ Artz *Issues of Interpretation*. See also Artz and Smythe "Bridges and Barriers" 215.

⁶³² Artz *Issues of Interpretation* 8.

⁶³³ S 7(1)(c) of the DVA.

⁶³⁴ See also s 5(4), which provides similarly for cases in which an interim protection order has not been issued.

This results in a situation where the respondent carries the burden of proof, and is

(...) saddled with an onus of satisfying the judge or magistrate, on a balance of probabilities, that the interdict should be amended or set aside (...)⁶³⁵

When it comes to the *ex parte* nature of the orders granted in terms of the *DVA* – and in particular those granted in terms of section 7(1)(c) – it should be pointed out that occasional departure from the *audi alteram partem* rule is accepted practice.

The court in the *Omar* matter saw nothing wrong with the provisions of section 8(1) of the *DVA*, which made possible the arrest of a respondent on the basis of a warrant granted during *ex parte* proceedings.

Van der Westhuizen J held that *ex parte* proceedings are not unfamiliar or even unusual in South African law, and that the circumstances under which many *DVA* applications are made are of such a nature that it could be dangerous to require the applicant – an alleged victim of domestic abuse – to give notice of his or her intentions to his or her abuser first.⁶³⁶

The court consequently found that section 8(1) of the *DVA* does not deny the respondent access to the courts:

Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. (...) It is not surprising that the legislature has opted to utilise established and well-known procedures for dealing with emergency situations, to adapt these to meet the needs related to domestic violence and to codify them in a statute. Section 8 does not deny a respondent access to the courts.⁶³⁷

⁶³⁵ SALRC Discussion Paper 70 6.

⁶³⁶ Par 35-38.

⁶³⁷ The *Omar* matter, (*supra*) par 38. See also in this regard the submissions of the Black Sash in SALRC Discussion Paper 70 13-15.

Insistence on the full observance of the *audi alteram partem* rule could lead to victims of domestic abuse withdrawing their applications, and renders the process more time-consuming and inaccessible.⁶³⁸

The South African Law Reform Commission, while writing its recommendations for the then proposed *DVA*, was satisfied that the use of a system of interim *ex parte* interdicts followed by a final decision made on the return date after the respondent has been notified (as is provided for in the *DVA* eventually accepted and signed into law) would prove to strike the best balance between the respondents' right to be heard and the complainants' rights.⁶³⁹

5.4.1.4 Relation between limitation and its purpose

The means employed by the *DVA* are often extreme. Writing a set of recommendations for the adoption of the *DVA* in 1997, the SALRC states:

Respondents may be excluded from their homes, prohibited from seeing their children or having access to their possessions. Moreover, there have been many examples of abuse of the Act in order to gain the upper hand in a matrimonial conflict.⁶⁴⁰

However, some may argue, extreme measures are exactly what are needed to combat such a pervasive social evil.⁶⁴¹ It may well be that situations might arise in which barring the respondent from the communal home is the best way to keep the applicant safe from the possibility of violence.

The possibility for abuse is curbed somewhat by regulation 2 to the *DVA*, which allows for the criminal prosecution of persons making false statements while applying for a protection order.⁶⁴² The question, however, needs to be asked whether or not this is a sufficient deterrent.

5.4.1.5 Less restrictive means

⁶³⁸ See SALRC *Discussion Paper 70* 16.

⁶³⁹ SALRC *Discussion Paper 70* 21-23.

⁶⁴⁰ SALRC *Discussion Paper 70* 1.

⁶⁴¹ See SALRC *Discussion Paper 70* 9.

⁶⁴² Artz *Issues of Interpretation*.

In the *Omar* matter, the court could not agree with Mr Omar's view that there are less restrictive measures that can be utilised to achieve the aims of section 8.⁶⁴³ Possibly the same could be said of the provisions of sections 7(1)(c) and (d):

"...(E)xcluding the respondent from the matrimonial home is often the only way in which violence can be prevented" writes the SALRC in 1997, following a submission received by the then Transvaal Law Society in favour of a clause like that which is at present encapsulated in sections 7(1)(c) and (d) of the *DVA*.⁶⁴⁴

The SALRC recommended the adoption of a clause such as sections 7(1)(c) and (d) after considering all of the submissions received both for and against it:

Although it is conceded that the inclusion of such a remedy in the legislation might have extreme consequences for a respondent, it seems clear that in cases of domestic violence an exclusion order will often be the only way of giving the applicant effective protection. Where there is a serious risk of physical violence, protection of the applicant and children should take priority over property rights.⁶⁴⁵

From the report by the South African Law Reform Commission on the (then) proposed *DVA*,⁶⁴⁶ it is clear that legislators had been made aware of the difficulties inherent in allowing for the court to grant protection orders on an *ex parte* basis:

Although the aim of the Act is laudable, the manner in which it provides for interdicts appears to be seriously flawed. Concern has been expressed for the apparent disregard of the *audi alteram partem* rule.⁶⁴⁷

The SALRC however felt that by providing for such *ex parte* orders to be granted as orders *nisi* only (as indeed it is in the final *DVA*) the problem would be alleviated.⁶⁴⁸ The position taken by the SALRC had been the same in previous as well as subsequent papers on the (proposed) *DVA*.⁶⁴⁹ This stance was analysed more

⁶⁴³ See the court's discussion at par 54-57.

⁶⁴⁴ SALRC *Discussion Paper 70* 120.

⁶⁴⁵ SALRC *Discussion Paper 70* 127.

⁶⁴⁶ SALRC *Research Paper on Domestic Violence*.

⁶⁴⁷ SALRC *Research Paper on Domestic Violence* 21.

⁶⁴⁸ SALRC *Research Paper on Domestic Violence* 21.

⁶⁴⁹ See amongst others SALRC *Discussion Paper 70* 120.

closely in chapter 4 of this dissertation, especially in relation to the *de facto* eviction orders provided for in section 7(1)(c) and section 7(1)(d) of the *DVA*.

The SALRC, however, recognised the seriousness of the remedy, and recommended that “the legislation should provide for an appropriate criterium to be applied by the courts”⁶⁵⁰ The criterion currently incorporated in the *DVA*, reads:

Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant⁶⁵¹

This criterion is somewhat less than that proposed by the SALRC, which read:

....[O]rders of this nature may only be made if it appears likely that the applicant or any relevant child (...) will suffer significant harm if an order is not made and that such harm will be greater than the harm which the respondent will suffer if the order is made.⁶⁵²

5.5. Conclusion

It has been shown that women, children, people with disabilities and the poor in general can be said to constitute “vulnerable persons.” Any of these persons may be a respondent – or, in the case of children, they may be in the care of a respondent – in an application in terms of the *DVA*.

Furthermore, it was demonstrated that a different standard of care should be adopted when interpreting socio-economic and other fundamental rights where the bearers of such rights constitute a class of vulnerable persons.

It has been shown that the limitations which sections 7(1)(c) and (d) of the *DVA* place on the rights of vulnerable persons – particularly on the rights as contained in section 26(3) – are quite severe. However, section 36 of the *Constitution* provides for rights to be limited if such limitations can be justified in an open and democratic society.⁶⁵³ Previous constitutional challenges to the range of orders that a court can

⁶⁵⁰ SALRC *Discussion Paper 70* 127.

⁶⁵¹ S 7(1)(c) of the *DVA*.

⁶⁵² SALRC *Discussion Paper 70* 129.

⁶⁵³ S 36(1).

grant in terms of the *DVA* have failed,⁶⁵⁴ and it appears that our legal system is very strongly geared towards protecting the victims of domestic abuse against further harm, even if this means limiting the rights of respondents in domestic violence applications.⁶⁵⁵

Taking into regard the nature of the right being limited, the extent of the limitation, the purpose of the limitation, the relationship between the limitation and its object and the possibility of less restrictive means that may be employed to achieve the same purpose, it can be argued that the limitation placed on the respondent's rights to property, to protection from arbitrary eviction, to access to the courts, human dignity and so forth is justified in order to protect the applicant - a victim of domestic abuse - from harm and from having his or her own fundamental rights infringed upon.

⁶⁵⁴ See the facts of the *Omar* case.
⁶⁵⁵ See the facts of the *Omar* case.

6. Conclusion and recommendations

6.1. *The effect of the Domestic Violence Act*

There can be little doubt that domestic abuse is a pervasive social evil. The *DVA*⁶⁵⁶ is designed to protect the rights of persons in abusive domestic relationships.

The *DVA* shows special care for the protection of the rights of vulnerable people.⁶⁵⁷ It was shown that vulnerable persons particularly deserve special consideration by the courts. Vulnerable persons can include a range of people, including the aged, the disabled, women, and children.⁶⁵⁸ These people, because of their vulnerability, are more likely to be victimised by abusers. The *DVA* attempts, amongst other things, to ensure that these persons' interests are taken into consideration.

It was conclusively shown that the *DVA* allows for a court to grant what amounts to a *de facto* eviction order against a respondent on an *ex parte* basis. This flows from the application procedure which was set out in paragraph 2.2 above, and which allows for applications for an interim protection order to be brought without notice to the respondent, by way of a prescribed application form accompanied by a sworn affidavit.⁶⁵⁹ This is to be read with section 7 of the *DVA*, which enumerates the types of orders a court can make, including an order that the respondent be denied access to a shared residence,⁶⁶⁰ or that he/she be denied access to a part of a shared residence.⁶⁶¹

The application form that is used to bring an application for an interim protection order gives no adequate indication of the respondent's situation, and therefore he or she may be vulnerable and in need of special consideration. This was the case in the second of the two fictional case studies used in paragraph 1.2 above, where Mrs X failed to inform the court of the fact that Mr Y suffered from a mental disability.

⁶⁵⁶ *Domestic Violence Act* 116 of 1998 (hereafter referred to as the *DVA*).

⁶⁵⁷ See par 2.2 of chapter 2.

⁶⁵⁸ See par 5.2.1 of chapter 5

⁶⁵⁹ See par 2.2 of chapter 2.

⁶⁶⁰ S 7(1)(c) of the *DVA*.

⁶⁶¹ S 7(1)(d) of the *DVA*. See also paragraph 2.2 of chapter 2.

The respondent is equally worthy of the court's concern, especially in cases where the respondent may be a vulnerable person him/herself. Again, this was illustrated by the fictional case study of Mrs X and Mr Y in paragraph 1.2 above.

It was further shown that the *DVA* has the potential to be abused by litigants to settle economic scores or battles over property, and there is no guarantee that the applicant is necessarily always the victim of abuse and the respondent the aggressor. *In some instances it might be that the DVA is actually used in such a way so as to serve as a tool for abuse* – this was the case in the first of the fictional case studies provided in paragraph 1.2 above. The orders envisioned in sections 7(1)(c) and 7(1)(d) of the *DVA* are perfect for getting rid of a rival claimant to land or property, since no proof of ownership or of any type of right to the property concerned is required.

6.2. Constitutionality

It has been shown that the types of orders envisioned in sections 7(1)(c) and 7(1)(d) of the *DVA* infringe on a number of the fundamental rights of the respondent.

Firstly, the respondent's property rights in terms of section 25(1) are limited.⁶⁶² Sections 25(1) and 25(2) of the *Constitution* reads:

(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

Whether or not property is deprived arbitrarily is a question that should be answered on a case by case basis. It is possible that there might be cases where an order

⁶⁶²

See Chapter 3.

such as envisioned in sections 7(1)(c) and (d) results in an arbitrary deprivation of property.⁶⁶³

The orders envisioned by sections 7(1)(c) and 7(1)(d) also infringe upon the right to access to housing set forth in section 26(3) of the *Constitution*, which reads:

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.⁶⁶⁴

The orders for eviction done in terms of the *DVA* do not consider “all the relevant circumstances”, since the court, at the stage of issuing the interim application, is rarely provided with knowledge of such circumstances and is put in possession of only the applicant’s version of events.⁶⁶⁵ The applicant may knowingly or unknowingly omit essential facts about the respondent.

Sections 7(1)(c) and 7(1)(d) of the *DVA* further infringe upon the respondent’s fundamental rights to human dignity,⁶⁶⁶ the right to access to the court,⁶⁶⁷ and, in some cases, the rights of children to shelter, education and parental care.⁶⁶⁸

6.3. Evictions in South African law

It was clearly shown in paragraph 2.2 that such orders as provided for in section 7(1)(c) and (d) of the *DVA* indeed amount to orders for eviction. As such, they need to comply with the requirements set for lawful evictions in South African law.

The concept of an eviction was discussed in chapter 2, where eviction was said to be defined in South African law as the removal of a person from his/her home or land he/she occupies, when such removal is done against his/her will, and whether such removal is permanent or only temporary.⁶⁶⁹

⁶⁶³ See paragraph 3.2.2 of chapter 3.

⁶⁶⁴ S 26(3) of the *Constitution of the Republic of South Africa*, 1996.

⁶⁶⁵ See paragraph 4.2.1.2 read with paragraph 4.4 in this regard.

⁶⁶⁶ See paragraph 2.4.2.1.

⁶⁶⁷ See paragraph 2.4.2.5.

⁶⁶⁸ See paragraph 2.4.2.4.

⁶⁶⁹ See chapter 2 and Chenwi *Evictions in South Africa* 2.

South African law as it pertains to eviction is governed constitutionally by section 26(3) of the *Constitution*, which holds 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.⁶⁷⁰

Pursuant to section 26(3) of the *Constitution* the legislator enacted several pieces of legislation that, *inter alia*, regulate eviction, both procedurally and substantively. Chief among these are the *Prevention of Illegal Eviction from and Occupation of Land Act*.⁶⁷¹ *PIE* governs all evictions from residential property that are not already covered by other legislation such as *ESTA*,⁶⁷² the *Labour Tenants' Act*⁶⁷³ or the *Informal Land Rights Act*.⁶⁷⁴

In terms of *PIE*, it is implicit that a person wishing to evict another from property must be the owner or the “person in charge” (such as an occupier) thereof, since the Act only makes provision for eviction proceedings brought by these parties.⁶⁷⁵ It is clear that, since no proof of ownership or other rights to property is required in the application form used by the domestic violence office to apply for protection orders, evictions done in terms of the *DVA* might be applied for by a person other than the owner or the person in charge of the property.

Procedurally, *PIE* further require that the respondent in an eviction matter be given at least 14 days' written notice of the applicant's intention to approach the court for an eviction order. Since evictions done in terms of section 7(1)(c) and 7(1)(d) of the *DVA* are done *ex parte*, it is obvious that these types of eviction orders, where they would normally fall under *PIE*, are procedurally deficient. Even in the case of urgent evictions, *PIE* still requires that the respondent be provided with a written notice.

⁶⁷⁰ S 26(3) of the *Constitution of the Republic of South Africa*, 1996.

⁶⁷¹ *Prevent of Illegal Eviction from and Occupation of Land Act* 19 of 1998 (Hereafter referred to as *PIE*).

⁶⁷² *Extension of Security of Tenure Act* 62 of 1997 (Hereafter referred to as *ESTA*).

⁶⁷³ *Land Reform (Labour Tenants') Act* 3 of 1996.

⁶⁷⁴ *Interim Protection of Informal Land Rights Act* 31 of 1996 (Hereafter referred to as the *Informal Land Rights Act*).

⁶⁷⁵ See paragraph 4.3.1.

ESTA contains similar provisions requiring that the person(s) to be evicted be given notice of the intended proceedings against them.⁶⁷⁶ Under *ESTA*, an occupier has to receive at least two months' written notice of the applicant's intention to apply to the court for an eviction order. Under the *Draft Land Tenure Security Bill*, 2011 the notification requirement will be extended to three months.⁶⁷⁷

Even in the case of urgent evictions done in terms of *ESTA* or the *Draft Land Tenure Security Bill*, 2011, the notification requirement is not wholly done away with.⁶⁷⁸

6.4. The justifiability of sections 7(1)(c) and 7(1)(d)

In chapter 5 it was seen that it might be possible to justify the infringements that sections 7(1)(c) and 7(1)(d) of the *DVA* pose on the fundamental rights of respondents in applications for protection orders under the *DVA*.

Artz⁶⁷⁹ writes:

(...) the management of domestic violence cases within the criminal justice system, and the effectiveness of the Act, [is] often dependent on how magistrates decided on these matters.

The rights of vulnerable persons involved either as applicants, respondents or third parties in an application under sections 7(1)(c) or 7(1)(d) of the *DVA*; and the rights of respondents in general to housing, property, human dignity and access to the court should however at all times be kept in careful consideration by the presiding officers faced with applications in terms of sections 7(1)(c) and 7(1)(d).

6.5. Recommendations

⁶⁷⁶ See paragraph 4.3.2.

⁶⁷⁷ See paragraph 4.3.3.

⁶⁷⁸ See paragraphs 4.3.2 and 4.3.3.

⁶⁷⁹ Artz *Issues of Interpretation* 7-8.

It is clear that the provisions contained in sections 7(1)(c) and 7(1)(d) serve a very important function within the *DVA* and the domestic violence court system. Although the provisions may infringe upon the rights of respondents in domestic violence applications, it is clear that such infringements can be justified. The provisions of sections 7(1)(c) and 7(1)(d) can thus not wholly be done away with.

It is equally clear, however, that the *DVA* is open to abuse by litigants wishing to settle economic and property disputes. Respondents may be the abused victims, and the *DVA* may be a tool by means of which they are abused.

It is suggested that magistrates working in the domestic violence courts undergo comprehensive training to help them identify cases where litigants are abusing the court system by settling economic and property disputes by means of the domestic violence courts. Magistrates need to be trained on how to deal appropriately with these situations by referring the litigants concerned to the correct forums, for example the municipal housing dispute committee, the Rental Housing Tribunal or the magistrate's court's estates office. In the experience of the author hereof, many magistrates also conduct informal mediation between persons litigating over property in the domestic violence courts.

Magistrates should be encouraged to build a network of organisations that are better equipped to handle the type of property disputes that often end up in the domestic violence courts, and to work closely with these organisations. These organisations may include forums for housing disputes, such as the Rental Housing Tribunal and the local municipality's housing department, as well as the estates office of the local magistrate's court. Litigants may also be referred for mediation to settle disputes about property rights.

The public should be properly educated on the role and function of the various organisations and courts, and litigants should be warned of the penalties that they may incur if they abuse the court system.

Finally, magistrates should not hesitate to penalise repeat "offenders" in terms of section 17 of the *DVA*, which section, amongst other things, makes it an offence to

wilfully make a false statement in an affidavit alleging that a respondent had breached the terms of a protection order.

By working together with the community, magistrates can be the key to prevent malicious applicants from using the *DVA* as a tool to abuse their victims further. In this way, some small part of the scourge that is domestic violence may be eradicated from our society.

ANNEXURE A



REPUBLIC OF SOUTH AFRICA

FORM 2

[Regulation 4]

APPLICATION FOR PROTECTION ORDER

SECTION 4(1) OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)

PART A : APPLICATION (To be completed by applicant)

1. PARTICULARS OF COMPLAINANT *(Victim of domestic violence)*

Surname :	
Full names :	
Id.No / Date of birth	
Home or temporary address :	
Home/contact telephone number :	
Work address :	
Work telephone number :	
Nature of domestic relationship with person who committed the act of domestic violence (Respondent):	
Occupation :	

2. PARTICULARS OF PERSON MAKING THE APPLICATION ON BEHALF OF THE COMPLAINANT *(if applicable)*

Surname :	
Full names :	
Id.No / Date of birth	
Home address :	
Home/contact telephone number :	

Department of Justice and Constitutional Development

Work address :	
Work telephone number :	
Occupation :	
Capacity in which application is made :	
Nature of relationship with the complainant :	
State reason(s) why application is made on behalf of the complainant:	
Indicate whether written consent of complainant has been obtained : (Delete whichever is not applicable)	Written consent "has been obtained and is attached/is not necessary since the complainant is- a minor (under the age of 21 years); mentally retarded; unconscious; unable to provide consent because

3. PARTICULARS OF PERSON WHO COMMITTED ACT OF DOMESTIC VIOLENCE
(hereafter called the Respondent) - in so far as such particulars are available

Surname :	
Full names :	
Id.No / Date of birth	
Home address :	

Home/contact telephone number :	
Work address :	
Work telephone number :	
Occupation :	

4. PERSONS AFFECTED BY DOMESTIC VIOLENCE

4.1 Particulars of children and adults sharing the residence :

<i>Name :</i>	<i>Age :</i>	<i>Relationship to complainant</i>

4.2 How are these persons affected ?

--

4.3 Do any of these persons suffer disabilities? If so give details :

--

5. INFORMATION REGARDING ACTS OF DOMESTIC VIOLENCE

Give full details regarding all incidents of domestic violence and also indicate whether firearms or other dangerous weapons were used, what injuries have been sustained and whether medical treatment was obtained :

6. INFORMATION REGARDING URGENCY OF APPLICATION

Submit the reasons why the Court has to consider the application as a matter of urgency and why undue hardship may be suffered if the application is not dealt with immediately

7. TERMS OF PROTECTION ORDER

It is requested that the Respondent must be ordered (Mark appropriate box and

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complete where necessary) :

(a)	Not to commit any act of domestic violence	
(b)	Not to get the help of another person to commit any act of domestic violence	
(c)	Not to enter the shared residence, situated at	
(d)	Not to enter a specified part of the shared residence, namely	
(e)	Not to enter the Complainant's residence, situated at	
(f)	Not to enter the Complainant's place of employment, namely	
(g)	Not to prevent the Complainant or any child who ordinarily live(s) or lived in the shared residence from entering or remaining in the shared residence or any part thereof, to wit	
(h)	Not to commit any other act, namely	

8.ADDITIONAL CONDITIONS

It is also requested that the Court must order that (mark appropriate box and complete where necessary) :

(a)	A peace officer, namely, ... is to accompany the Complainant to assist with arrangements regarding the collection of the Complainant's personal property set out in paragraph 9, below.	
(b)	A member of the South African Police Service is to seize the following arm(s) or dangerous weapon(s) in the possession of the Respondent:	
(c)	The Respondent is to pay the following rent or mortgage payments:	

(d)	The Respondent is to pay the following emergency monetary relief:	
(e)	The Respondent is refused any contact with the following child or children:	
(f)	The Respondent is granted the following contact with the above-mentioned child or children:	
(g)	The physical address of the Complainant's residence not be disclosed to the Respondent	
(i)	Other conditions requested :	

9. PERSONAL PROPERTY

<i>Property description:</i>	<i>Grounds on which property is considered to be personal property :</i>	<i>Address where property is kept:</i>

10. I am likely to report a breach of the Protection Order at the Police Station.

DEPONENT
(Person who applies for order)

DATE

PART B : CERTIFICATION (for official use)
--

11. I hereby certify that before administering the "oath / taking the affirmation I asked the Deponent the following questions and noted "her/his answers in "her/his presence as indicated below:-

- (a) Do you know and understand the contents of the above declaration?
 Answer _____.
- (b) Do you have any objection to taking the prescribed oath?
 Answer _____.
- (c) Do you consider the prescribed oath to be binding on your conscience?
 Answer _____.

I hereby certify that the Deponent has acknowledged that "she/he knows and understands the contents of this declaration which was "sworn to / affirmed before me, and the Deponent's "signature / thumb print / mark was placed thereon in my presence.

Dated at _____ this _____ day of _____ year _____.

 Justice of the Peace / Commissioner of Oaths

Full Names _____

Designation _____

Area for which appointed _____

Business Address _____

ANNEXURE B

JS23E



REPUBLIC OF SOUTH AFRICA

FORM 5

[Regulation 7]

NOTICE TO RESPONDENT TO SHOW CAUSE (SUBMIT REASONS)

WHY A PROTECTION ORDER SHOULD NOT BE ISSUED

SECTION 5(4) OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____	
HELD AT _____	APPLICATION NO. _____ / _____
In the matter between:	
APPLICANT: _____	
(*Id.No./Date of Birth: _____)	
AND	
RESPONDENT: _____	
(*Id.No./Date of Birth: _____)	

NOTICE TO RESPONDENT:

1. Particulars of Respondent:	
Home Address:	_____ _____ _____ (Tel.No. _____)
Work Address:	_____ _____ _____ (Tel.No. _____).
2. Particulars of Application	

On _____ (date), the Applicant applied for a protection order against you. The Court considered the application but has not issued an interim protection order but will on the undermentioned date decide whether or not to issue a protection order against you.

3. Protection Order	
3.1.	You are hereby called upon to give reasons why a protection order should not be issued against you by the above-mentioned Court on the _____ day of _____ at 08:30, on the basis of the application and supporting affidavits, if any, of which certified copies are attached hereto.

- 3.2 If you so wish, the matter can be heard on a earlier date after you have given at least 24 hours' written notice to the applicant and the Court.
- 3.3 The Court will issue a protection order against you if you do not appear in the court on the abovementioned date and time, and if the Court is satisfied that this notice was properly served on you and that you have committed an act of domestic violence.

CLERK OF THE COURT

DATE

ANNEXURE C

J551E



REPUBLIC OF SOUTH AFRICA

FORM 6

[Regulation 8(a)]

PROTECTION ORDER

SECTION 6 OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)

(This form must be completed if an Interim protection order was issued in terms of section 5(2))

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____

HELD AT _____ APPLICATION NO. _____ / _____

In the matter between:

APPLICANT: _____

(*Id.No./Date of Birth: _____)

AND

RESPONDENT: _____

(*Id.No./Date of Birth: _____)

Whereas the Applicant successfully applied for a protection order which was issued on the _____ day of _____, and after considering the facts of the matter;

The Court orders that the attached interim protection order be :

1.*Confirmed;

2.*Amended as follows: _____

_____ ; or

3.*Set Aside.

A copy of this order and interim protection order, as well as the warrant of arrest for the Respondent must be forwarded to the _____ Police Station.

Dated at _____ this _____ day of _____ year _____.

MAGISTRATE

DATE

*Delete whichever is not applicable

Department of Justice and Constitutional Development

ANNEXURE D

JS66E



REPUBLIC OF SOUTH AFRICA

FORM 7

[Regulation 8(b)]

PROTECTION ORDER

SECTION 6 OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)

(This form must be completed if an interim protection order was not issued).

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____	
HELD AT _____	APPLICATION NO. _____ / _____
In the matter between:	
APPLICANT: _____	
(*Id.No./Date of Birth: _____)	
AND	
RESPONDENT: _____	
(*Id.No./Date of Birth: _____)	

1. PARTICULARS OF RESPONDENT	
Home Address:	_____ _____ _____ (Tel.No. _____)
Work Address:	_____ _____ _____ (Tel.No. _____).
Occupation:	_____

2. PARTICULARS OF APPLICATION
Whereas the Applicant has applied for a Protection Order against the Respondent as per the affidavit(s) and record of oral evidence(if any) attached, and an interim protection order was not issued, and after consideration of the application the Court now makes the order hereunder.

3. ORDER BY COURT
3.1 The Court orders that :
3.1.1 *The application for a Protection Order is dismissed; or
3.1.2 *An Interim Protection Order is granted; and the Respondent is ordered-
3.1.2.1 *not to commit the following act(s) of domestic violence _____

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3.1.2.2 *not to enlist the help of another person to commit the acts of domestic violence specified in paragraph 3.1.3;

3.1.2.3 *not to enter the shared residence at _____

3.1.2.4 *not to enter the following parts of the shared residence _____

at _____

3.1.2.5 *not to enter the Complainant's residence at _____

3.1.2.6 *not to enter the Complainant's place of employment at _____

3.1.2.7 *not to prevent the Complainant or any child who ordinarily live(s) or lived in the shared residence at _____

from entering or remaining in the shared residence, or any part thereof;

3.1.2.8 *not to commit any of the following acts, to wit _____

3.1.2.9 *to make rent or mortgage payments in the sum of R _____ per month / annum;

3.1.2.10 *to pay the sum of R _____ to the Complainant as emergency monetary relief.

4. ADDITIONAL ORDERS

4.1 It is further ordered that :

4.1.1 *A peace officer, namely, _____ accompanies the Applicant to the following residence in order to assist with arrangements regarding the collection of personal property, i.e. _____

4.1.2 *A member of the South African Police Service at _____ seizes the following arm(s) or dangerous weapon(s) in the possession of the

3

Respondent, i.e. _____

 _____;

4.1.3 *The Complainant's physical address not be disclosed to the Respondent;

4.1.4 *The Respondent is ordered not to have any contact with the following child(ren) _____

 _____;

4.1.5 *The Respondent is allowed contact with the following child(ren) _____

 _____,
 on the following basis: _____

 _____;

4.1.6 *The Respondent _____

 _____;

4.2 A Warrant is authorised for the arrest of the Respondent, the execution of which is suspended subject to the Respondent's compliance with the provisions of the Protection Order as stated above.

4.3 A copy of this order and the warrant of arrest must be forwarded to the _____ Police Station, once this order has been served on the Respondent.

 MAGISTRATE

 DATE

 *Delete whichever is not applicable

ANNEXURE E

J649E



REPUBLIC OF SOUTH AFRICA

FORM 12

[Regulation 13]

APPLICATION FOR VARIATION OR SETTING ASIDE OF PROTECTION ORDER

SECTION 10(1) OF THE DOMESTIC VIOLENCE ACT, 1998 (ACT NO. 116 OF 1998)

(A copy of this Form must be forwarded to the other party)

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF _____

HELD AT _____ APPLICATION NO. _____ / _____

In the matter between:

APPLICANT: _____

(*Id.No./Date of Birth: _____)

AND

RESPONDENT: _____

(*Id.No./Date of Birth: _____)

PART A : AFFIDAVIT (To be completed by applicant)

1. PARTICULARS OF APPLICANT

Surname :	_____
Full names :	_____
Id.No / Date of birth :	_____
Home or temporary address :	_____
Home/contact telephone number :	_____
Work address :	_____
Work telephone number :	_____

*Delete whichever is not applicable

Department of Justice and Constitutional Development

2

2. PARTICULARS OF RESPONDENT

Surname :	
Full names :	
Id.No / Date of birth	
Home address :	
Home/contact telephone number :	
Work address :	
Work telephone number :	

3. PARTICULARS OF PROTECTION ORDER

A protection order was granted on :	
	(Date)
In the Magistrate's Court at :	
Against :	
	(Name of Respondent)

4. APPLICATION REGARDING PROTECTION ORDER

I wish to apply for:	*(a) The setting aside of the above-mentioned Protection Order
	*(b) The variation of the Protection Order as follows :

*Delete whichever is not applicable

3

The reasons for my request are as follows :	
---	---

 Signature of Deponent

 Date

PART B : CERTIFICATION (for official use)
--

I hereby certify that before administering the "oath / taking the affirmation I asked the Deponent the following questions and noted "her/his answers in "her/his presence as indicated below:-

(a) Do you know and understand the contents of the above declaration?

Answer _____.

(b) Do you have any objection to taking the prescribed oath?

Answer _____.

(c) Do you consider the prescribed oath to be binding on your conscience?

Answer _____.

I hereby certify that the Deponent has acknowledged that "she/he knows and understands the contents of this declaration which was "sworn to / affirmed before me, and the Deponent's "signature / thumb print / mark was placed thereon in my presence.

Dated at _____ this _____ day of _____ year _____.

 Justice of the Peace / Commissioner of Oaths

Full Names _____

Designation _____

Area for which appointed _____

Work Address _____

 *Delete whichever is not applicable

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Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and others CCT 12/13

Transvaal Agricultural Union v Minister of Land Affairs 1997 (2) SA 621 (CC)

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Internet Sources

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Forms and Precedents

Department of Justice *Form J480E – Application for Protection Order* [Downloaded from http://www.justice.gov.za/forms/dva/dva_form%2002.pdf 28 May 2013]

Department of Justice *Form J523E – Notice to respondent to Show Cause (Submit Reasons) Why a Protection Order Should Not Be Issued* [Downloaded from http://www.justice.gov.za/forms/dva/dva_form%2002.pdf 28 May 2013]

Department of Justice *Form J551E – Protection Order* [Downloaded from http://www.justice.gov.za/forms/dva/dva_form%2002.pdf 28 May 2013]

Department of Justice *Form J566E – Protection Order* [Downloaded from http://www.justice.gov.za/forms/dva/dva_form%2002.pdf 28 May 2013]

Department of Justice *Form J649E – Application for Variation or Setting Aside of Protection Order* [Downloaded from http://www.justice.gov.za/forms/dva/dva_form%2002.pdf 28 May 2013]