

# The systemic violation of section 26(1): An appeal for structural relief by the judiciary\*

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## **Abstract**

In 2014, a year supposedly marked to celebrate twenty years of democracy and the transformation of our housing regime from one being grossly discriminatory to a welfare-orientated legal system that functions under the auspices of the rights and values entrenched in the Constitution the poorest households in South Africa remain subject to not only intolerable housing conditions, but also unlawful state evictions. The housing jurisprudence has developed certain indicators of the state's constitutional obligations and these indicators constitute the courts' conception of its expectations of the state in complex housing disputes that generally concern homelessness/landlessness. However, recent state actions taken in contravention of section 26 indicate the systemic violation of the right to the extent that it is deprived of all meaning.

With the required cognisance of the courts' inherent competencies, concerns for separation of powers boundaries and an inclination to maintain a high level of deference in polycentric matters with economic and social consequences for the community, the courts are obliged to hold government accountable and vindicate the violation of fundamental rights. A form of reparation is therefore required that is able to address these violations in a systemic manner, without usurping the functions of the executive. Structural relief is apt in such instances, provided that it is structured in a specific manner to address immediate and long-term housing needs in a way consistent with other constitutional provisions and the underlying values of the Constitution. A once-off form of relief is inappropriate to counter the systemic violation of the right of access to adequate housing. On the other hand, a structural interdict is different to the extent that it can consist of different remedial phases over which the court retains jurisdiction to ensure that the state complies with its section 26(2) obligations. Throughout this process of supervision the court should encourage a dialogue between the different stakeholders and assist with predeterminations of the kinds of governmental actions that would be unreasonable, procedurally unfair and generally in contravention of the Constitution.

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## 1 Introduction

In 2014, a year supposedly marked to celebrate twenty years of democracy and the transformation of our housing regime from one being grossly discriminatory to a welfare-orientated legal system that functions under the auspices of the rights and values entrenched in the Constitution of the Republic of South Africa, 1996 ('Constitution') the poorest households in South Africa remain subject to not only intolerable housing conditions, but also unlawful state evictions. In numerous cases the facts confirm that the state continuously acts in contravention of the constitutional housing provision. It does so by conducting evictions in a procedurally unjust manner – ignoring section 26(3) of the Constitution and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act<sup>1</sup> ('PIE') – and without consideration for the plight of the poor with regard to their substantive right to housing post-eviction. Measures to assist the landless subsequent to eviction are generally absent, which creates immediate and long-term problems for private landowners and the state as landowner since evictees need living-space, after all. The housing jurisprudence has developed certain indicators of the state's obligations in terms of section 26(2), which provides insight regarding the content of section 26(1). Read together, these indicators constitute the courts' conception of its expectations of the state in complex housing disputes that generally concern homelessness/landlessness. However, the case law indicates that the state is often reluctant to adhere to the courts' expectations in relation to both its duties and the rights of the vulnerable. In consequence, I argue that recent state actions taken in contravention of section 26 indicate the systemic violation of the right (that is, a relentless infringement of the right, in all its incidents) to the extent that it is deprived of all meaning.

With the required cognisance of the courts' inherent competencies, concerns for separation of powers boundaries and an inclination to maintain a high level of deference in polycentric matters with economic and social consequences for the community, the courts are obliged to hold government accountable and vindicate the violation of fundamental rights. A form of reparation is therefore required that is able to address these violations in a systemic manner, without usurping the functions of the executive. I argue that structural relief is apt in such instances, provided that it is structured in a specific manner to address immediate and long-term housing needs in a way consistent with other constitutional provisions and the underlying values of the Constitution. A once-off form of relief is inappropriate to counter the systemic violation of the right of access to adequate housing. On the other hand, a structural interdict is different to the extent that it can consist of different remedial phases over which the court retains jurisdiction to ensure that

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<sup>1</sup>19 of 1998.

the state complies with its section 26(2) obligations. Throughout this process of supervision the court should encourage a dialogue between the different stakeholders and assist with predeterminations of the kinds of governmental actions that would be unreasonable, procedurally unfair and generally in contravention of the Constitution.

## 2 Governmental resistance to the jurisprudential contextualisation of section 26(2)

### 2.1 *Jurisprudential indicators of section 26(2) – setting a threshold*

Section 7(2) of the Constitution requires the state ‘to respect, protect, promote and fulfil the rights in the Bills of Rights’. The question whether socio-economic rights are justiciable is uncontested, although the judicial enforcement of these rights, and specifically the right to have access to adequate housing, is a difficult issue which the courts have struggled with since *Government of the Republic of South Africa v Grootboom*<sup>2</sup> (*Grootboom*). Section 26(2) of the Constitution places the duty to enact reasonable laws and other measures to achieve the progressive realisation of the right to have access to adequate housing squarely on the state.<sup>3</sup> The determination of the content of these laws and measures is a matter for the legislature and the executive. It therefore falls outside the jurisdiction of the courts. However, the courts have a specific duty to oversee that both the adopted legislation and other measures taken by the state are reasonable.<sup>4</sup> All state action in relation to housing must be assessed by the courts against the requirements listed in section 26 of the Constitution. This means that ‘[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing’<sup>5</sup> and central to this evaluation of reasonableness is the question whether all state actions take account of the inherent human dignity of those affected.<sup>6</sup> In

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<sup>2</sup>2001 1 SA 46 (CC) para 20.

<sup>3</sup>See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011 4 SA 337 (SCA) paras 26-40 for the legislative framework regulating the responsibilities of the different governmental spheres with regard to housing.

<sup>4</sup>*Grootboom* (n 2) para 41.

<sup>5</sup>*Id* para 82.

<sup>6</sup>*Id* para 83. ‘All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enable them to enjoy the other rights enshrined in Chapter 2’: para 23. Sachs argues that the courts have a duty to address situations of homelessness, because it goes ‘to the core of a person’s life and dignity’: Sachs ‘Social and economic rights: Can they be made justiciable?’ (2000) *SMU LR* 1381 at 1388.

*Grootboom*, the Constitutional Court held that municipalities are expected to first engage with unlawful occupiers and investigate their specific circumstances and needs before resorting to an eviction. In addition, evictions must be humanely executed in line with section 26 of the Constitution.<sup>7</sup> The facts indicated that the state failed on all counts and, in the end, Mrs Grootboom and her fellow occupiers accepted the state's offer for temporary alternative accommodation,<sup>8</sup> while the court made a declaratory order in terms of which the state was required to act to meet its section 26(2) obligations.<sup>9</sup> The court also ordered the state to devise and implement a reasonable programme and declared the housing programme in the area of the Cape Metropolitan Council unreasonable.<sup>10</sup> This order has been criticised on the basis that it fails to direct the state to take positive measures to give effect to the obligations stipulated in the order. Arguably, a mandatory order would be necessary to force the state to adhere to the declaratory order, which would require follow-up litigation.<sup>11</sup> A declaration of rights has been described as a toothless remedy since it merely clarifies the legal position without placing any concrete obligations on the state.<sup>12</sup> It is therefore not surprising that the

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<sup>7</sup> *Grootboom* (n 2) paras 87 and 88.

<sup>8</sup> *Id* para 91. Pillay refers to the endorsement of the settlement agreement as the interlocutory order. In terms hereof the state was obliged to provide the Grootboom community with temporary alternative accommodation. The state had to provide basic sanitation, water and temporary structures to house the community. In addition, the state had to report back to the Court regarding the implementation of this agreement: Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) *LDD* 255 at 262. Liebenberg mentions that this order was very specific regarding the exact services that the state had to deliver. Shelters had to be adequately waterproofed and a specific number of toilets and taps had to be provided by the state. The shortcoming of this order was that it failed to make provision for the community's medium to long term needs, which had a direct impact on the community's tenure security: Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 400-401.

<sup>9</sup> *Grootboom* (n 2) para 96. The Court indicated that the state has an obligation to 'devise, fund, implement and supervise measures to provide relief to those in desperate need'. Section 8(1)(d) of PAJA makes provision for declarations of rights, while s 172(1)(a) of the Constitution also places an obligation on the courts to declare law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. This provision is imperative and does not leave the court with any discretion: *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape* 2011 3 SA 538 (SCA) para 25.

<sup>10</sup> *Grootboom* (n 2) para 99. The Court therefore stated the legal position as in contravention with the spirit, purport and objects of the Constitution and placed a general duty on the state to bring its laws and measures in line with the Constitution – the chosen method and content of this administrative process fell outside the judicial proceedings.

<sup>11</sup> Pillay (n 8) 264.

<sup>12</sup> Hoexter *Administrative law in South Africa* (2012) 558. This does not mean that the remedy is entirely useless since it allows the court to make a statement of the law without dictating to other decision-makers how they should make their decisions: *Rail Commuters' Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 108. Roach argues that a declaration of rights can promote some dialogue between the state and the courts, provided that the state acts in good faith and complies with these declarations: Roach *Constitutional remedies in Canada* (1994) 12-15. If

declaratory relief granted in *Grootboom* served as an example of governmental non-compliance.<sup>13</sup>

Shortly after this judgment the Supreme Court of Appeal decided *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*<sup>14</sup> (*Modderklip*) where a private landowner had obtained an eviction order against thousands of unlawful occupiers, which was essentially unenforceable due to either the state's inability or its sheer unwillingness to enforce the order.<sup>15</sup> The section 25 right of the landowner not to be deprived of property in an arbitrary manner and the occupiers' section 26 right of access to adequate housing were identified and held to have been infringed by the state's initial failure to engage with the occupiers and ensure that alternative land was made available to them.<sup>16</sup> The Court decided that the only appropriate relief in this case would be that of constitutional damages, based on the fact that *Modderklip's* rights were infringed and the land could not be returned.<sup>17</sup> In addition, the occupiers could remain on the land until alternative land was made available by the state. The advantage of this order was that the Court bypassed the eviction and allocation of alternative land issue, which solved the immediate access to land problem. Nevertheless, the medium and long term problems were simply overlooked on the basis that the state could deal with it at a later stage when it can afford it.<sup>18</sup> The Court also made remarks regarding the estimated length of the occupation as 'indefinite since informal settlements tend

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the conduct of a specific municipality or department is persistently at odds with the Constitution, a declaration of rights is insufficient: *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA) para 29. In *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2004] All SA 169 (SCA) (*Modderklip*) para 39 the Court held that the High Court's declaratory order was formulated too broadly and that a mere declaration of what the Constitution states serves no purpose.

<sup>13</sup>Hoexter (n 12) 559.

<sup>14</sup>(N 12).

<sup>15</sup>*Modderklip* (n 12) paras 7 and 9. A deposit of R1.8 m was required to cover the costs of a firm which the sheriff intended to engage to assist with the execution of the eviction order. This amount was higher than the value of the land unlawfully occupied: para 4.

<sup>16</sup>*Id* paras 35 and 52. Van der Walt mentions that the Court construed failure to protect and give effect to the occupiers' s 26 right as a direct consequence for failure to protect *Modderklip's* s 25 right: Van der Walt 'The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) *SAJHR* 144 at 159.

<sup>17</sup>*Modderklip* (n 12) para 43. The basis for the payment of compensation was phrased differently in the Constitutional Court, namely that the state's failure to act justified the payment of compensation: *Modderklip* para 48. Van der Walt mentions that the Constitutional Court focused on the s 34 right of access to the courts (with sufficient enforcement procedures) rather than the infringement of ss 25 and 26 as justification for the payment of compensation: Van der Walt (n 16) 156.

<sup>18</sup>*Modderklip* (n 12) para 43.

to become permanent'.<sup>19</sup> Furthermore, the Court described the state of affairs as 'probably a case of a continuing wrong'.<sup>20</sup>

Despite the fact that it was basically impossible, if not futile, for the Court to grant an eviction order, it sanctioned the continued unlawful occupation of land and, most likely, also an arbitrary deprivation of property.<sup>21</sup> In *Port Elizabeth Municipality v Various Occupiers*,<sup>22</sup> (*PE Municipality*) the Constitutional Court made a similar finding to the extent that a number of unlawful occupiers could remain on private land.<sup>23</sup> In the end, the Court remarked regarding the way forward that the decision should not preclude 'further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned'.<sup>24</sup> Different from *Modderklip*, the Court refrained to place any duty, directly or indirectly, on the state regarding the provision of alternative accommodation in due course. The state's constitutional obligation to provide access to adequate housing in the manner described in *Grootboom*, namely that it entails available land, appropriate services (such as water and the removal of sewage) and 'a dwelling',<sup>25</sup> was overlooked in both cases, since the courts refrained from placing any positive duty on the state to provide services or devise legally secure tenure to the occupiers. It therefore seems that the courts adopted a highly deferential approach in both cases, which resulted in arbitrary deprivations of property, situations that are inherently unlawful and an outright failure on the courts' side to vindicate the fundamental right to have access to adequate housing as it was envisioned in *Grootboom*. The reluctance to give content to section 26(2) therefore had a direct impact on the housing rights of the marginalised to such an extent that they had to continue occupying land as unlawful occupiers with no legal tenure and without basic services.

Subsequent case law addressed some of the issues raised in *Grootboom*, *PE Municipality* and *Modderklip*. The concern regarding the state's duty to first engage with unlawful occupiers was dealt with in *Occupiers of 51 Olivia Road*,

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<sup>19</sup>*Id* para 44.

<sup>20</sup>*Ibid*.

<sup>21</sup>Strydom and Maass 'Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved' (2014) *PER* 1207 at 1234.

<sup>22</sup>2005 1 SA 217 (CC).

<sup>23</sup>The decision against an eviction was based on the following factors: a) the lengthy period of the unlawful occupation; b) the absence of any plans to put the land to some productive use; c) the municipality's failure to interact with the occupiers; and d) the small number of occupiers who seemed to be sincerely homeless and in need: *PE Municipality* (n 22) para 59.

<sup>24</sup>*Id* para 61. It was unsatisfactory to the landowner, who simply had to tolerate squatters on his land for an indefinite period of time, and of course to the unlawful occupiers since the Court made no order regarding the nature of their tenure nor the state's duty to provide services, whereas the state was not held accountable for failing to give effect to s 26.

<sup>25</sup>*Grootboom* (n 2) para 35.

*Berea Township and 197 Main Street Johannesburg v City of Johannesburg*<sup>26</sup> (*Olivia Road*) where the Constitutional Court made an interim order aimed at ensuring that the municipality and unlawful occupiers of dilapidated inner-city buildings first engage with each other in a meaningful manner before eviction proceedings commence.<sup>27</sup> The Court justified the interim order on the basis that the city failed to engage with the occupiers before it instituted eviction proceedings, despite the fact that the city was aware that the eviction order would likely render the occupiers homeless. This duty to first engage meaningfully was phrased as a positive duty the state had to satisfy before it could proceed with an application for eviction.<sup>28</sup> The parties' post-engagement agreement made provision for measures to ensure that the buildings would be rendered safer and more habitable in the interim,<sup>29</sup> while the city had to provide temporary alternative accommodation, pending the provision of permanent housing to the evictees.<sup>30</sup> This agreement was endorsed by the Court since it represented a reasonable response to the engagement process.<sup>31</sup>

Another issue that surfaced in the initial eviction cases is that of continued unlawful occupation of private land, which has to a large extent been addressed in a number of subsequent Supreme Court of Appeal and Constitutional Court cases where a notion has developed that suspended eviction orders should be granted to allow the state to provide vulnerable occupiers with suitable alternative

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<sup>26</sup>2008 3 SA 208 (CC).

<sup>27</sup>*Id* para 5. The Court required the City and occupiers to 'engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned': para 5. The idea of meaningful engagement was initiated in *PE Municipality* paras 39-43.

<sup>28</sup>*Olivia Road* (n 26) para 13. A municipality that evicts persons from their homes without first meaningfully engaging with them acts in contravention with the spirit and purpose of ss 10, 11 and 152 of the Constitution: para 16. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) the Constitutional Court already retreated from this principle. See specifically Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement"' (2012) *African HRLJ* 1 at 21-26; McLean 'Meaningful engagement: On step forward or two back? Some thoughts on Joe Slovo' (2010) *CCR* 223 at 237.

<sup>29</sup>*Olivia Road* (n 26) para 25.

<sup>30</sup>*Id* para 26. The Court also decided that the nature and extent of the engagement must depend on the context: para 19.

<sup>31</sup>*Id* para 28. The Court decided that it was neither necessary for it to consider the question of permanent housing for the occupiers, nor appropriate to consider the plight of other poor persons and the state's housing plan in relation to them: paras 34 and 35. McLean (n 28) 239 criticises the Court's approach on the basis that it avoids the primary dispute before it and therefore shows an unwillingness to decide the issue at all.

accommodation if the eviction would likely render the occupiers homeless.<sup>32</sup> This development was held to be justifiable since it would generally not be just and equitable, and therefore in contravention of sections 4(6) and 4(7) of PIE, to grant an eviction order where the effect would be to render the occupiers homeless.<sup>33</sup> In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,<sup>34</sup> the Constitutional Court decided that regardless of whom the evictor is, once the possibility of homelessness exists as a result of an eviction order, the scenario can be categorised as an emergency and the state should provide emergency accommodation.<sup>35</sup>

Even though the state was obliged to provide the evictees in *Blue Moonlight* with alternative accommodation, the City of Johannesburg was still reluctant to engage with the affected households and their lawyers to provide information regarding the allocated housing. Days before the set date for eviction the residents approached the South Gauteng High Court (now referred to as the Gauteng Division of the High Court of South Africa), which temporarily suspended the eviction order and ordered the City to both provide accommodation to the evictees and report back to the court regarding the progress made.<sup>36</sup> Follow-up litigation

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<sup>32</sup>In *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W), the court held for the first time that the interests of the occupiers, the private landowner and the state would be protected if the state was joined, because the state has a duty to provide the evicted occupiers with adequate housing (para 18).

<sup>33</sup>*The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) paras 14, 16 and 18.

<sup>34</sup>2012 2 SA 104 (CC).

<sup>35</sup>*Id* para 92. See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 46 for a contradictory statement by the Supreme Court of Appeal. The Court in *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) emphasised that the need to housing can be defined as an emergency if the occupiers would be rendered homeless in consequence of the eviction order (para 15). The s 26 obligations of the government are, however, not linked with the initial question whether the eviction order would be just and equitable. The needs of the occupiers, and specifically the availability of alternative accommodation, can have an influence on the date of the eviction order, but will weigh very little when considering whether the eviction order should be granted or not. The Court decided that the eviction should be carried out without delay and that the City should provide temporary alternative accommodation to the evictees on the sheriff's schedule (paras 14, 18 and 56-58).

<sup>36</sup>See specifically the joint CALS and SERI press release (9 March 2012) 'City of Johannesburg set to breach Constitutional Court Order – Residents go back to Constitutional Court to compel City to identify alternative accommodation and engage meaningfully': [http://www.seri-sa.org/images/stories/saratoga\\_pressrelease\\_final.pdf](http://www.seri-sa.org/images/stories/saratoga_pressrelease_final.pdf) (accessed 2014-08-25) and the unreported order of *Occupiers of Saratoga Avenue v City of Johannesburg*, South Gauteng High Court case no: 2012/13253 (13 April 2012). See Dugard 'Beyond Blue Moonlight: The implications of judicial avoidance in relation to the provision of alternative accommodation' (2014) *CCR* (forthcoming (manuscript with author)) for the problems with the accommodation arrangements. Dugard also mentions that refusal by the Constitutional Court to oversee the implementation of its order can be critiqued as part of the Court's well-known unwillingness to supervise compliance with its orders



was, once again, necessary to challenge the City's implementation of the Constitutional Court since the accommodation offered by the state was unacceptable.<sup>37</sup> Three related cases, namely *Tikwelo House*,<sup>38</sup> *Chung Hua Mansions*<sup>39</sup> and *Hlophe*<sup>40</sup> show the City's response to its obligation in the *Blue Moonlight* judgment by 'stalling, obfuscating, trying to offer the same accommodation to various different sets of litigants and, ultimately, doing all in its power to fail to implement subsequent and/or related orders for alternative accommodation'.<sup>41</sup>

The post-1994 housing jurisprudence has steered our understanding of the right to have access to adequate housing along the lines of certain indicators – guidelines of what is expected of the state when facing matters of homelessness/landlessness. The first indicator was developed in *Grootboom* and requires the mentality of the state to be reasonable – every step at every level of government

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<sup>37</sup>Unreported judgment of *Dladla v City of Johannesburg and MES*, South Gauteng High Court case no: 39502/2012.

<sup>38</sup>*City of Johannesburg v Changing Tides 74 (Pty) Ltd, Unlawful Occupiers of Tikwelo House, No 48 and 50 Davies Street, Doornfontein, Johannesburg 2012 (6) SA 294 (SCA)*.

<sup>39</sup>Unreported judgment of *Changing Tides 74 (Pty) Ltd. And The Unlawful Occupiers of Chung Hua Mansions*, South Gauteng High Court case number: 2011/20127 (14 June 2012).

<sup>40</sup>Unreported judgment of *Philani Hlophe v City of Johannesburg Metropolitan Municipality*, South Gauteng High Court case no: 2012/48103 (consolidated with case no: 2011/20127 [*Chung Hua Mansions*]) (6 February 2013).

<sup>41</sup>Dugard (n 36). In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* (n 35) the City was ordered to provide evictees with emergency accommodation, but the Legal Resources Centre (LRC) detected that the identified buildings for this purpose were already allocated for other evictees, which forced the LRC to, once again, approach the South Gauteng High Court with an urgent application to either stall the eviction or force the state to provide temporary emergency accommodation. Dugard (n 36) mentions that many of these occupiers moved to other slum buildings. The matter in *Mthimkulu and The Occupiers of Chung Hua Mansions 191 Jeppe Street and Hoosein Mahomed* 2011 6 SA 147 (GSJ) concerned the unlawful eviction of residents from private land by the private landowner, a security company and police. These actors were held in contempt of court for their unlawful actions, while the court also reversed the illegal eviction. In follow-up litigation the court ordered the City to provide alternative accommodation to the residents with some security against future eviction and a report stipulating the nature and location of the accommodation. Similar to prior failures by the state, this order was not complied with and the reason given by the state was that it did not have the required resources to comply with the order: Dugard (n 36). Follow-up litigation was again necessary to hold government accountable. In *Philani Hlophe and The Residents of Chung Hua Mansions 191 Jeppe Street, Johannesburg v City of Johannesburg Metropolitan Municipality* case no: 48102/2012 (3 May 2013) the South Gauteng High Court directed the question why the City has failed to comply with the *Blue Moonlight* order over the course of 18 months to the Executive Mayor, City Manager and Director of Housing for the City of Johannesburg. The court made it clear that the City had an obligation towards evictees and that it had to provide the court with a report setting out its more general housing plans in relation to poor evictees. For the first time the City agreed to engage with the residents in a meaningful manner and provide alternative accommodation that seemed adequate, although the engagement process raised problems with the suitability of the offered accommodation: Dugard (n 36).

(or in any sphere of government) must take account of the inherent dignity of those affected in order for state actors to act reasonably. A second indicator is that the state must first engage with marginalised unlawful occupiers before eviction proceedings are instituted.<sup>42</sup> The Constitutional Court has held that this is an important pre-eviction requirement which the state must adhere to.<sup>43</sup> This requirement is inherently democratising since it ensures openness, transparency, due process, public participation and compassion for the plight of the poor as it aims to inform government officials of households' basic needs and concerns.<sup>44</sup> The third indicator is that the possibility of rendering evictees homeless post-eviction should be avoided altogether through the provision of alternative accommodation by the state, while suspended eviction orders are justifiable to give effect to this principle. Read together, these indicators have a great deal to say about the role that the state should adopt in all eviction matters that concern the marginalised. It does not necessarily speak to the state's formal policies and measures, adopted in terms of section 26(2), that are carefully formulated to give effect to sections 26(1), but rather to the state's more general approach towards the homeless/landless in specific instances. The three indicators can therefore be interpreted to set a threshold for state actions when dealing with vulnerable evictees and their section 26(1) rights. Moreover, the indicators represent the courts' general expectations of the state in giving content to section 26(2) in specific instances, although it also has an indirect impact on the meaning of section 26(1).

## 2.2 *A systemic breach of the right to housing*

Despite these clear indicators of what is expected of a democratically elected state that should make its housing related decisions with a vision to transform our society, and the everyday lives of those who live in poverty, in line with the spirit, purport and objects of the Constitution, cases such as *Zulu v eThekweni Municipality*<sup>45</sup> reveal that the state approach the courts for orders to the effect that marginalised occupiers should be evicted without even adhering to the procedural

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<sup>42</sup>*Olivia Road* (n 26) para 13. Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road v City of Johannesburg*' (2009) *CCR* 371 at 380 argues that the duty to first engage is now part of the reasonableness concept as it was established in *Grootboom*. Failure to first engage with the occupiers will therefore suggest that the state acted unreasonably.

<sup>43</sup>Chenwi (n 42) 379 mentions that the Court developed meaningful engagement as a remedy and located the duty to engage within the City's obligation to provide services in a sustainable manner and promote participatory democracy.

<sup>44</sup>See specifically Liebenberg (n 28) 14 and 18; Chenwi (n 42) 381; and Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) *SAJHR* 107 at 109.

<sup>45</sup>[2014] ZACC 17.

safeguards in PIE or section 26(3).<sup>46</sup> Similar to *Zulu, Fischer v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re: Ramahlele v Fischer*<sup>47</sup> concerned the demolition and removal of structures erected on private land. Prior to the demolition of the structures, the state adopted a number of measures to determine whether both the structures were permanently erected and the invaders took occupation. This process was described by the court as haphazard in the sense that the selection of structures to be demolished was identified in an arbitrary manner.<sup>48</sup> The state's conduct came under review in the High Court where the issue before Gamble J was whether the affected persons had taken occupation of the structures.<sup>49</sup> If so, the state's conduct would clearly have been illegal since PIE regulates the eviction of unlawful occupiers and therefore had to find application in this case. This is also what the court decided. In light of the finding that the structures were complete and the evictees were occupiers, the court held that PIE was applicable.<sup>50</sup>

The evictions conducted in both *Zulu* and *Fischer* are reminiscent of the old apartheid-style evictions – a clear manifestation of the state's naivety, if not its blatant unwillingness to come to grips with its constitutional duty to provide, at the very least, a secure space where marginalised evictees can live.<sup>51</sup> Even if the

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<sup>46</sup>See *Zulu v eThekweni Municipality* (n 45) para 11 for the interim order and para 25 in which the Constitutional Court held that the interim order amounted to the eviction of the unlawful occupiers. In terms of the interim order the state was authorised to take all reasonable steps to prevent persons from both invading and occupying the municipal land. In addition, the state could demolish structures erected on the land. In *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC) the state also tried to circumvent s 26(3) and PIE by relying on the Disaster Management Act 57 of 2002 to effectively evict unlawful occupiers and demolish their structures. The state argued that removal of the occupiers was an administrative act and did therefore not require an order of court: para 21. Even though the informal settlement was declared a disaster area due to the development of sinkholes in the area, the history of the matter indicated that the relocation of the occupiers was at no point in time urgent to authorise their removal and demolition of their structures: para 41. See also Muller 'Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa' (2015) SALJ (forthcoming (manuscript with author)).

<sup>47</sup>2014 3 SA 291 (WCC).

<sup>48</sup>*Id* para 77.

<sup>49</sup>*Id* para 74.

<sup>50</sup>*Fischer v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re: Ramahlele v Fischer* (n 47) para 82.

<sup>51</sup>See specifically *Modderklip* (n 12) para 22. See also *Pheko v Ekurhuleni Metropolitan Municipality* (n 46). Even though the state in *Fischer* adopted some measures to determine whether the shacks were permanently erected and in fact occupied, the actual evictions (forcing vulnerable households from private land and demolishing the structures that they erected) were not in line with the approach as developed by previous court decisions. It was inconsistent with the content given to section 26(2) by the judiciary. The state decided in an arbitrary manner whether dwellings were

evictions were executed in line with PIE, the obligation for the state does not end there. Persons who invade private or state land with the view to erect shacks are clearly in desperate need and the state has a constitutional obligation to address this need. To simply demolish the structures and evict the invaders, either in contravention of or in line with PIE, with no post-eviction allocation of suitable state land for those urgently in need of a space to live is at odds with section 26(1) and (2) of the Constitution. The state's decisions in both cases to demolish the structures and evict the occupiers are a) unreasonable since it fails to take cognisance of the households' inherent dignity; b) procedurally at odds with the duty to first meaningfully engage with the occupiers; and c) without consideration of its effect in rendering marginalised groups landless.

The affected households in *Zulu* and *Fischer* have a right of access to housing under section 26(1). The absolute minimum extent of the right in these cases is similar to that in *Modderklip*, namely 'it is limited to the most basic, a small plot on which to erect a shack or the provision of an interim transit camp'.<sup>52</sup> However, the state should aspire to rather provide the type of housing as it was articulated in *Grootboom*, namely available land, appropriate services (such as water and the removal of sewage) and 'a dwelling'.<sup>53</sup> Regardless of both the jurisprudential indicators of the state's housing obligations and the minimalistic content given to section 26(1), *Zulu*, *Fischer* and *Pheko* show that the state is reluctant to adhere to the most basic requirements envisioned in section 26(1) and (2), because it often deprives the marginalised of their homes without allocating post-eviction spaces to live.<sup>54</sup>

A frightening reality is that the state is constitutionally obliged to give effect to section 26(1), but it is in fact the state who is the transgressor when it comes to the gradual mitigation of the content of the section 26 right. It seems that the state often seeks ways to strip sections 26(1) and (2) of meaning, while also attempting to circumvent section 26(3).<sup>55</sup> Arguably, the time is ripe to approach housing matters from the standpoint that there is a systemic violation of sections 26(1) and (2), but plausibly section 26(3) as well. This violation is based on a universal failure by the state to comply with the guidelines developed by the

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occupied or not after which it simply evicted the trespassers and demolished the structures. An approach of this kind is at odds with the spirit, purport and objects of the Constitution, especially in light of the fact that the state was ignorant of its duty to assist the evictees/trespassers in at least finding a space to live.

<sup>52</sup>*Modderklip* (n 12) para 22.

<sup>53</sup>*Grootboom* (n 2) para 35.

<sup>54</sup>This is also evident from the *Blue Moonlight* saga.

<sup>55</sup>*Zulu v eThekweni Municipality* (n 45) and *Fischer v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re: Ramahlele v Fischer* (n 47); *Pheko v Ekurhuleni Metropolitan Municipality* (n 46).

judiciary and consequently protect the marginalised from homelessness, landlessness and the right to live with dignity. The systemised undermining of this fundamental right by the state is a matter that the judiciary should react to by holding government accountable by means of effective remedies. In *Fose v Minister of Safety and Security*<sup>56</sup> Ackermann J held that ‘when the legal process does establish that an infringement of an entrenched right has occurred, it [must] be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal’.<sup>57</sup>

### 3 A matter of deference?

Decisions taken by organs of state that relate to section 26(1) and (2) of the Constitution are often of an administrative nature since it impacts households’ rights and expectations negatively.<sup>58</sup> These decisions therefore fall under the ambit of administrative law principles, which must be adhered to. More specifically, if the state decides to evict a person (or group of persons) from either private or public land, that decision would undoubtedly be of an administrative nature (in terms of section 1 of PAJA), because the decision would prejudice those affected and have a direct external legal effect on the evictees’ rights. In addition, once evictions have been carried out and the evictees are rendered homeless/landless, the section 26(2) obligation of the state kicks in and any failure by the state to take action and make either alternative housing or vacant land for resettlement purposes available would also amount to an administrative action.<sup>59</sup> One of the issues which results from most of the eviction cases relates to the steps that government will take, and ought to take, subsequent to the eviction and the extent to which the courts can and should oversee the medium and long term actions of the state.<sup>60</sup> It therefore concerns the judicial review of administrative actions in relation to housing.

The permissible extent of the courts’ control over the administration is indeterminate since this judicial power operates on a scale somewhere between the empowerment of state officials to carry out their state duties and the limitation of those powers in order to protect rights.<sup>61</sup> The placement of the courts’ power

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<sup>56</sup>1997 3 SA 786 (CC).

<sup>57</sup>*Id* para 69.

<sup>58</sup>See s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the definition of administrative action.

<sup>59</sup>The state’s failure to act also qualifies as an administrative action in terms of s 1 of PAJA.

<sup>60</sup>*Modderklip, PE Municipality* and *Blue Moonlight* clearly show that failure by the court to oversee the state’s medium and long term objectives will likely result in non-compliance with ss 26(1) and (2) of the Constitution.

<sup>61</sup>Hoexter (n 12) 137-138.

on this continuum depends on a number of factors, including the particular attitude and willingness of the justice to interfere with decisions made by the administration, which is often politically driven.<sup>62</sup> In the constitutional dispensation it is clear that the courts do generally have the jurisdiction to oversee state actions, 'all exercise of public power is to some extent justiciable under our Constitution'.<sup>63</sup> The implication of this duty means that the courts must find some balance between its obligation to review administrative decisions, founded on the supremacy of the Constitution, and an intrinsic inclination to show some constraint in certain cases.<sup>64</sup>

The extent to which the courts must intervene remains unclear, which has raised the concept of judicial deference or respect.<sup>65</sup> Hoexter describes the ideal level of deference as follows: 'a judicial willingness to appreciate the constitutionally-ordained province of administrative agencies; to acknowledge the expertise of those agencies in policy-laden or polycentric issues; to give their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they have to operate'.<sup>66</sup> Even though a high level of deference or respect might be required in certain cases due to the multiple social and economic consequences for the community,<sup>67</sup> the polycentric nature<sup>68</sup> or technicality<sup>69</sup> of the

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<sup>62</sup>*Id* 137-138.

<sup>63</sup>*Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) para 244. In *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) Froneman J held the following with regard to the courts' duty in giving content to the values and principles contained in the Constitution: '[J]udges will invariably "create" law. For those steeped in the tradition of parliamentary sovereignty, the notion of judges creating law, and not merely interpreting and applying the law, is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit judges from doing what they are called upon to do in terms of the Constitution' (paras 597-598).

<sup>64</sup>*Matiso v Commanding Officer, Port Elizabeth Prison* (n 64) paras 597-598.

<sup>65</sup>Hoexter (n 12) 138-139. Hoexter explains this concept as 'the doctrine that courts should in appropriate cases consciously exercise restraint in their interference with administrative decisions'. From a theoretical perspective, Hoexter discusses a number of theories regarding the appropriate extent of judicial review. An interesting movement in the United States is the New Public Law (NPL) movement, which challenges high levels of deference. This movement rests on three principles, namely (a) law is normative, which means that it should shape society and the legitimacy of government rests on these values; (b) law is transformative, which means that the law must change conditions that generate injustice; and (c) the relationship between law and the community is important for reconciliation purposes. With regard to specifically the latter principle, the courts must offer a space where reconciliation can take place and where differences can be resolved. It is therefore not the role of the judges to simply enforce rules in a coercive manner (134).

<sup>66</sup>Hoexter 'The future of judicial review in South African administrative law' (2000) *SALJ* 484 at 507.

<sup>67</sup>*Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) (*TAC*) para 38.

<sup>68</sup>The institutional competence of the judiciary to decide polycentric issues is debatable, because these matters can either not be isolated from broader issues that are not necessarily placed before the court in a specific case or will have multiple repercussions: Hoexter (n 12) 148-150. Pieterse

decision, the courts are still obliged to evaluate state decisions that concern the infringement of fundamental rights, regardless of the nature of the administrative decision.<sup>70</sup>

Currently, the judiciary has a crucial role with regard to the transformation of our society in the sense that it should force the executive and legislature to 'respect, protect, promote and fulfil' the rights in the Bill of Rights.<sup>71</sup> Hoexter adds that in response to a public administration that often seems reluctant to respond to the plight of the poor and even in some instances acts 'unthinkably cruel' towards its people, the judiciary can set a threshold standard for decent government behaviour.<sup>72</sup> Judges must be actively involved in the realisation of specifically socio-economic rights and refrain from falling into the trap of judicial avoidance on the basis of separation of powers concerns.<sup>73</sup> Nevertheless, in the socio-economic rights framework the Constitutional Court has made it clear that it will refrain from adjudicating issues where its orders will have multiple social and economic consequences for the community.<sup>74</sup> Instead, the courts should require the state to take appropriate measures to give effect to constitutional rights, while the courts should merely evaluate the reasonableness of the measures taken.<sup>75</sup> However, the mere fact that a matter before the court concerns economic or political considerations does not mean that the court should not be able to decide the lawfulness of the state action – the courts should still be able to determine

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'Coming to terms with the judicial enforcement of socio-economic rights' (2004) *SAJHR* 383 at 395 argues against the idea that courts should generally not decide polycentric issues on the basis that (a) the majority of disputes are to some extent polycentric and (b) the other branches of government are not necessarily better suited to decide these matters.

<sup>69</sup>The idea of deference was acknowledged in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 48, although O'Regan J preferred the term 'respect' and described it as respect by the courts to give proper weight to decisions made by the administration, especially when a great deal of expertise or experience is required to make the specific decision. Nevertheless, this does not mean that the courts should simply endorse unreasonable decisions.

<sup>70</sup>*MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 81. See also Davis 'To defer and when? Administrative law and constitutional democracy' (2006) *Acta Juridica* 23 at 40-41 in which the author calls for a development along the lines of an inquiry regarding the role of the courts in a constitutional democracy.

<sup>71</sup>See specifically s 7(2) of the Constitution. See also Liebenberg (n 28) 2.

<sup>72</sup>Hoexter (n 12) 147-148, referring to *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) para 17.

<sup>73</sup>Hoexter (n 12) 148. The separation of powers doctrine is useful for a number of reasons, amongst others that it inherently distinguishes between different competencies of the decision-makers. Nevertheless, the competencies of decision-makers should not exclude judicial oversight in an outright manner – it should rather be a consideration.

<sup>74</sup>*TAC* (n 68) para 38.

<sup>75</sup>*Id* para 38. The idea that the courts should consider the reasonableness of state actions was developed in *Grootboom* (n 2).

whether state power has been exercised in line with both the rights in the Bill of Rights and the underlying values of our constitutional democracy.<sup>76</sup> Pieterse argues that the judiciary has recently taken the role of primary protector of individuals' fundamental rights.<sup>77</sup>

The question is how the courts will protect fundamental rights and hold government accountable for its failure to vindicate fundamental rights without seizing the functions of the administrator. The nature of judicial review is inherently limited as a 'backward-looking safeguard'.<sup>78</sup> This means that the courts can only decide matters that are raised by the litigants and judges should not decide substantive issues, namely the *essentialia* of an administrative dispute since the court is unable to provide substantive relief in such instances.<sup>79</sup> Even though the function of judges is to provide effective relief for specific individuals in specific cases (and therefore not encroach on the role of the executive in making policy) and craft these remedies within the boundaries of the law,<sup>80</sup> judges have a discretion regarding the selection of remedies to the extent that the selected remedy *must* vindicate an infringed fundamental right.<sup>81</sup>

The nature of the right to have access to adequate housing renders it difficult to adjudicate since it is a polycentric issue with multiple economic and social repercussions for the community. It is undesirable for the courts to dictate to the state exactly how this right should be given effect to in any given instance, because the adequate realisation of the right would require a multitude of state actions at different governmental levels.<sup>82</sup> The courts simply do not have the insight or the required knowledge to make informed suggestions regarding the detail of precisely what steps the state should take. Nevertheless, this does not mean that the courts should have no input since they have to ensure that the state fulfils its constitutional obligations. This means that the state must provide the homeless, at the very least, with a secure space where they can live and the

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<sup>76</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 313.

<sup>77</sup> Pieterse (n 69) 388. This development is indeed apt since the judiciary is competent to give effect to socio-economic rights on the basis that the courts can provide individualised remedies speedily. Pieterse argues that there is little that the courts cannot decide in the socio-economic rights framework, provided that it is given sufficient information: 395.

<sup>78</sup> Hoexter (n 12) 167-168.

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

<sup>80</sup> Section 8 of PAJA lists a number of specific remedies and gives the court or a tribunal the power to grant any order that is just and equitable. The remedies listed are therefore not exhaustive.

<sup>81</sup> Hoexter (n 12) 168-169; *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* [2003] 1 All SA 465 (T) para 48. One should also note that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after internal remedies have been exhausted. There exists a strict duty to first exhaust internal remedies before an affected individual can proceed to judicial review (ss 7(1) and (2) of PAJA).

<sup>82</sup> See for instance *Ekurhuleni Municipality v Dada NO* 2009 4 SA 463 para 9.



state must aim to provide services and some degree of tenure security.<sup>83</sup> Evictees from private or state land who are rendered landless (or homeless) are entitled, as a bare minimum, to this form of housing. In some instances a suspended eviction order might be required to allow the state to make this form of housing available and the approach of the courts should be to facilitate and accommodate the state throughout this process.<sup>84</sup> However, a strict supervisory role on the court's side is required to have oversight in relation to the actual realisation of the section 26 right. Ideally, the courts should oversee the state's medium and long term plans since housing is a fundamental right.<sup>85</sup> The preferred remedy in the majority of large-scale eviction cases should therefore be a structural interdict.<sup>86</sup>

## 4 The structural reform of sections 26(1) and (2)

### 4.1 *Structural interdicts – its nature and transformative purpose*

A structural interdict is a mandatory remedy, which enables a court to retain jurisdiction over a specific case with the aim to effectively supervise state actions and ensure compliance with the court's order.<sup>87</sup> The court is actively involved in the implementation of the order and may require the parties to report back to the court. It is a recent development, in conformity with the transformative vision of the Constitution.<sup>88</sup> The typical elements of such an order is: (a) a declaration by the court indicating governmental non-compliance with its constitutional obligations; (b) a positive obligation on the state to comply with the Constitution; (c) a duty to produce a report stipulating the steps that government has taken and future steps that it will take to vindicate the right; and (d) the report is made an

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<sup>83</sup>See *Modderklip* (n 12) para 22 for a description of the bare minimum of the right.

<sup>84</sup>See for instance *Sailing Queen Investments v The Occupants La Colleen Court* (n 32) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* (n 35).

<sup>85</sup>See for instance Sachs J (n 6) 1388 where he mentions that the courts have a duty to address situations of homelessness, because it goes 'to the core of a person's life and dignity'.

<sup>86</sup>Hoexter (n 12) 562 also mentions that this remedy is especially useful in the context where the state has positive obligations. One should note that any interdict must comply with certain common law requirements. The applicant must establish a *prima facie* right, show that irreparable harm is likely to be incurred if the interdict is not granted, the balance of convenience favours the remedy and no other remedy can satisfy the claimant. The interdict will only be made final if the claimant has a clear and direct right, the right has been infringed and there is no other satisfactory remedy: 560.

<sup>87</sup>*Id* 561. See also De Beer and Vettori 'The enforcement of socio-economic rights' (2007) *PER* 1 at 10 where the authors mention that the courts usually include a time frame for governmental compliance.

<sup>88</sup>Roach and Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) *SALJ* 325 at 328. The authors mention that even though this remedy was available during the pre-1994 era, it was rarely used.

order of court if the court is satisfied that the suggested governmental steps will vindicate the infringed right.<sup>89</sup> In the South African context it seems that structural interdicts are appropriate in instances where it is necessary for the court to ensure that the state adheres to its order; there is reason to believe that the order will not be complied with in a prompt manner; failure to comply with the order will have such a severe impact that the court must retain jurisdiction to ensure compliance; and a mandatory order would be too general for the government to effectively comply with the will of the court.<sup>90</sup>

Mbazira argues that the purpose of the remedy is the 'elimination of systemic violations existing especially in institutional or organisational settings'.<sup>91</sup> It is therefore not a once-off form of redress. Essentially, the remedy aims to curb future injustices rather than to compensate and cure past wrongs – it is therefore not your typical back-ward looking form of judicial reparation since it is not deduced from a particular infringement.<sup>92</sup> The remedy is in fact a process of deliberation in terms of which a continuation of performance is required by the state, which necessitates on-going endorsement by the court.<sup>93</sup> Systemic violations of a complex nature can generally not be addressed by means of traditional remedies, while a structural interdict is plausibly more appropriate in such instances since it aims to achieve structural reforms by responding to core problems, instead of the impact of these systemic flaws. This requires a continual determination of relevant facts and legal consequences, which could point to inherent flaws in a specific institution itself.<sup>94</sup> Likewise, Budlender argues that the issue regarding the adjudication of socio-economic rights which entail positive obligations on the state is the selection of an appropriate remedy that would cure a systemic breach, 'that is, where the cause of the breach is a breakdown or

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<sup>89</sup>Currie and De Waal *The Bill of Rights handbook* (2005) 218.

<sup>90</sup>Roach and Budlender (n 89) 333-334. These findings are based on the following decisions: *Minister of Health v Treatment Action Campaign (No 2)* (n 68); *Sibiya v Director of Public Prosecutions: Johannesburg High Court* 2005 5 SA 315 (CC); and *City of Cape Town v Rudolph* 2004 5 SA 39 (C). De Beer and Vettori (n 88) 10-11 mention that the remedy is particularly useful where the matter involves a large number of affected households.

<sup>91</sup>Mbazira 'From ambivalence uncertainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) *SAJHR* 1 at 4. Most arguments raised by the author are based on literature and jurisprudence from the United States of America, because the US judiciary in essence initiated the structural form of relief (3).

<sup>92</sup>*Id* 4.

<sup>93</sup>*Ibid*. In some instances the active participation of the court might be required for the implementation of the judgment, for example by means of reporting back to court. Again by way of a report back?

<sup>94</sup>*Id* 5.

malfunctioning of the system'.<sup>95</sup> In his view, the courts are currently retreating into the role of passive observers of the systemic breach of fundamental rights of the marginalised and structural interdicts could help address these failures.<sup>96</sup>

Mbazira further points out that structural interdicts are the preferred remedy in structural suits.<sup>97</sup>

These suits challenge large scale government deficiencies, sometimes arising out of organisational or administrative failure. The causes of the failure are various: failure to use (or misuse of) discretion; negligence; failure to comprehend the law; administrative red tape; and deliberate disregard of rights.<sup>98</sup>

In addition, these suits are usually both assisted by *amici curiae* and are instituted against more than one level of government.<sup>99</sup> Five different models of this interdict are utilised by the courts of which three are interesting for the housing framework, namely the bargaining model, the legislative/administrative hearing model and the report back to court model. The bargaining model allows for negotiations by the parties in order to reach remedial decisions that are more easily implemented and acceptable to all concerned. The legislative/administrative hearing model concerns a legislative committee process in terms of which all interested parties can engage in public hearings and informal participation processes to assist with the formulation of appropriate remedies. This model is particularly useful in matters of a polycentric nature, particularly socio-economic rights issues.<sup>100</sup> The report back to court model requires that a defendant articulate ways in which to remedy the breach, which are reported back to the court for approval. In light of separation of powers concerns this model is advantageous to the extent that the court allows the defendant, mostly the state, to propose the necessary steps that ought to be taken to cure a breach. The court therefore shows respect to the governmental body and refrains from usurping state powers. In addition, suggestions made by the state are logically more likely to be implemented.<sup>101</sup>

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<sup>95</sup>Budlender 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) *ESR* 9 at 10. See also De Beer and Vettori (n 88) 10.

<sup>96</sup>Budlender (n 96) 11. See also Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) *SAJHR* 215 at 228.

<sup>97</sup>Mbazira (n 92) 5.

<sup>98</sup>*Ibid.*

<sup>99</sup>*Id* 5-6. The South African eviction cases are usually both assisted by *amicus curiae* and directed at more than one governmental level.

<sup>100</sup>Budlender (n 96) 11 also mentions that structural interdicts provide an opportunity for society at large to participate in the design and implementation of a government housing programme.

<sup>101</sup>Mbazira (n 92) 6-8. See also Budlender (n 96) 11.

A real danger associated with structural interdicts is that the close supervision of administrative decision-making might either force the courts out of their institutional area of competence or result in the courts overstepping separation of powers boundaries.<sup>102</sup> The report back to court model seems to address these concerns, provided that the courts show the required levels of respect.<sup>103</sup> Criticism raised against this form of relief is that it is antidemocratic since unelected judges will make decisions that impact on the community. However, it is difficult to imagine court decisions that do not impact the community. Budlender also questions this concern on the basis that the remedy should essentially encourage engagement between the courts, state and different stakeholders, which is deeply democratising since it promotes government accountability and community participation. He proposes that more deliberate interaction should take place between the courts and the various stakeholders to overcome systemic breakdowns and ensure the methodical realisation of constitutional rights.<sup>104</sup>

#### 4.2 *Application within the housing framework*

A structural interdict is an appealing form of relief for courts to implement in difficult housing disputes that concern the eviction of marginalised groups. The nature of the remedy provides the courts with an opportunity to oversee and supervise administrative decisions in relation to the realisation of the right to housing without dictating to the organs of state as to what steps should be taken. The court can therefore ensure compliance with an evolving concept of section 26(1), while remaining within its competencies. Depending on the model that the court implements, it can remain within its competencies and refrain from overstepping separation of powers boundaries. Previous non-compliance by the state to adhere to court orders regarding housing matters supports the contention that a structural interdict is apt. In addition, declaratory as well as mandatory orders have proven to be ineffective since they are too general to comply with and are simply ignored by the state.<sup>105</sup> Moreover, the systemic violation of sections

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<sup>102</sup>Hoexter (n 12) 564.

<sup>103</sup>Swart (n 97) 226 mentions that courts are reluctant to grant structural interdicts due to considerations of resources and legitimacy. Courts are also more inclined to grant once-off remedies, while structural interdicts are generally time consuming since they require a lengthy process of supervision.

<sup>104</sup>Budlender (n 96) 11. A similar reasoning was adopted in *S v Zuba and 23 similar cases* 2004 4 BCLR 410 (E) para 36 in which the High Court held that the usual remedies, such as a *mandamus* or an award of damages would be ineffective to remedy 'systemic failures or the inadequate compliance with constitutional obligations, particularly when one is dealing with ... rights of a programmatic nature'.

<sup>105</sup>Hoexter (n 12) 559. The state's failure to comply with these orders result in the systemic violation of a fundamental right that is central to the realisation of other fundamental rights: Sachs (n 6) 1388; *Grootboom* (n 2) para 23; and Liebenberg 'The value of human dignity in interpreting socio-

26(1) and (2) necessitates a form of reparation that goes beyond the typical once-off remedy to cure a specific infringement and address core problems by means of structural reforms. Governmental deficiencies in the section 26 framework is astonishing when considering state negligence, the state's failure to comply with the law and a complete disregard of rights. The High Courts in *Grootboom*<sup>106</sup> and *Modderklip* granted structural interdicts, although this form of relief was rejected by the Supreme Court of Appeal in *Modderklip*.<sup>107</sup> Later, in *Pheko v Ekurhuleni Metropolitan Municipality*<sup>108</sup> the Constitutional Court granted this form of relief.

With reference to *August v Electoral Commission*,<sup>109</sup> the High Court in *Modderklip* justified this order on the basis that it had to retain jurisdiction to oversee the required implementation of its order and it must determine adequate relief in light of the specific circumstances of the case.<sup>110</sup> A declaratory order was given to the effect that the occupiers' failure to relocate amounted to an infringement of the owner's section 25 rights. In light of sections 26(1) and (2), read with section 25(5) of the Constitution, the court held that the state is required to both implement the necessary measures to give effect to the occupiers' right of access to adequate housing and adopt measures to adhere to the court's eviction order.<sup>111</sup> To remedy the breaches, the court also gave a structural interdict in terms of which the state had to report back to the court with a comprehensive plan setting out how the state will make provision for: (a) the dissolution of the infringement of the owner's rights within a reasonable period of

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economic rights' (2005) SAJHR 1 at 2.

<sup>106</sup>In *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C), the High Court ordered the state to provide shelter to the children (with their parents) who were rendered homeless post-eviction. The relief was therefore granted in terms of s 28 of the Constitution, not s 26. The court therefore declared the obligations of the parties, but also required that the state report back to the court within three months, explaining the implementation of the order. In light of separation of powers concerns, the court carefully structured the order not to dictate how the state should accommodate the children and their parents. Nevertheless, the order amounted to a structural interdict since the court retained jurisdiction over the state's plans. The court made it clear that it wished not to be prescriptive regarding the solutions that the state can implement to vindicate the right enshrined in s 28 of the Constitution. However, the court did set certain guidelines to assist the state to comprehend what children's right to shelter as a bare minimum consist of, namely 'tents, portable latrines and regular supply of water': at 24-25. An order of this kind was unnecessary in the Constitutional Court in light of the agreement reached between the occupiers and the state: Roach and Budlender (n 89) 329.

<sup>107</sup>The decision to make this order was based on s 38 of the Constitution. See *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* (n 77) para 30 in this regard. (N 12).

<sup>108</sup>(N 46).

<sup>109</sup>1999 3 SA 1 (CC).

<sup>110</sup>*Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* (n 82) paras 50 and 52.

<sup>111</sup>*Id* para 52. The latter was based on s 165(4) of the Constitution.

time, either by way of expropriation or through other measures;<sup>112</sup> (b) compliance with the state's sections 25(5) and 26 obligations; (c) the prioritisation of an appropriate scheme for the resettlement of the occupiers either on suitable land or in adequate housing; and (d) the monitoring of the implementation and maintenance of the suggested plan. In addition, the landowner and the *amicus curiae* were entitled to comment on the state's proposed plan, while the state also had the opportunity to reply on the comments made.<sup>113</sup> A process of this kind allows deliberation between different stakeholders after the state made the initial recommendations. The court does therefore not usurp the powers of the state, nor does it overstep separation of powers boundaries – the decisions are made by the state, while the court oversees the lawfulness thereof during the process of deliberation. Structural relief can therefore be used to avoid a cycle of litigation since the court can provide clear indications of relief that would not be appropriate and therefore unlawful since the court is involved in the formulation of the required relief.

The Supreme Court of Appeal held that the declaratory order was 'too broadly formulated', while the structural interdict was dismissed on the basis that it suffered from a number of defects.<sup>114</sup> Specific concerns raised by the SCA were that the court failed to clarify what was expected of the state, the court effectively made a policy decision by giving priority to the occupiers without any clear entitlement on the side of the occupiers and the determination of the required

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<sup>112</sup>Importantly, the court did not order the state to expropriate the property. The court ordered the state to dissolve the infringement of the owner's property rights and mentioned the state's power of expropriation as a measure that could be used to do so. The court does not have the power to expropriate property: *Ekurhuleni Metropolitan Municipality v Dada* (n 83).

<sup>113</sup>*Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* (n 82) para 52. During the same period that this case was decided, the High Court in the Western Cape made a similar finding in *City of Cape Town v Rudolph* (n 91) where a large number of unlawful occupiers of vacant state land faced eviction proceedings, which they successfully opposed. The occupiers also counter-claimed that the city was in breach of its housing obligations as formulated in *Grootboom*. In light of *TAC* (n 68), the court held that a declaratory order would be insufficient to grant effective relief to the occupiers. In response to (a) the state's ignorance regarding the plight of the poor and its s 26 duty to act; and (b) its failure to have followed the *Grootboom* order, the court decided that the circumstances justified the award of a structural interdict: 558. The court declared the city's housing programme unconstitutional and ordered the City of Cape Town to comply with its constitutional obligations. In addition, the court ordered the state to compile a report setting out what steps it has taken, and what steps it intends on taking (and when), to comply with its constitutional obligations. This report had to be finalised within four months after which the respondents could comment on the report and, in response to the commentary, the state could also reply. Only at this stage would the court consider and determine the report (560).

<sup>114</sup>*Modderklip* (n 12) paras 39-40. The Court mentioned a number of concerns associated with structural interdicts, namely that they impact on the separation of powers principle, they deal with policy matters instead of the enforcement of particular rights and they are difficult to enforce due to their effect on the state's ability to comply on a financial level or otherwise.

steps to be taken falls within the jurisdiction of the state – either the municipality or the state, not the court.<sup>115</sup> These concerns are clearly misplaced in consideration of the nature and purpose of structural interdicts in general. The High Court directed the state to adhere to its constitutional obligations and left it to the state to decide as to how this should be done. A declaration of constitutional violations and a mandate to address such violations was therefore apt to the extent that the determination of the required reparation was placed with the state – the court took the role of a supervisor, not dictator. The apprehension that the provision of housing to the occupiers amounted to some form of prioritisation without any entitlement on the side of occupiers is misconstrued, because all persons are entitled to have access to adequate housing, which means that the state must address matters that are inherently unlawful and, as a bare minimum, make land available where the marginalised can live without constant fear of eviction.

In *Pheko v Ekurhuleni Metropolitan Municipality*<sup>116</sup> the municipality decided to declare an informal settlement a ‘disaster area’ in terms of the Disaster Management Act<sup>117</sup> and both remove the applicants and demolish their homes without an order of court.<sup>118</sup> The case turned on the lawfulness of these state actions. Nkabinde J held that ‘unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom’.<sup>119</sup> The eviction of the applicants and the demolition of their homes contravened section 26(3) of the Constitution and were therefore unlawful.<sup>120</sup> The applicants were entitled to effective relief, which entailed the identification of suitable land and development of houses for the applicants. The Court decided to retain jurisdiction and oversee the state’s actions since effective relief had to take place over a period of time.<sup>121</sup> In the end, the Court declared the eviction, demolitions and relocation unlawful, placed a positive obligation on the state to meaningfully

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<sup>115</sup>*Id* para 40. Mbazira argues that the Constitutional Court is generally reluctant to grant structural interdicts in socio-economic rights cases, which might have resulted in an overall failure by the courts to address the plight of the poor: Mbazira (n 92) 1-2, referring to Swart (n 97) 228 and Bilchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) SALJ 484 at 501. The impact of this reluctance can plausibly be considered a reason why the state has failed to implement the Court’s orders. In contrast to this aversion to structural relief, the High Courts have made a number of these orders to vindicate socio-economic rights (Mbazira (n 92) 2). Seemingly, the reason why the Constitutional Court has adopted a high level of deference is that the state has implemented its decisions and there is therefore no need for the courts to oversee compliance by the state.

<sup>116</sup>(N 46).

<sup>117</sup>57 of 2002.

<sup>118</sup>*Pheko v Ekurhuleni Metropolitan Municipality* (n 46) para 3.

<sup>119</sup>*Id* para 32.

<sup>120</sup>*Id* para 49.

<sup>121</sup>*Id* para 50.

engage with the occupiers to identify suitable land for their relocation and ordered the municipality to comply with this obligation by filing a report setting out the steps it had taken in relation thereto.<sup>122</sup> The detail of such a report (or final decision made) will depend on the facts of each case and the state's capacity in giving effect thereto – the report is essentially a reflexion of what the state envisions to do. A report of this kind is generally made an order of court and non-compliance thereof would amount to contempt of court, which could lead to prison sentences.<sup>123</sup>

This decision is a welcome departure from the Court's previous reluctance to award structural relief. The report-back approach ensures that the Court retains oversight and that the state gives effect to the evictees' housing rights. However, *Pheko* stops short of an articulation of section 26(1) in relation to tenure security and the provision of services. Even though the latter aspects of section 26(1) are long-term objectives for any municipality in its section 26(2) progressions, there is no reason why the Court should not oversee the realisation of them as well. Even though structural relief is complicated, time consuming and sensitive to the specific facts of the case, which could easily lead to administrative delays, it is arguably the only form of redress in terms of which the court is actively involved to ensure that the state acts lawfully. A fine line must therefore be established to ensure that the court both retains jurisdiction to oversee the state's actions and operates within the confines of its inherent powers. A court must ensure that state decisions are reasonable, lawful and that individuals' constitutional rights are being given effect to in a progressive manner. The court must hold government accountable in this regard. As explained in *Bato Star*:

A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.<sup>124</sup>

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<sup>122</sup> *Id* para 53. The applicants were given an opportunity to respond to the report.

<sup>123</sup> A persistent and continual refusal by the state to comply with court orders, resulting in a cycle of litigation, is a matter that falls outside the scope of this article since it is mainly focussed on the way in which structural relief can be used in the housing context to ensure that the state acts lawfully.

<sup>124</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (n 70) para 48.



### 4.3 *The way forward*

Structural interdicts can be structured to reach specific goals. In the housing framework their structure should be directed at the systemised reform of the state's conception of the content of section 26(1) and its obligations in relation to this right – that is, section 26(2). I envision that the structure of this form of reparation should consist of a number of facets, which has to some extent already been formulated by the courts in a haphazard way. In a case where the state acted in contravention of the Constitution and infringed either sections 26(1) and (2) or section 26(3), the court should make a declaratory order to make this clear. The identification of multiple state actions that amount to the violation of fundamental rights should raise some awareness regarding the meaning of reasonable state action – that is, governmental decisions taken with an inherent sensitivity towards the human dignity of those affected.<sup>125</sup> Importantly, ignoring the duty to assist evictees post-eviction with access to alternative accommodation or, at the very least suitable land for resettlement must be shown to contravene the fundamental right to housing.<sup>126</sup>

The second facet of the remedy should be directed at the prioritisation of the needs of the poor. The Constitution places an obligation on the state and local government in particular to give priority to the previously disadvantaged and their needs. To determine the specific circumstances and needs of those facing homelessness the state must undertake meaningful engagement as it was formulated in *Olivia Road*.<sup>127</sup> If the dispute concerns the unlawful occupation of private land the engagement should take place between the state, unlawful occupiers and private landowner since negotiations between the state and private

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<sup>125</sup>This principle that all state actions regarding housing must be reasonable and therefore sensitive to the human dignity of those affected was established in *Grootboom*.

<sup>126</sup>This facet of the court's order is in line with the jurisprudential indicator that there is a positive duty on the state to provide alternative accommodation to evictees facing homelessness post-eviction.

<sup>127</sup>This facet of the order has a similar aim as the bargaining model of structural relief. It is also in sync with the jurisprudential indicator that meaningful engagement is required prior to the eviction of marginalised occupiers. Liebenberg mentions that meaningful engagement, as suggested in *Olivia Road*, affirms participatory democracy in housing issues: Liebenberg (n 28) 18. Meaningful engagement must be imposed to gather information regarding the needs of the vulnerable. It should form part of structural relief since the court must retain jurisdiction over this process. Structured in this way, meaningful engagement will unlikely fall into the trap of a process of local dispute resolution: Liebenberg (n 28) 19. The meaningful engagement process should be linked to the next facet, which deals with the proposed steps that government will take to vindicate the s 26 right. In addition, if meaningful engagement forms part of the structural interdict the court will play a supervisory role in relation to the engagement process as well.

landowner could likely result in viable solutions to all concerned.<sup>128</sup> If a resolution cannot be reached between the state and private landowner and the specific circumstances show that the permanent acquisition of the land would address the long-term housing needs of the occupiers, an expropriation might likely be the only viable option for the state to act lawfully.<sup>129</sup> The decision to expropriate would essentially be made by the state, while the court merely sets boundaries to ensure lawfulness.

The third facet of the structural interdict should be directed at the vindication of fundamental rights by the state. Typical of a structural interdict, the court should request the state to formulate a comprehensive plan, based on the knowledge it ascertained during meaningful engagement, to give effect to the occupiers' housing rights. The plan can consist of different stages since it might be illogical to give full effect to section 26 in a once-off manner. An immediate form of redress can therefore be structured with successive phases, leading to long-term housing solutions. However, the long-term housing suggestions must comply with the broader vision of the Constitution requiring the transformation of our housing regime from one of gross tenure insecurity for the previously disadvantaged in remote areas to one of security of tenure in economically sustainable locations where the socio-economically weak can live with dignity and actively participate in society.<sup>130</sup> Even though the detail regarding the exact steps that government plan to take must be articulated by the state, the court should retain jurisdiction over these steps in both a preliminary manner – by approving the steps in their initial draft version – and a continual fashion, overseeing that the steps are adequately implemented in due course.<sup>131</sup> The court must ensure that

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<sup>128</sup>Chenwi (n 42) 386 mentions that there is a need to involve a wide range of stakeholders in the engagement process. On this point I agree with Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) *Stell LR* 742 at 757 that meaningful engagement is different from procedural fairness at least to the extent that the former requires a purposive conversation between the state and occupiers to determine how content can be given to s 26 in a specific instance.

<sup>129</sup>An expropriation would enable the state to take acquisition of the land and provide permanent housing to the unlawful occupiers. It would therefore address their immediate needs and provide long-term solutions in conformity with s 26(1). The relocation of the occupiers would no longer be of concern, nor would the court have to order a suspended eviction order. The location would like also be suitable to the occupiers. Even though the state would have to compensate the private landowner in terms of ss 25(2) and (3) of the Constitution, some state expenditure would have been required to relocate and provide alternative accommodation to the evictees in due course in anyway.

<sup>130</sup>Section 25(6) of the Constitution provides that a person or community who occupies land with legally insecure tenure is entitled to legally secure tenure. Even though the provision also provides that this form of redress should take place in terms of specifically enacted legislation it does not mean that the state and courts should be ignorant of the provision's broader scope and purpose to the extent that they should aim to address insecure tenure in a general fashion.

<sup>131</sup>This facet therefore resembles the report back to court model.

the envisioned steps, which should speak to the content of sections 26(1) and (2) directly, are in all their instances reasonable, taking account of the human dignity of those affected, and in compliance with the spirit, purport and objects of the Constitution.<sup>132</sup> Surely, this means that the marginalised should occupy land as lawful occupiers with some degree of tenure security and that the state must service the land.

The supervisory role of the court is important throughout these facets of structural relief. Without overstepping separation of powers boundaries the court is obliged to direct governmental actions to comply with the Constitution. In the interest of time and need for the efficient vindication of fundamental rights the court should play an active role from the outset and predetermine what type of state actions would be unacceptable – in other words, guide the state to rule out options that are inherently incompatible with the transformative purpose of the Constitution.<sup>133</sup> In addition, judicial predeterminations can also be made to caution the state against propositions that are irrational. In a case such as *Modderklip* the court should ideally have granted a structural interdict, consisting of the mentioned facets, and with predetermined guidelines stipulating that an eviction order would be irrational. In addition, the court should have made it clear that the continued unlawful occupation of land would amount to a continuing wrong and any proposition by the state to this effect would clearly fail to vindicate the section 26 right. Judicial predeterminations of this kind can force the state to create innovative measures in difficult housing disputes without dictating the exact steps that government ought to take.<sup>134</sup> A low level of deference might therefore be required, although this does not translate into the courts acting outside their competencies.

## 5 Concluding remarks

The high level of deference adopted in cases such as *Modderklip* and *PE*

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<sup>132</sup>Ray makes an interesting observation regarding the way in which a democratised process can give content to socio-economic rights: 'Procedural remedies like engagement promote that kind of dialogue and thus give the courts an important role to play while still democratizing the process of constitutional development. The result is a collaborative model of constitutional development in which courts, citizens and political branches each participate in negotiating the meaning of the Constitution (Ray (n 44) 114).

<sup>133</sup>See specifically *id* 112.

<sup>134</sup>An obvious example would be for the state to lease privately held land that is unlawfully occupied. The state would act as public sector landlord, while the unlawful occupiers would in fact no longer occupy the land unlawfully. They would occupy the land as public sector tenants. The owner would receive some form of rental income, which the state would have to subsidise. An agreement of this kind can include a range of terms and conditions to suite the specific needs of all the parties involved. A lease agreement would have been a solution in a case such as *Modderklip*. Alternatively, the state can expropriate the property.

*Municipality* results in situations that are unlawful and generally in contravention of rights in the Bill of Rights. Moreover, the mere judicial placement of an obligation on the state to vindicate the right to housing has also shown to be ineffective. Declaratory orders that confirm the violation of fundamental rights and request the state to devise policies and programmes to address such violations in a generalised fashion have also failed due to non-compliance by state officials. What falls by the wayside is the fundamental right to have access to adequate housing – a key right for the realisation of vulnerable groups' right to live with dignity. For the courts to shy away from this reality behind separation of powers concerns would amount to judicial avoidance, an approach that we simply cannot afford at this stage. A robust and innovative methodology is therefore required from the judiciary in all complex eviction disputes that have homelessness/andlessness as a concern. For the courts to award suspended eviction orders with a broad duty on the state to provide temporary alternative accommodation simply does not vindicate section 26(1) since it amounts to a provisional solution, while it effectively just adds numbers to a growing housing backlog. The point of departure in large-scale eviction cases should be to assist the state in forging long-term housing solutions for the marginalised, right there and then. Often, this would require the courts to play an active supervisory role over lengthy periods of time to guide the state in its section 26(2) duties, which is both permissible and justifiable in light of the importance of the rights involved. Structural interdicts are the only form of redress that allows the courts to retain jurisdiction, oversee state actions and hold government accountable over time to ensure compliance with sections 26(1) and (2), whilst operating within its inherent competencies. Consequently, a threshold for section 26(2) can be established, which would speak directly to the content of section 26(1). Judicial predeterminations of unreasonable state actions and inadequate housing options would arguably not amount to the courts overstepping boundaries since the courts must ensure that violations of constitutional rights are amended and that effective reparation takes place.

However, the exact determination of the required steps to be taken in order to give effect to section 26(1) must remain with the state. The provision of adequate housing in the form of private ownership is of course not an end in itself and the state has leeway to craft various forms of tenure for low-income households, which should comply with section 25(6).<sup>135</sup> A short-term objective of the state should be to ensure that evictees occupy land that is serviced with secure tenure. Their legal occupation can take various forms and the courts should predetermine that the unlawful occupation of land is incongruent with

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<sup>135</sup>Short-term rental housing is an option that can be utilised by the state for this purpose. See specifically Maass 'Rental housing as adequate housing' (2011) 22 *Stell LR* 759.

legally secure tenure and therefore unacceptable. These short-term objectives are fairly easy to achieve, provided that the state takes cognisance of its abilities and powers as they are set out in the Constitution and enabling legislation. In a case such as *Modderklip* the state could easily have decided to expropriate the property, service the land and provide each occupier with a lease at a minimal rent level. Clearly, the will to provide such a nominal form of housing escaped both the state and the judiciary – leaving those in need in a destitute position. Our judiciary has to play a more active role and force the state to comply with sections 26(1) and (2), but also section 25(6), through the mentioned facets of structural relief. Ultimately, the result in *Modderklip* would have been something similar to a judicial expropriation since the court could have predetermined that the unlawful occupation of land would be inconsistent with the Constitution – a suggestion that cannot be endorsed by the court – and that an eviction order would be irrational since it was impossible to enforce. Judicial predeterminations of this kind fall inside the courts' inherent competencies since it rules out state decisions that are unlawful – something that the court would have done at a later stage in anyway. The only difference is that the court makes the predeterminations during the process of deliberation between the different stakeholders. Still within its competencies, simply stating the law and the obvious, the High Court in *Modderklip* was on the right track to holding government accountable and giving effect to section 26(1); all that can be said is that the court could have gone even further. That being said, structural relief is a remedy that must be crafted and tweaked to address specific needs in particular instances. It is by no means a perfect remedy since it requires time and dedication from a number of stakeholders. As with any court decision, there is no guarantee that the state will comply with the eventual court order, but the point of departure is that the state is in adherence with the essence of the decision since it played a leading role in making the decision.