

A critical legal perspective on the context and content of the right to access to adequate housing in South Africa

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Abstract

The oppressive Apartheid government policy and laws of the past deliberately entrenched inequality, forced segregation and denied the majority of black Africans unfettered right of access to various socio-economic rights, goods and services, particularly housing. However, after the apartheid government was defeated in 1994, the African National Congress (ANC) became the new ruling government in South Africa and in a bid to redress the past injustices, particularly the imbalances in social, socio- and economic amenities where the majority blacks were excluded, the new government enacted the Constitution of the Republic of South Africa, 1996. It provides that all citizens are equal before the law and have the same rights, privileges and benefits for the mere fact of being citizens of the Republic of South Africa. Despite this, it is disheartening that most citizens, particularly the poor, indigent and the vulnerable still do not have access to adequate housing guaranteed in the Constitution. This article highlights poor quality housing delivery by the government as the major barrier to the realisation and fulfilment of access to adequate housing. It accentuates that this barrier is intensified because of the endemic corruption by the executive arm of government that have been bestowed with the responsibility to provide adequate housing for all. As part of the solution, the article examines comparative law and international law on the right to access to adequate housing using salient jurisprudence from the courts' decisions to clarify and ascertain the content of adequate housing.

Keywords: low quality houses, the poor, corruption, government officials, interventions, the Constitutions, South Africa.

JEL Classification: K14, K33

1. Introduction

South Africa has a high number of individuals without adequate housing caused by the unjust laws of the apartheid government that permitted the deprivation and denial of land and access to adequate housing, particularly to the Historically Disadvantaged Black People (HDBP) who suffered various injustices under the oppressive rules of the apartheid government. These unjust rules decimated the HDBP and destroyed their properties and livelihoods without recourse or

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accountability.³ During the apartheid regime, the people of South Africa were categorised according to their race and cultural status by the apartheid government.⁴ The system of apartheid government was grounded on the notion of unequal treatment of people and unequal distribution of resources.⁵ People in urban areas have unfettered access to basic services, household necessities and good health services while those who lived in the rural areas and homelands had no access to privileges like basic services and proper health facilities. In contrast, the white minority benefitted from different housing programmes provided to them by the apartheid government while the black majority were denied such and were also forcefully removed from their land, had their properties demolished, and left with no other option than to settle in the informal settlements and townships.⁶ This forceful removal was perpetrated in terms of section 5(1)(b) of the Native Administrative Act 38 of 1927 which gave the apartheid government the power to order that particular tribe be removed from a certain place and put in another. As part of the entrenchment of segregation, each group or race were assigned separate settlement areas.⁷ These apartheid segregation and land dispossession policies prevented the black majority from building themselves decent houses because there was no security of tenure.

With regard to urban areas, the surrounding informal settlements were hostel accommodation. and black townships which were regarded as accommodation for black people in urban areas.⁸ In terms of the Native (Urban Areas) Act, hostel accommodation and backyard rooms were regarded as adequate houses for black people who were labourers in the urban areas. The limited accommodation or housing for black people in the urban areas led to an increase of urban squatter camps and informal settlements.⁹

According to Maylam, houses in squatter camps and informal settlements were undignifying because they have inadequate living space inside and outside.¹⁰ Living and housing conditions of the informal settlements and squatter camps were very poor and posed health risks to the people dwelling in those houses. The irony

³ Liebenberg, S and Goldblatt, B, 2007. The Interrelation Ship Between Equality and Socio-Economic Rights Und Er South Africa's Transformative Constitution. *South African Journal on Human Rights*, pp. 335-361.

⁴ Maylam P, 1995. Explaining the apartheid city: 20 years of South African urban historiography, *Journal of Southern African Studies*, p. 33.

⁵ Radebe, SB, 2013. The Protection of the Right of Access to Adequate Housing By the South African Constitutional Court, available at scholar.sun.ac.za/bitstream/10019.1/80279/1/. See also Schoombie JT 1985. Group areas legislation - The political control of ownership and occupation of land, *Acta Juridica*, pp. 77-87.

⁶ See Section 10(a) and 10(b) of the Native (Urban Areas) Act 1945.

⁷ Maylam, p. 33.

⁸ May, J. and Rankin, S. 1991. The differentiation of the urbanization process under apartheid, *World Development*, pp. 1351-1353.

⁹ Ibid.

¹⁰ Maylam, p. 34.

is that the informal settlements unlike urban squatter camps have houses that do not conform to the legal standard but the occupiers were not subjected or exposed to forced removal.¹¹

The Constitution of the Republic of South Africa of 1996 (the Constitution) was introduced to do redress the injustices of the apartheid government, promote human dignity and fundamental rights to everyone by prohibiting housing inequality, housing segregation and other forms of unfair discrimination.¹²

The Constitution provides socio-economic rights as a mechanism to uplift the people of South Africa, more especially the HDBP who were denied and deprived access to adequate housing, social assistance, sufficient water, and access to health care facilities.¹³ Socio-economic rights form part of the Bill of Rights in the Constitution, primary aim of which was to assist the poor, the vulnerable and disadvantaged people by providing access to basic socio-economic goods and services that are significant in fostering social and economic inclusion and participation by all in the society.¹⁴ Socio-economic rights are recognised in the international human rights documents such as the Universal Declaration of Human Rights of 1948¹⁵ and the International Covenant on Economic, Social and Cultural Rights of 1966.¹⁶

The South African Human Rights Commission has been established in terms of section 181(1)(b) of the Constitution to protect, promote and monitor human rights for purposes of ensuring implementation and enforcement of socio-economic rights in terms of section 2 of the South African Human Rights Commission Act 40 of 2013. Socio-economic rights are inherent in the Constitution which includes among others that everyone has the right to have access to sufficient food, the right to have access to adequate housing, the right to have access to sufficient water and the right to have access to basic education.¹⁷ With regard to the right to access to adequate housing, this is explicitly provided for in section 26(1) of the Constitution that everyone have the right to access a house that is adequate.¹⁸ In order for a house

¹¹ See Haarhoff, E. 1985. Contemporary urban informal settlement and African urbanization in the Durban region, in Haines, R. and Buijs, G. (ed). *The Struggle for social and economic space: urbanisation in the Twentieth Century South Africa*, University of Durban-Westville, p. 64.

¹² See Section 7(1) of the Constitution of Republic of South Africa, 1996 (Hereinafter is referred as the Constitution) and also see Section 2(1)(e) of the Housing Act 107 of 1997 which mandate government to make available measure to “to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination” when providing houses.

¹³ Section 26 and 27 of the Constitution.

¹⁴ Khoza, S. 2007, *Socio-Economic Rights in South Africa*, second edition, p. 34.

¹⁵ Articles 22, 25 and 26 of the Universal Declaration of Human Right of 1948.

¹⁶ Article 9 and 13(2) of the International Covenant on Economic, Social and Cultural Rights of 1966.

¹⁷ See section 27, 26 and 29 of the Constitution.

¹⁸ See Article 11 of International Covenant on Economic, Social and Cultural Rights, 1966; Article 25 of Universal Declaration of Human Rights, 1948; Article 21 of International Convention relating to the status of Refugees 1951; Article 8(1) of European Convention on Human Rights and Fundamental Freedoms, 1950; Article 14(2)(h) of International Convention on the Elimination of All Forms of Discrimination against Women, 1979; Article 5(e)(iii) of Convention on the Elimination of All forms

to be adequate, basic services such as sufficient water, ventilation, sewage removal, appropriate environmental conditions and spacing are an integral part and parcel of the structure and premises of the house.¹⁹ In terms of section 7(2) of the Constitution, the state has constitutional responsibilities and duties to protect, promote, respect and fulfil the right to access to adequate housing in the Bill of Rights.

If the state fails to protect, promote, respect and fulfil the right to access to adequate housing, the courts of law are empowered in terms of section 165 of the Constitution to direct all persons including other spheres of government such as the executive to make resources available for the implementation of the right to suitable and satisfactory accommodation as provided in section 26 of the Constitution. This assertion is made considering that the executive sphere of government is responsible for the allocation of resources for the purposes of the realisation of the right of access to adequate housing as a constitutional right but the implementation and realisation of the right to access to adequate housing is subject to availability of resources.²⁰ It is submitted that in order for the implementation of provision of access to adequate housing to be achieved, the government have the responsibility to mobilise financial resources and capital investment in housing to provide people in need with houses.²¹ Those who should be the major beneficiaries of the available resources for access to adequate housing are the poor, homeless and vulnerable people. By so doing, the constitutional obligation which provides for the progressive realisation of adequate housing would have been achieved.²² This proposition has been supported by the court in the case of *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)*²³ where it was held that the court have powers to impose a structural interdict as an order that requests the executive sphere of government to do their duties as provided for by the Constitution and that the court must be updated of the progress in a form of a report on carrying out the court order.²⁴ The court may impose a structural interdict to eliminate the violation of

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- of Racial Discrimination, 1966; Article 27(3) of International Convention on the Rights of the Child 1989.
- ¹⁹ *Government of Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 47 (Grootboom case).
- ²⁰ See Liebenberg, S. 2002. South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty? *Law, Democracy & Development*, 2: 160-173 and see also the case of *B v Minister of Correctional Service* 1997 6 BCLR 789 (CC) para. 37.
- ²¹ See 4th ESR report 'Adequate Housing – Period: April 2000 - March 2002' on chapter 2 available at https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_2.pdf. Accessed on 17 September 2018.
- ²² See Gabru, N. 2005. Some Comments on Water Rights in South Africa, *Potchefstroom Electronic Law Journal*, pp. 1-33. See also Nleya, N. 2011. Linking service delivery and protest in South Africa: An exploration of evidence from Khayelitsha, *Africanus*, pp. 3-16.
- ²³ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) (17 March 2017).
- ²⁴ De Beer, RJ. and Vettori, S. 2007. The Enforcement of Socio-Economic Rights, *Potchefstroom Electronic Law Journal*, pp.1-26 and see the description provided by Trengrove 1999 *Economic and Social Rights Law Review* at 8-10 and in *Thozamile Eric Magidimisi v The Premier of the Eastern Cape* Case Number 2180/04 at par 39 Department of Social Development and the Premier was given a time frame to comply with the order.

fundamental rights and where the rectification of the violation will be better done through the supervision of the court.²⁵ This form of interdict, requires the sphere of government, under oath, to compile a report to the court on a date prearranged by the court.²⁶ A structural interdict is an effective tool to remedy the violation of fundamental rights where the court monitors the rectification of violation of constitutional obligation imposed on the spheres of government to perform their duties as mandated by the Constitution.²⁷

The three spheres of government, namely, local, national and provincial should assist and support each other with regard to the implementation and enforcement of access to adequate housing as entrenched in the Constitution.²⁸ In promoting service delivery or the implementation of the right of access to adequate housing, there should be co-operation and mutual trust between spheres of government in order to avoid conflict which will warrant litigation for issues surrounding the provision of access to adequate housing in court.²⁹

However, it is pertinent to point out that the state's failure to provide houses on the basis of lack of resources does not on its own amount to violation of the citizen's right to have housing that is adequate.³⁰ Adequate housing as a right forms part of the Bill of Rights and is not absolute and may be limited in term of section 36 of the Constitution and that the limitation should "be reasonable and justifiable and based on human dignity, equality and freedom." The state is not obliged to achieve the right to adequate housing unless the prevailing circumstances and needs call for an emergency situation where accommodation is urgently required to alleviate human suffering. In this situation, the state should assume immediate responsibility by providing temporary accommodation as indicated in the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* case.³¹

If it is necessary but not an emergency situation, the state should show that it is in the process of realising the provision of adequate housing and that strategies for low cost programmes are being implemented for the poor, indigent and

²⁵ *Black Sash Trust v Minister of Social Development and Others (Freedom under Law NPC Intervening)* 2017 (3) SA 335 (CC) (17 March 2017). (Black Sash Case).

²⁶ *Black Sash case* para 61.

²⁷ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) (31 March 2016), para 79.

²⁸ See section 41(1)(h) of the Constitution.

²⁹ See Section 41(1) of the Constitution and see section 4 of the Housing Act 107 of 1997 which provides the responsibilities of all spheres of government in providing houses to the people of South Africa.

³⁰ See Section 26(2) of the Constitution.

³¹ Maastricht Guideline on Violation of Economic, Social and Cultural Rights(1997) para 8 available at <http://ipasa.co.za/Downloads/Patient%20Rights/Maastricht%20Guidelines%20on%20Socio-Economic%20Rights.pdf> Accessed 09/04/2018 and further see Grootboom case para 97 and Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 (5th session), 1990, UN doc. E/1991/23, The nature of States parties' obligations (art. 2(1)) of the ICESCR; *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC).

vulnerable people, and that in this situation, the provision of temporary accommodation will suffice.

Deliberate provisions of dilapidated, low quality, lack of basic services, and poor standard of housing by the government in South Africa are as a result of repeated endemic corruption and other hindrances, such as, financial constraints and limited or lack of resources available for the construction and distribution of houses to the poor and the needy for the purpose of fulfilling the constitutional obligation of provision of access to adequate housing.³² Adequateness is well-defined as “the quality or state of being satisfactory, acceptable, or suitable in quality.”³³ Therefore, an adequate standard of a house should mean that a house must be suitable and have basic services such as access to sufficient water, sewerage removal, clean environment, ample space, and promotes privacy and dignity.³⁴

In terms of section 26(2) of the Constitution, the government have adopted policies and legislative measures such as the National Housing Policy and Subsidy Programmes Scheme, 2009, to promote and implement adequate housing by “*bringing about social cohesion, stability and security integrated developments and to create jobs and economic well-being for communities which did not previously have access to land and business services, formal housing and social and economic amenities.*”³⁵ Legislative interventions are playing critical roles by stipulating the duties and responsibilities of the government in the promotion, realisation, provision and fulfilment of the right to access to adequate housing in South Africa.³⁶ It is against the backdrop of this that in terms of section 10 of the Housing Act 107 of 1997, the municipality through authorisation by the Member of the Executive Council (MEC) may manage national housing programmes.³⁷

As a result of a high rate of rural-urban migration, most people end up occupying land illegally. Hence, the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 19 of 1998 (PIE) was enacted to address the issues of eviction which violate the right to adequate housing. When PIE was drafted, the Legislature was aware that majority of the people who occupy the land illegally are mostly poor, vulnerable and disadvantaged, hence PIE protects the illegal occupiers of land. Where the court is faced with the matter of illegal occupiers of land it must take into consideration the effect of eviction if it were to be granted.³⁸ Therefore, after the court must have considered all relevant factors, it would grant the order that

³² Chenwi, L. 2010. Government's obligation to unlawful occupiers and private landowners, *ESR Review: Economic and Social Rights in South*, pp. 9-11.

³³ Defined in English Oxford Living Dictionaries available at <https://en.oxforddictionaries.com/definition/adequateness>, accessed on 16 June 2018.

³⁴ Fact Sheet No. 21/Rev.1- The Right to Adequate Housing page 9 available at https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf Accessed on 22 June 2018.

³⁵ See Part B(2.1) of the National Housing Policy and Subsidy Programmes Scheme, 2009.

³⁶ See Sections 24(b), 25(5), 26(2) & 27(2) of the Constitution of Republic of South Africa, 1996 and see section 10 of the Housing Act 107 of 1997.

³⁷ In terms of section 1 of the Housing Act, 'Member of the Executive Council' means the member of the Executive Council of a province responsible for housing matters in the province in question.

³⁸ See section 4(6) of the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 19 of 1998 (PIE).

would be just and equitable. The eviction order might only be allowed if the court is of the view that it is reasonable and sensible to do as such.³⁹

2. Problem statement

The South African government is facing a huge challenge in putting into practice section 26(1) of the Constitution which mandates the delivery of adequate housing to people. Inadequate or lack of houses are causing homelessness of people and eviction hinders the progressive realisation of adequate housing as a constitutional right.⁴⁰

South Africa is now 24 years into democracy, but most citizens, particularly in the rural and township areas, are still without access to adequate housing and those who have houses lack basic services and amenities; hence the houses are inadequate for human habitation.⁴¹ It is a known assertion that the apartheid government disadvantaged the majority of the black people through discrimination and denial of opportunities to be assisted by government to access houses. The democratic Constitution has corrected this by dealing with inequality in section 9 of the Constitution that states that all people irrespective of their colour of skin or gender are entitled to the rights provided for in the Bill of Rights including access to housing that is adequate.⁴² Against this Constitutional obligation, pieces of legislation have been enacted to implement and enforce the issues relating to the right to adequate housing and that right to adequate housing is realised progressively.⁴³ However, it is pertinent to point out that to the contrary, the progressive realisation of section 26(1) is hindered by lack of finance, maladministration and corruption. Also, another apparent impediment is that the demand for houses in South Africa is far greater than the rate at which government is providing houses.⁴⁴ In other words, the realisation of adequate housing in South Africa is less than the increasing rate at which the homeless and people without adequate housing want government to provide them with housing. Because of the huge demand, government officials have been using this as an excuse to provide and deliver poor quality houses to the needy. This article

³⁹ See section 4(8) of the PIE.

⁴⁰ *Grootboom* case para 8` and see also UN Committee on Economic, Social and Cultural Rights, General 7 'The Right to Adequate Housing (Article 11(1) of the covenant): Forced Eviction' UN Doc E/C 12/1997/4 (1997) and see 4th ESR report 'Adequate Housing – Period: April 2000 - March 2002' on chapter 2 available at https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_2.pdf, Accessed on 17 September 2018.

⁴¹ See Ficksburg 2007. RDP Houses: no water, no electricity, incomplete!, available at <https://citizenjusticenetwork.org/2017/06/05/rdp-houses-no-water-no-electricity-incomplete/>. Accessed on 20 March 2018.

⁴² See section 26(1) of the Constitution.

⁴³ Housing Act 107 of 1996; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Breaking New Ground Policy: A Comprehensive Plan for the Development of Sustainable Human Settlement (September 2004); National Housing Code (2000, Revised in 2009); Human Settlement Sector Strategy Plan 2009-2014 (2009); National Housing Programme: Housing Assistance in Emergency Circumstances (2004).

⁴⁴ Tomlinson, M. 2006. From 'quantity' to 'quality': Restructuring South Africa's housing policy ten years after, *Development Planning Review*, pp. 85-100.

asserts that the fact that a high number of poor people are waiting to be provided with housing should not be used as a justification to reduce the quality and adequate standard of housing that the Constitution mandates.⁴⁵ The issue of reducing the standard of housing to accommodate many people is evidenced by most of the Reconstruction and Development Programmes (RDP) houses that government built and allocated to the poor beneficiaries have been structurally defective due to poor construction. Many of the houses are dilapidated, lack basic services, are unsustainable and posed as risks to the occupants.⁴⁶

3. Implementing the constitutional mandates of access to adequate housing

Provision of housing is becoming difficult and daunting because those who have been given constitutional responsibilities to implement the constitutional provisions mandating access to adequate housing are failing in all respects with the result that inadequate houses are being provided and sometimes nothing is provided.⁴⁷ Similarly, the implementation of the provision and delivery of adequate housing is a difficult issue because of financial constraints caused by corruption and the misuse of state resources. The poor and the poorest of the poor are the ones bearing the brunt of rampant housing corruption in South Africa. According to Byrnes, the implementation of adequate housing as part of social and economic rights affects the lives of many people in South Africa who are poor, vulnerable and disadvantaged.⁴⁸

In 1994, a White paper on Housing was issued containing the requisite proper standards of government's housing policy to accomplish the housing vision. Through building adequate housing, the government was aware it also has the responsibility to provide access to good health facilities and education. The notion of the 1994 White Paper was to provide access to residential structures that are permanent with access to sufficient water and sanitation facilities. Furthermore, the domestic energy supply forms part of the housing vision of establishing viable, social and economic integrated communities. The goal of the White Paper is to improve the lives of South Africans, especially that of poor people who cannot afford to access adequate housing for themselves.

⁴⁵ Leibbrandt, M. Woolard, I. Finn, A. and Argen, J. 2010, Trends in South African Income Distribution and Poverty Since the Fall of Apartheid' (2010) OECD Social Employment and Migration Working Papers No. 101 1-90 at pp. 13-68. Leibbrandt et al., argue that more and more people are unemployed, do not have access to basic necessities with the net result that the poorest of the poor are becoming worse-off, with inequality in all spheres of everyday existence being the order of the day.

⁴⁶ Mbonambi, G. 2012, RDP houses falling apart, *IOL News* 27 March 2012 available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/rdp-houses-falling-apart-1264406>. Accessed on 14 June 2018.

⁴⁷ Grant, E. 2007, Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa, *African Journal of International and Comparative Law*, pp.2-13.

⁴⁸ Byrnes, A. 2010. Second-Class Rights Yet Again? Economic, Social And Cultural Rights In The Report Of The National Human Rights Consultation, *UNSW Law Journal*, p. 193.

The government enacted the Housing Act 107 of 1997 to assign each sphere of government with powers to ensure that the housing right as entrenched in the Constitution is fulfilled and promoted.⁴⁹ The Housing Act of 1997 placed a duty on the national, provisional and local sphere of government to show preference for the poor people when fulfilling the right to adequate housing and to promote gender equity.⁵⁰ The Housing Act of 1997 facilitates the sustainable housing development process and regulates housing development in terms of section 11 and 12 of the Act. One of the objectives of the Housing Act was to put an end to the housing laws that were enforceable during the apartheid government in relation to the regulation and development of housing. The right to housing interacts and interrelates with the safety of the person and promotion of dignity.

In 2000, the government of South Africa in response to the constitutional provision that everyone has the right to access adequate housing, introduced the National Housing Code as a policy for the progressive realisation of housing rights. Moreover, the National Housing Code provides that the residential environment of the people should encourage access to educational facilities, health care amenities, social amenities and economic opportunities.⁵¹ The Constitution mandates the government to the commitment of providing all citizens and permanent residents of South Africa access to permanent residential structures that promote privacy, access to sanitation, a domestic energy supply and potable water.⁵² The parliament has enacted Housing Assistance in Emergency Housing Situations in terms of chapter 12 of the National Housing Code, to deal with situations where people need housing because of the occurrence of events beyond people's control. The local authority would required in terms of Chapter 13 of the National Housing Code to upgrade informal settlements through the Upgrading of Informal Settlements Programme by "providing secure tenure and access to basic services and housing."⁵³ The Upgrading of Informal Settlements Programme is aimed at "*bringing about social cohesion, stability and security in integrated developments and to create jobs and economic well-being for communities which did not previously have access to land and business services, formal housing and social and economic amenities.*"⁵⁴ Through the putting into practice of the provisions of the National Housing Code, most black people would benefit from the provision of houses by government.

Part B of *the National Housing Policy and Subsidy Programmes Scheme* was introduced to deal with the process of assisting in the upgrading of informal settlements, providing social and economic facilities, and housing assistance in case of emergency using Social Housing Programme and Institutional subsidies. These principle are contained in the 1994 White Paper on Housing to assist and support

⁴⁹ See sections 3, 7 and 9 of the Housing Act 107 of 1997.

⁵⁰ Sections 2(1)(a) and (e) of the Housing Act 107 of 1997.

⁵¹ Chapter 13: upgrading of informal settlements of National Housing Code 2004:3 available at <http://abahlali.org/files/Chapter%2013-final%20version%2019%20Oct%202004.pdf>. Accessed on 17 September 2018.

⁵² National Housing Policy and Subsidy Programmes (2010), p. 7.

⁵³ See Part B(2.1) of the National Housing Policy and Subsidy Programmes Scheme, 2009.

⁵⁴ Ibid.

poor households with basic services.⁵⁵ This legislation promotes the principle of legality by empowering South Africans to claim adequate housing from government and to approach the court to intervene where the government fails to provide adequate housing.⁵⁶

3.1 *The concept of adequate standard of housing*

According to Paglione, “*the right to housing is considered a component of the broader human right to an adequate standard of living.*”⁵⁷ Yitay said that the idea of adequate in the context of the right to housing refers to “*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities—all at reasonable cost.*”⁵⁸

In terms of section 39(1)(b) of the Constitution, the courts are mandated to consider international law when interpreting the right to adequate housing as part of the Bill of Rights.⁵⁹ South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the 12 of January 2015⁶⁰ and in the General Comment 4 of the United Nation Committee on Economic, Social and Cultural Rights of ICESCR recognised that “the right to housing should not be interpreted in a narrow or restrictive sense, equating it with, for example, the shelter provided by merely having a roof over one’s head or viewing shelter exclusively as a commodity. Rather, it should be seen as the right to live somewhere in security, peace and dignity.”⁶¹ According to article 11(1) of the ICESCR, the right to adequate housing requires continuous improvement of the living conditions. The interpretation to be adopted from ICESCR is that the right to housing does not only require the building of houses but places the duty on the state to continuously improve the living conditions.

⁵⁵ In terms National Housing Policy and Subsidy Programmes Scheme, basic services includes potable water and sanitation available at <http://policyresearch.limpopo.gov.za/bitstream/handle/123456789/1084/National%2520Housing%2520Policy%2520and%2520Subsidy%2520Programmes.pdf?sequence=1> Accessed on 17 September 2018.

⁵⁶ See section 165 of the Constitution.

⁵⁷ Paglione, G. 2006, Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing, *Human Rights Quarterly*, pp. 124-135. See also Mahanyel SM Budget speech given by Housing Minister Mahanyele SM, to the National Assembly, 6 May 1997. Mahanyele indicated that, “housing is about fulfilling basic human needs, the availability of land, and access to credit, affordability, basic services, economic growth, social development, and the environment.”

⁵⁸ Yitay, BA 2011. The critical analysis of the judicial enforcement of socio-economic rights in Ethiopia, pp. 33-34. See also Mignon, S. ‘Women and the Right to Adequate Housing’ (1998) 16(1) *Netherlands Quarterly of Human Rights*, pp. 152, 168.

⁵⁹ See section 39(1)(b) of the Constitution.

⁶⁰ *Ellen Nomsa Dladla and others v. City of Johannesburg and another*, Constitutional Court of South Africa, Case No: 124/2016 para. 9.

⁶¹ UN Committee on Economic, Social and Cultural Rights, General Comment 4 (1991): The right to adequate housing (Article 11(1) of the Covenant), para 1. Adopted at the Committee’s Sixth Session on 13 December 1991. UN Document E/1992/23 para. 7.

Similarly, the court has the discretion to consider foreign law when interpreting the Bill of Rights.⁶² The United Kingdom adopted the concept of “adequate standard of living” from the ICESCR which includes access to basic needs when providing houses to the homeless since 1976.⁶³ The right to an adequate standard of living as derived from article 11(1) of the ICESCR comprises of “adequate housing and continuous improvement of living conditions”, progressive realisation of the right to housing that is adequate should be achieved by providing new houses or continuously improving the existing houses.⁶⁴ In South Africa, the government focus on providing housing without continuously improving the living conditions of existing houses. Therefore, the concept of adequate housing should be advanced to include adequate housing which means a suitable house that promotes dignity and that occupiers find suitable to stay in irrespective of physical ability. Gómez and Thiele, argue that without adequate housing other rights may be in danger or obstructed. These include, among others, education, health, and privacy.⁶⁵ Adequate housing is a vital right that determines the enjoyment of other rights such as the right to privacy and education. The South African Human Rights Commission states that the right to adequate housing is one of the most important human rights that provides “*shelter from the elements, a place to eat, sleep, relax and raise a family.*”⁶⁶

Conway is of the view that inadequate housing may cause diseases.⁶⁷ Both Gómez and Thiele view inadequate housing not only as hazardous to the well-being of the occupiers but also as a threat to occupiers’ lives. In the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v The Federal Republic of Nigeria*, houses that are exposed to an unhealthy or hazardous environment violate the right to adequate housing in terms of article 14, 16 and 18 of the African Charter.

3.2 Implementing and enforcing right to access to adequate housing

Lack of finance or non-availability of resources make it difficult for the state to implement the right to a house that is adequate. Basic services and amenities are needed in a house to make living comfortable. However, if the occupier is unable to afford to pay for these services this means that the accommodation will be inadequate for comfortable habitation. Leibbrandt argues that unemployment is the reason why people do not manage to pay for access to basic necessities and their

⁶² See sections 39(1)(c) of the Constitution.

⁶³ See Equality and Human rights Commission at <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-economic-social>; and see Equality and Human Rights Commission 2016, ‘Socio-economic rights in the UK’, pp.15-28.

⁶⁴ Article 11(1) of the ICESCR.

⁶⁵ Gómez, M and Thiele, B. 2005. Housing Rights Are Human Rights, *Human Right*, pp.2-14.

⁶⁶ South African Human Right Commission ‘The right to adequate housing factsheet’ page 2 available on <https://www.sahrc.org.za/home/21/files/Fact%20Sheet%20on%20the%20right%20to%20adequate%20housing.pdf> accessed on 16 September 2018.

⁶⁷ Conway, J. 2000. Housing Policy, First Edition.

being treated as less human in society. Therefore, government should intervene.⁶⁸ Poor and jobless people are unable to provide for themselves because of the lack of financial means to meet the expenses of housing.⁶⁹ Baker and Beerdeem that the government should assist the poor people to access adequate housing by building adequate housing for the homeless and for those that do not have houses that are adequate in standard.⁷⁰ The government should assist poor people through service delivery. Nleya is of the view that service delivery is one of the “*central, real and symbolic parts of the actualisation of a meaningful life in poor areas.*”⁷¹

The Constitution in its preamble commits to improve the lot of those that were historically disadvantaged by the injustice of the apartheid regime. Section 26(2) of the Constitution requires the state to take reasonable legislative and other measures to achieve adequate housing within the availability of resources. All spheres of government in terms of section 2(1) of the Housing Act 107 of 1997, should prioritise the needs of the poor people when providing houses. To the contrary, poor people are being ignored and those that are privileged or through corruption are provided with adequate houses. Corruption plays a vital part in the allocation of houses and it has been alleged that some of the people own more than one Reconstruction and Development Programme (RDP) house and others sell RDP houses.⁷² Minister Lindiwe Sisulu said that since 1994, at least 3 411 RDP houses that were built to assist those that are homeless are being sold to private people by the beneficiaries within eight year after being built.⁷³ This behaviour of selling houses that are intended to assist those that are poor shows that houses are being provided to those that are not in need of them thereby straining housing resources. In order to discourage this sort of misbehaviour, it is crucial to explore the criminal and civil responsibilities of the perpetrators.⁷⁴

According to the former president of South Africa, the late Nelson Mandela, South Africa as a democratic country should comprehend democracy as the absence of inequality and the provision of all fundamental rights and freedom to all people.⁷⁵ Section 9 of the Constitution disallows all acts of unfair discrimination.⁷⁶

⁶⁸ Leibbrandt, pp. 13-68.

⁶⁹ Tshoose, CI. 2006, *Social Assistance: Legal reform to improve coverage and quality of life for the poor people in South Africa*, University of South Africa, pp. 55.

⁷⁰ Baker, E. and Beer, A. 2007. Developing a workable model of housing need: Applying geographical concepts and techniques to a problem of public policy, *Applied geography Journal*, 27, pp. 165-176.

⁷¹ Nleya, p.11.

⁷² Gqirana, T. 2015, Government seeks to discipline those selling RDP houses’ at Mail and Guardians on 08 June 2015 available at <https://mg.co.za/article/2015-06-08-govt-seeks-to-discipline-those-selling-rdp-houses>, accessed on 08 August 2018.

⁷³ Ibid.

⁷⁴ Mhlanga, T. 2018, RDP house buyers beware, available at <https://mg.co.za/article/2018-08-03-00-rdp-house-buyers-beware>, accessed 16 August 2018.

⁷⁵ Nelson Mandela's opening address on the occasion of the ANC's Bill of Rights Conference, Mandela Bill of Rights for a democratic South Africa, p. 12.

⁷⁶ As articulated in section 9 of the Constitution: “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair

To strengthen the prohibition of discrimination, the legislature enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in terms of section 9(4) of the Constitution to do away with social and economic inequality, particularly housing segregation, inequality and denial.

Langa ACJ in the case of *President of Republic of South Africa v Modderklip Boerdery (Pty) Ltd* declared that “confronted by intense competition for scarce resources... people are forced to live in the bleakest of circumstance.”⁷⁷ In this case the state failed to provide alternative accommodation to the Community of Gabon that occupied private land of the Modderklip Boerdery Pty Ltd. As a result, the Department of Agriculture and Land Affairs was required to compensate Modderklip for loss of use of land for a period that the community occupied the land. Taking into account section 2(1) of the Housing Act 107 of 1997, discrimination to prefer poor people is based on the notion of distribution of scarce resources to benefit and uplift those that have no access to adequate housing.⁷⁸ This discrimination emanates from the notion that government should achieve the right to adequate housing within the limits of available resources as provided in section 26(2) of the Constitution.⁷⁹

Carrying out and putting into practice the right to adequate housing does not only fulfil the constitutional requirements but it also improves the lives of the people who are unfortunate and cannot afford to build houses for themselves.⁸⁰

The definition of standard housing provided in terms of section 26(1) as interpreted in the case of *Grootboom case*,⁸¹ includes among others, availability of land, “provision of services such as water and sewage removal.”⁸² The court did not provide what constitutes the qualities of adequate housing and to what extent those qualities of adequate housing apply.⁸³ This means that the nature and the scope of adequate housing should be developed and be given a context. The reality on the ground is that most houses that people are being provided with by government do not last long, are dilapidated and cracked, while others fell apart which poses a threat to the rights and wellbeing of the occupiers and owners.⁸⁴ For example, in 2011, the people of Umlazi in Kwazulu Natal were provided with houses by government. Within months residents were afraid to live in these houses because the houses were

discrimination may be taken; (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection. National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

⁷⁷ *President of Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para. 49.

⁷⁸ Section 9(5) of the Constitution allows discrimination that is fair and justifiable.

⁷⁹ Section 26(2) of the Constitution.

⁸⁰ See Tshoose, p. 82.

⁸¹ *Grootboom case*.

⁸² *Grootboom case* para 35.

⁸³ See the *Grootboom Case*.

⁸⁴ Mbonambi.

defective and were likely to eventually collapse. This was a threat to the occupants' wellbeing.⁸⁵ Poor or inadequate houses infringe the rights of occupants' safety and protection against a harmful environment and their right to a peaceful environment.⁸⁶ The aim of the Constitution in promoting provision of social and economic rights such as adequate housing is to restore the dignity of the homeless and promote their wellbeing.⁸⁷ The provision of inadequate housing oversteps the right to dignity and poses a health risk to the dwellers.

Chenwi pointed out that the South African Human Rights Commission observed that Madibeng Local Municipality farmers in the North West Province were provided with houses that are poor in standard and without sanitation facilities.⁸⁸ A house that is not of adequate standard violates the right to adequate housing in terms of section 26(1) of the Constitution and is enforceable in terms of section 38 of the Constitution. J Yacoob in the *Grootboom* case set a precedent in that a basic service such as sewage removal which includes sanitation should be financed by government when housing is being provided to the homeless or people without adequate housing.⁸⁹ The safety and health of the public on a land is significant when considering whether a house is adequate in terms of the standard pronounced above.⁹⁰ The provision of adequate housing or socio-economic rights as whole should uplift the human dignity of the poor, vulnerable and disadvantaged.

In spite of the constitutional commitment to develop South Africans by way of providing houses to those that are without adequate houses, corruption in the public sector negatively affects the rate at which houses are being provided.⁹¹ Corruption in the public sector may be defined partly as the use of public resources available or intended for the implementation of section 26(1) of the constitution, namely, to provide houses to those in need, by certain individuals for personal or collective gains.

All spheres of governments ought to “*be loyal to the Constitution and provide effective, transparent, accountable and coherent government to the Republic as a whole.*”⁹² When implementing and enforcing social and economic rights such as access to adequate housing,⁹³ each sphere of government is distinct from others and exercises a distinct function in the implementation and enforcement of social and economic rights.⁹⁴ The principles of the rule of law, transparency, and separation of powers exist to ensure that the state funds and resources designed to be allocated

⁸⁵ Ibid.

⁸⁶ See section 24(a) of the Constitution.

⁸⁷ Byrnes, p.193.

⁸⁸ Chenwi, p.23.

⁸⁹ See *Grootboom* Case para 35.

⁹⁰ Ibid.

⁹¹ See Modimowabarwa, K. 2014, Exploring Challenges of Municipal Service Delivery in South Africa (1994-2013), *Africa's Public Service Delivery and Performance Review*, pp.90-104.

⁹² See Section 41(1)(b) of the Constitution.

⁹³ Ibid.

⁹⁴ See Section 41(1)(f) of the Constitution.

to alleviate poverty and provide houses are used as such.⁹⁵ The section of the population of South Africa that needs adequate housing is increasing on a daily basis and this has led to an increase in the numbers of people living in slums and shacks.⁹⁶

3.3 Socio-economic rights-tool for restoring human dignity

Socio-economic rights should be seen as rights that “give people access to certain basic needs (Resources, opportunities and services) necessary for human beings to lead a dignified life.”⁹⁷ In terms of section 39(1)(a) of the Constitution, the court is required when interpreting socio-economic rights as part of the Bill of Rights to promote human dignity. According to Mbezira, the implementation of social and economic rights may be used as an instrument to uplift the human dignity of the poor people.⁹⁸ Similarly, Liebenberg asserts that “*respect for human dignity requires respect of worth of the poor by marshalling state resources to redress the conditions that perpetuate their marginalisation.*”⁹⁹ The constitutional court in the *Grootboom* case was of the view that one of the fundamental values of the people is dignity which is denied to those who are without access to social and economic rights such as adequate housing.¹⁰⁰

Stain views the implementation of social and economic rights as a transformation process having the prospect of restoring or uplifting human dignity and respect for everyone.¹⁰¹ Everyone, including poor, vulnerable and disadvantaged people, has the right to approach the court for the enforcement of Socio-economic rights or alternatively complain to the South African Human Rights Commission.¹⁰² Both right to access to court and complaining to the South African Human Rights Commission regarding the implementation of socio-economic rights may promote service delivery and make the executive sphere of government aware of the lack of service.

Access to housing as part of socio-economic rights is recognised in the international human rights instruments as a mechanism to safeguard the well-being

⁹⁵ See Seleka, N. 2012, Unfinished RDP houses leave residents fuming, available at <https://www.sowetanlive.co.za/news/2012-06-20-unfinished-rdp-houses-leave-residents-fuming/>. Accessed 20/03/2018.

⁹⁶ South Africa: Informal settlements status- research series published by the Housing Development Agency available at http://www.thehda.co.za/uploads/files/HDA_Informal_settlements_status_South_Africa.pdf states that “According to the 2009 GHS, of the 1.2 million households currently living in shacks...”

⁹⁷ Khoza, p.19.

⁹⁸ Mbazira, C. 2007, Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies.

⁹⁹ Liebenberg, S. 2005. The value of Human Dignity in Interpreting Socio-economic rights, *South Africa Journal of Human Rights*, pp. 1-12.

¹⁰⁰ *Grootboom* case Para. 23.

¹⁰¹ Stain, T. 2013, Constitutional Socio-Economic Rights and International Law: You Are Not Alone, *Potchefstroom Electronic Law Journal*, pp. 16-26.

¹⁰² See sections 34 and 181(1)(b) of the Constitution.

and human dignity of the poor and homeless, according to Gómez and Thiele.¹⁰³ The provision of adequate housing does not only impact a person physically and socially but also provides security and safety so that the occupiers are not exposed to danger of domestic violence.¹⁰⁴ The right to an adequate house is linked to the protection and promotion of dignity as earlier mentioned, and one needs to be protected, respected and not be exposed to the risks of an inadequate house. Protection entails that human beings live a dignified life.¹⁰⁵

Nevertheless, Yitay agrees with Chenwi, but claims that the right to housing is more important than the right to food.¹⁰⁶ The right to adequate housing is linked to the protection and promotion of dignity as mentioned above and one needs, above all, to be protected, respected and not be exposed to risk. Protection goes hand in hand with the right to life and dignity in this study where the right to life is one of the vital rights in the Constitution.¹⁰⁷ Both the right to food and to housing are crucial, and the delivery of one might also require the other to be provided.¹⁰⁸ Socio-economic rights are based on the notion of ensuring that human beings live a dignified life.¹⁰⁹ That means one must be alive in order to claim social and economic rights as provided in the Constitution.¹¹⁰

Chenwi articulates that the right to adequate housing is a basic human right for the enjoyment of social, economic and cultural rights.¹¹¹ The right to adequate housing may be violated by evicting occupants of a house or making the house inadequate to occupy. In the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v The Federal Republic of Nigeria*,¹¹² the Nigerian military used a state-owned company for the production of oil in Ogoni area. People in Ogoni were forcefully evicted without proper consultation and others were physically injured, suffered emotional trauma and had no alternative accommodation.¹¹³ The production of oil led to the exploitation of the environment and destroyed the food supply for the Ogoni Community and the community was exposed to health risks. As indicated by the Court, Nigeria violated the right to adequate housing and went further to define the right to housing as a right that promotes privacy, peace, safety, best physical and mental health. The promotion of privacy, peace, safety, best physical and mental health altogether refers to human dignity. Eviction does not only violate the dignity of the homeless and results in their

¹⁰³ Gómez and Thiele.

¹⁰⁴ Ibid.

¹⁰⁵ Khoza.

¹⁰⁶ Yitay.

¹⁰⁷ See section 11 of the Constitution and *S v Makwanyane* 1995 (3) SA 391.

¹⁰⁸ *Grootboom* case para. 35.

¹⁰⁹ Khoza.

¹¹⁰ See section 26 and 27 of the Constitution.

¹¹¹ Chenwi, L. 2013, The right to adequate housing in the African regional human rights system: Convergence or divergence between the African Commission and South African approaches, *Law, Democracy & Development*, pp. 342-353.

¹¹² *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v The Federal Republic of Nigeria* 2001(155) 96 para. 60.

¹¹³ See Articles 14, 16 and 18(1) of the African Charter on Human Rights.

searching for “a place where they and their families can rest their heads...society as a whole is demeaned when government action intensifies rather than mitigates their marginalisation.”¹¹⁴

The government has the responsibility to protect the citizen against any violation of their rights as provided in the provision of the constitution.¹¹⁵ The government of Nigeria failed to act positively in the protection of the right to adequate housing. In South Africa, the government is duty bound according to section 7(1) of the Constitution to protect and promote the Bill of Rights. The right to adequate housing calls on the state in South Africa not to take away the houses or destroy the houses of the people without the order of the court.¹¹⁶ The progressive realisation commitment by the state ensures that the government does not violate section 26(1) as provided in the Constitution’s “right to access to adequate housing.” The state is under obligation to act positively and to protect homeless or vulnerable people against eviction.¹¹⁷ The state has a duty to assist people who cannot afford to support themselves with social assistance and decent accommodation.¹¹⁸ The duties of the state with regard to adequate housing may be categorised into four, namely: duty to respect, protect, promote and fulfil.¹¹⁹ The duty to respect requires the state not to take away socio-economic rights arbitrarily from people or make it hard for those people to obtain those rights.¹²⁰

With regard to the constitutional duty to respect, the state is prohibited to enact laws that arbitrarily violate socio-economic rights.¹²¹ In the case of *Jafta v Schoeman*,¹²² an immovable property was attached for the settlement of the debts. However, in this case, it was found that the law allowed a house to be sold for the purpose of settling a small civil debt. This would lead to people being left homeless, and thus violating the duty to respect section 26(1) of the Constitution. With regards to the duty to protect, the state should protect those that are vulnerable or disadvantaged through laws, against violation of rights to housing by those that are powerful like landlords, banks employers, auctioneers or insurance companies.¹²³ The duty to promote calls for awareness of such rights by the state to the people and to respect the rights to have access to houses that are adequate. The duty to fulfil is supported by section 26(2) that reasonable measures must be taken to fulfil the rights. In the case of *Minister of Public Works v. Kyalami Ridge Environmental*

¹¹⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para. 8.

¹¹⁵ See section 7(2) of the Constitution.

¹¹⁶ See section 26(3) of the Constitution.

¹¹⁷ *Cape Killarney Property Investment v. Mahamba* 2000 (2) SA 67 (C) para 11 and further see *Ekurhuleni Metro politan Municipality & another v. Various Occupiers, Eden Park Extension 5* [2014] 1 SA 386 (SCA) para. 19.

¹¹⁸ Section 27(1)(c) of Constitution.

¹¹⁹ See section 7(2) of the Constitution.

¹²⁰ Khoza.

¹²¹ See sections 26(3), 27(3) and 29(3)(a) of the Constitution.

¹²² *Jafta v. Schoeman* 2005 (2) SA 140 (CC).

¹²³ The National Credit Act 34 of 2005 as one of the laws to protect consumers aims and promote responsible credit practice.

Association,¹²⁴ the government established a transit camp for house victims of floods on the state-owned land. When government was challenged in this case it relied on the view that it has a constitutional obligation to support and protect people in disaster situations. The constitutional court held that the decision of government to assist vulnerable people during the disaster was reasonable and supported by the constitutional duty.

3.4 Realisation of adequate housing in a progressive manner

Janka says that the implementation of the right to adequate housing is difficult because it “*does not mean the same thing for everyone*.”¹²⁵ This means that the needs of the people are different when it relates to housing comfort and habitability. But basic things in the house such as access to sanitation, sufficient water, ventilation are inevitable; hence, for a house to be adequate, these services are imperative. On the other hand, Conway argues that the implementation and enforcement of adequate housing is difficult because of the involvement of economic and financial means.¹²⁶ The courts are suited to instruct the executive sphere of government on how implementation should be done and make an order to maintain supervisory jurisdiction.¹²⁷

In the words of Teymur, by asserting that “the cost of housing is too high is equivalent to saying” that providing people with housing is worth nothing”.¹²⁸ The cost of adequate housing should not be used to encroach upon section 26(1) of the Constitution. The Constitution mandates government to provide houses that are “economically, fiscally, socially and financially affordable and sustainable” for everyone in terms of section 2(1)(c)(ii) of the Housing Act 107 of 1997.

Radebe argues that section 26(1)(2) of the Constitution requires substantive content.¹²⁹ According to Radebe, it is clear that sections 26(1)(2) do not have the practical content to which the people may claim to be provided with. Radebe continues by saying that “the court has failed to develop the nature and scope of the positive duties imposed by the right to access to adequate housing.”¹³⁰ The court has in a number of cases dealt with the issues of the concept of adequate housing and

¹²⁴ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

¹²⁵ Janka, DG. 2007, *The Realization of the Right to Housing in Ethiopia*, p. 10.

¹²⁶ Conway.

¹²⁷ Davies, DM. 2006, Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’? *South African Journal on Human Rights*, pp.304-314. Davies explains the reasons for the reluctance of the Constitutional Court to formulate policy: “In general the Constitutional Court has been reluctant to impose additional policy burdens on government, notwithstanding the imperative to give some content to these rights as contained in the text of the Constitution and see *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) para. 8.

¹²⁸ Teymur, N. Markus, TA. and Woolley, T. (Eds), 1998. *Rehumanizing Housing*, Butterworths, London, Boston, Durban, Singapore, Sydney, Toronto and Wellington, p. 137.

¹²⁹ Radebe.

¹³⁰ *Ibid*.

included basic services in providing adequate housing.¹³¹ The nature and scope should refer to the essential components of the right to adequate housing and the extent to which the right to adequate housing is enforceable and claimable.

The right to housing does not only place the government under the responsibility to provide adequate housing alone, individuals without adequate houses are also responsible to provide houses that are adequate for themselves. If the state does not have resources or sufficient resources to fully achieve the rights, it must implement strategies to prioritise people who are vulnerable.¹³² Due to government's limited resources, the government should encourage financial freedom and increase employment.¹³³ By so doing the government will be reducing the number of people who are waiting to be provided with adequate housing by government as they will be in a position to provide for themselves.

Liebenberg addresses the issue of allocation of resources by saying that the government must distribute the resources in a manner that is equal and to all that need assistance. On the contrary, the view of Liebenberg should not apply when coming to the attainment of adequate housing as a constitutional right. If the view of Liebenberg was to be used in the allocation of available resources, the houses built might end up being inadequate in the sense that their standard would have been subject to available resources and may compromise the adequateness of housing as required by section 26(1) of the Constitution.

Gabru avers that people who cannot afford adequate housing should claim them from the state.¹³⁴ Everyone is constitutionally protected to claim the right to adequate housing in accordance with section 7(1) read together with section 26(1) of the Constitution. According to Mbazira, the court commits to realising the constitutional vision of transformation by safeguarding the reasonable distribution of resources aimed to improve the life of poor people.¹³⁵

In the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and Others*, the city of Johannesburg applied for an eviction order of the dwellers in a building located in the inner city because the building was not safe and healthy for occupancy. The Johannesburg High Court denied the granting of an eviction order and ordered the "city to remedy its housing programme which was found to be inadequate".¹³⁶ The order was opposed by the Supreme Court of Appeal where an eviction order was granted on condition that alternative accommodation is provided to anyone who might end up being homeless because of the enforcement of the eviction order. The court held that

¹³¹ *Grootboom* Case.

¹³² Committee on Economic, Social and Cultural Rights, General Comment No. 3 (5th session), 1990, UN doc. E/1991/23, The nature of States parties' obligations (article 2(1)) of the ICESCR.

¹³³ According to Consolidation Subsidy Programme, one of the requirements for housing subsidy is that the combined monthly income of the household must not exceed R3 500.

¹³⁴ Gabru.

¹³⁵ Mbazira, C. 2009, *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice*, pp. 17-31.

¹³⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008(3)SA 208 20 (CC) Para 2. (*Occupiers of 51 Olivia Road* case).

the city is constitutionally duty bound to provide access to adequate housing however, people cannot raise demands that are unreasonable and people who are entitled to housing are those that are without shelter.¹³⁷ The case proves that the government of South Africa has a positive obligation to respect the right to housing.

In the view of Liebenberg as well as Gabru, the available resources should be distributed to the poor.¹³⁸ The view of Gabru is significant because the South African government has limited available resources and cannot cater for all the people, and as such, the resources must be distributed with priority to those that need them the most. According to the view of both Liebenberg and Gabru, the government should provide adequate housing for those that are poor and cannot afford to build adequate houses for themselves. The distribution of the available resources should not affect the standard of housing that is required in terms of section 26(1) of the Constitution. It is noteworthy that adequate housing demands that a house must be safe and conform to the prerequisites requests required in the case of *Grootboom*.¹³⁹

In the *Grootboom* case, the Constitutional court held that merely building a house or providing accommodation does not constitute the right to adequate housing.¹⁴⁰ This is so because adequate housing requires land where a house is going to be built, sufficient water, and sewerage services. The case of *Grootboom* encompasses the main definition of adequate housing and that socio-economic rights are interdependent and interwoven.¹⁴¹ Hence, the socio-economic rights and other rights in the Bill of Rights jointly support each other, like the right to housing includes provision of land and basic needs.¹⁴²

In the case of *Soobramoney v. Minister of Health (Kwazulu-Natal)*,¹⁴³ the court was of the view that where the resources are too limited to provide socio-economic rights, the government must prove that it is acting with *bona fide* in utilising the resources to realise the achievement of such socio-economic rights.¹⁴⁴ As a result, the court wanted the government to show that it has the intention of realising the right. A point worth noting is that the limitation of the resources should not lower the standard that a right to housing provides. The view in the *Soobramoney*'s case is important because the standard of housing that the Constitution requires aims to ensure that implementation of the right to housing does not pose a threat to the safety of the people. This means that the houses that government are required to provide should promote constitutional values and dignity.

¹³⁷ *Occupiers of 51 Olivia Road* case para. 38.

¹³⁸ See Liebenberg (note 12 above) 160.

¹³⁹ *Grootboom* case para. 35.

¹⁴⁰ *Grootboom* case para. 41.

¹⁴¹ *Grootboom* case para. 35.

¹⁴² *Grootboom* case para. 23.

¹⁴³ *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998(1) SA 765 (CC).

¹⁴⁴ See Committee on Economic, Social and Cultural Rights, General Comment No. 3 (5th session), 1990, UN doc. E/1991/23, The nature of States parties' obligations (article 2(1)) of the ICESCR.

In the case of *Minister of Public Works v Kyalami Ridge Environmental Association*,¹⁴⁵ the vulnerable group who were the victims of floods were given temporary accommodation in a camp on Leeuwkop prison farm. In situations like this, during an emergency, not limited to natural disasters, the government should provide people with temporary housing which may not conform to the standard of adequate housing.¹⁴⁶ When compromising the standard of living that is required by section 26(1) of the Constitution, it should be done only in situations when accommodation is required urgently as a result of uncontrollable events. However, “[n]o one should be denied access to water and sanitation because of their housing or land status.”¹⁴⁷ Water is a source of life, and people must be given water and sanitation¹⁴⁸. As mentioned above, the right to adequate housing should not pose harm to the people, and the environment must not impose health risks. That is also why Chenwi highlighted sanitation in the Grootboom case as a basic need that cannot be denied to any person. All these basic amenities compliment physical structure or buildings to make them adequate and appropriate for dwelling.

4. The right to access to adequate housing under international law

The right to housing is protected and guaranteed by various international human rights instruments and the right is of a legally binding nature and in order to ensure the implementation of this right, it is necessary to effectively use the domestic and international legal remedies to challenge any violations of the right to adequate housing.¹⁴⁹

South Africa is a democratic country which makes the international law one of its pillars of democracy. South Africa embraces international law broadly and, as a matter of fact, treaties and conventions which are part and parcel of the sources of international law become part of the South African law by ratification; hence there is a strong link between South African law and international law.¹⁵⁰

There is constitutional support for this position in terms of section 231(2) of the South African Constitution. An international agreement or treaty binds the country only after it has been approved the resolutions of both the National Assembly and the National Council of Provinces. Section 231(3) provides that an international agreement is of a technical nature entered into by the national executive, and binds the Republic. More significantly, section 231(4) provides that

¹⁴⁵ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) (Kyalami Case).

¹⁴⁶ Kyalami.

¹⁴⁷ See Chenwi, L. 2010, Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations CESCR and the South African Constitutional Court’ Research paper written for Studies in Poverty and Inequality Institute, pp.11-15.

¹⁴⁸ Ibid.

¹⁴⁹ Gailiūtė D, 2012, Right to Housing in the Jurisprudence of the European Committee of Social Rights, *SociETAL Studies*, pp. 1605-1622.

¹⁵⁰ Dougard J, 2014, *International law: A South African Perspective*, 4th edition Juta and Co (Pty), Ltd. Cape Town, p. 25.

any international agreement becomes law in the Republic when it is enacted into law by national legislation. Similarly, section 39 of the Constitution provides that courts have the constitutional mandate to consider international and foreign laws and apply them when there is the need and where applicable.

Therefore, the right to housing was recognised under the Universal Declaration of Human Rights (UDHR) where in terms of section 25(1) the UDHR provides for the right to an adequate standard of living which speaks to the issue that by merely providing access to housing is not enough, but that the standard of the house must ensure that those who reside in the house must have all amenities that make their standard of living comfortable, well secured in a peaceful and dignified environment. The UDHR is the first international human rights instrument that recognised the right to adequate housing. Therefore, irrespective of economic status, age, status in the society, being disabled or not, everyone is entitled to access to adequate housing. This entails that the adequate material standards of living are equally provided, fulfilled, realised and fully guaranteed. Over and above, the significance of emphasis of adequate housing is to stress that by providing a temporary makeshift shelter where there is absence or lack of security, peace, and dignity by the occupants would be contrary to section 11(1) and as such inadequate for human dwelling.

However, the core human right treaty that is binding and enforceable regarding the right to adequate housing is the ICESCR. The ICESCR is the primary interpretative instrument of the United Nation when it comes to the interpretation of the socio-economic right.¹⁵¹ According to Kucs et al., (2008), “recent developments in the international human rights law and also the jurisprudence of regional and national human rights bodies show that social and economic rights, including the right to housing, are receiving greater recognition. They are seen as an integral part of economic, social and cultural rights within the UN, European, Inter-American, and African human rights instruments.” The member states to the ICESCR are required and enjoined to take reasonable steps to safeguard the achievement of the progressive realisation of the social, economic and cultural rights.¹⁵² In order to achieve the progressive realisation of socio-economic rights, the states are enjoined to adopt or enact laws to regulate the implementation and enforcement of socio-economic rights. According to Gailiūtė (2012), “the right to housing is no doubt one of the most crucial social rights closely connected to the right to life and other civil, political and economic, social rights and freedoms. The right to housing secures social inclusion and integration of individuals into society and contributes to the abolishment of socio-economic inequalities.”¹⁵³ Against this backdrop, the executive sphere of government are expected to enact and implement policies, allocate budgets, assign programmes and introduce measures for the implementation of

¹⁵¹ Awasthi, SK and Katoria, 2005, *Law Relating to Protection of Human Rights 2ed*, Orient Publishing Company, p. 62.

¹⁵² *Article 2(1) of the International Covenant on Economic, Social and Cultural Rights 1976*.

¹⁵³ Gailiūtė D, 2012, Right to Housing in the Jurisprudence of the European Committee of Social Rights, *SociETAL Studies*, pp. 1605-1622.

socio-economic rights in accordance with legislation.¹⁵⁴ There is broad approval by the member states of the UN that each member must fulfil the obligation to fulfil the right to adequate housing in conformity with the right to an adequate standard of living set in article 11(1) of the ICESCR which includes adequate housing and continuous improvement of living conditions.¹⁵⁵ Article 11(1) is broad and holistic, it does not envisage just a shelter but a house that is conducive for human habitat and thus consists of all basic socio-economic amenities, facilities, services and materials that make for full comfort in and outside the house and the premises for both able and vulnerable people. Sadly, the situation of housing and its environment are dire in South Africa because housing is still inadequate. Houses that have been provided by the government did not meet the standards set in article 11(1) of the ICESCR; hence people, particularly the indigent and poor, continue to live in squalor, informal settlements, and dilapidated shelters, that is, low standard, inadequate housing.

The Committee on Economic, Social and Cultural Rights (CESCRs) is the United Nations' body of independent experts that effectively monitors the implementation of the ICESCR by its member states. The CESCR has clarified the state's obligations and the content of the right to housing principle/policy in its General Comments 4, which provides for the right to adequate housing, and 7, on the right not to be forcefully ejected from a house. It makes concluding observations on state reports by emphatically stating that the states have obligations in relation to the right to adequate housing, namely, to respect, to protect, to promote and to fulfill.¹⁵⁶

What is remarkable and encouraging about the CESCR is that individuals have the opportunity are able to complain about the violation of their rights in an international arena, bringing real meaning to the rights contained in the ICESCR, namely, the violation of the right to adequate housing. The complaints are usually investigated and verified by the UN Special Rapporteur on Adequate Housing who reports back to the CESCR for effective intervention.

The Convention on the Rights of the Child requires the states parties to assist the parents of the children with housing considering the vulnerability.¹⁵⁷ The right to be assisted with housing requires one not to have or be in the position of having adequate housing. In the context and content of the Convention on the Rights

¹⁵⁴ Byrnes A, 2010, Second-Class Rights Yet Again? Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation, *UNSW Law Journal*, p. 202.

¹⁵⁵ See Universal Declaration on Human Rights 1948 at Article 22 – 26; the Convention on the Elimination of All Forms of Discrimination against Women 1979 at Article 3 &10-14; Rights of the Child 1989 at Article 4,6(2), 19, 20, 24, 26-29 &31 and there are other significant treaties such as Convention on the International Labour Organization; the United Nations Educational Scientific and Cultural Organization; the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; the Convention on the Elimination of All Forms of Discrimination against Women of 1980 and the Convention on the Rights of Persons with Disabilities of 2007.

¹⁵⁶ Kucs A, Sedlova Z, Pierhurova L, 2008, The Right to Housing: International, Regional and National Perspectives. *The Right to Housing: International, European and National Perspectives*, pp.101-123.

¹⁵⁷ Articles 24(2)(c) and 27 of the Convention on the Rights of the Child.

of the Child, the state should assist parents that are vulnerable, poor and disadvantaged to provide housing for their children. The state should advance appropriate measures to ensure that people enjoy adequate living conditions.¹⁵⁸ The following criteria define the existence of safe and adequate house as set by the United Nation Committee on Economic, Social and Cultural Rights:

- The occupiers of the house should have access to facilities essential for health, security, comfort and nutrition;
- The cost of housing should not compromise the satisfaction of basic needs;
- The houses should have adequate space, promote privacy and freedom; and
- The occupiers should be protected against eviction.¹⁵⁹

An adequate standard of housing should refer to the standard that promotes human rights and freedom. The occupiers should enjoy the right to safety and security of the state against unlawful eviction. In order for a house to be enjoyable to the occupiers, it should be in close proximity to health and safety facilities. Furthermore, the occupiers should have access to basic services such as nutrition and socio-economic amenities.

5. Comparative insights on the right to access to adequate housing

The right to access adequate housing entails that the government should provide houses or adequate accommodation to poor, disadvantaged and vulnerable people who lack adequate housing or live in an overcrowded environment. The test to determine who qualifies to claim adequate housing from government differs in the United Kingdom and South Africa. In South Africa, whether a person became homeless intentionally or not does not affect the right to claim housing assistance from the government. Rural-urban migration increases the number of homeless people in urban areas as people intentionally or due to poverty are forced to relocate to squatter camps for easy access to jobs in most South African cities.¹⁶⁰ In the United Kingdom, a person who intentionally becomes homeless is disqualified from claiming access to accommodation or housing from the government. The local authorities, before allocating a house to a homeless person or person without adequate housing, inquire about for the reason for the homeless state of the applicant.

In order for one to be provided with adequate housing, an application must be made to the relevant authorities.¹⁶¹ After the application has been received by the

¹⁵⁸ See Articles 5(e)(iii) and 7 of the Convention on the Elimination of All Forms of Racial Discrimination, Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 24(2)(c) and 27 of the Convention on the Rights of the Child and Article 28 of the Convention on the Rights of Persons with Disabilities.

¹⁵⁹ General Comment No. 4, para. 8 of the Committee on Economic, Social and Cultural Rights, 1991.

¹⁶⁰ Tomlinson R, 2017, *Urbanization in post-apartheid South Africa*, Routledge, pp. 8-9.

¹⁶¹ In South Africa, an application must be directed to the municipality where an applicant resides. In the United Kingdom, an application should be directed to the local authority within the district where an applicant resides.

relevant local authority in the United Kingdom, temporary accommodation will be provided to the applicant while an inquiry is being conducted to ascertain the eligibility of the applicant for permanent accommodation. In South Africa, the local authority in conjunction with the provincial and national departments provide temporary accommodation to the applicant in the state of natural disaster, emergency and/or where the court ordered such accommodation to be provided. There are many poor South Africans who for no fault of their own are homeless, without shelter and so it is the constitutional obligation of the government to provide adequate housing regardless of their situations.¹⁶² The right to access adequate housing forms part of the socio-economic rights of the people which entails that the people should have access to adequate housing, health care service, food and sufficient water.

In the United Kingdom, the Parliament's Joint Committee on Human Rights adopted a Bill of Rights that places an obligation on the State to enforce the right to adequate housing.¹⁶³ In Australia, the Homelessness Bill of 2013 was introduced to protect the homeless person and guarantee the right to claim adequate housing from the government. The influence of constitutional protection of the right to adequate housing was the result of an increasing number of homeless people in Australia and the United Kingdom.¹⁶⁴ Clause 7 of the Draft Homelessness Bill states that all persons have the right to access to adequate housing. Where a person is guaranteed a right, he or she should be allowed to challenge any natural or juristic person who infringes the right.

The government of South Africa is bound by the judicial precedent in the case of *Grootboom* and section 26(1) of the Constitution that the government will only provide houses subject to availability of resources. In South Africa, everyone has a right to claim adequate housing from the government and the government need to state whether it has the resources to achieve adequate housing or not. Therefore, the government is not immune from being challenged by poor, disadvantaged and vulnerable people who need to be provided with houses. The right to adequate housing is a constitutionally protected right that requires the state organs to promote, fulfil and protect.

The United Kingdom Parliament's Joint Committee on Human Rights in 2004 and 2008¹⁶⁵ proposed the adoption of the Bill of Rights that define socio-economic rights as:

- legally enforceable rights and justified;
- an order that directs the State policies; and

¹⁶² See Hirschowitz 2000, 'Statistics South Africa.

¹⁶³ Joint Committee on Human Rights, The International Covenant on Economic, Social and Cultural Rights, House of Lords Paper 183, House of Commons Paper No 1188, Session 2003–04 (2004) and Joint Committee on Human Rights, A Bill of Rights for the UNITED KINGDOM? House of Lords Paper 165, House of Commons Paper No 150, Session 2007-08 (2008) chapter 5.

¹⁶⁴ Chamberlain C and MacKenzie D, 2003, Counting the Homeless: 2001', ABS Catalogue No 2050.0.

¹⁶⁵ Joint Committee on Human Rights, A Bill of Rights for the United Kingdom?, House of Lords Paper 165, House of Commons Paper No 150, Session 2007-08, 2008, chapter 5.

- duty of State to achieve progressive realization with a judiciary exercising a limited role in the enforcement of socio-economic rights.¹⁶⁶

The Bill of Rights is intended to place an obligation on the state to achieve, implement and realise the socio-economic rights such as access to adequate housing. The Bill of Rights further directs the state to implement policies to provide for the realisation of the right to adequate housing. The intention of the United Kingdom Parliament's Joint Committee on Human Rights is to impose a duty on the state to direct policies for the purpose of progressive realisation and achievement of socio-economic rights such as the right to access adequate housing.¹⁶⁷ Therefore, the proposal of the United Kingdom Parliament's Joint Committee on Human Rights intended that the court should be allowed to enforce the socio-economic rights indirectly. The court is a watchdog that ensures that the resources are allocated to achieve the progressive realisation of adequate housing.¹⁶⁸ In South Africa, the principle of checks and balances places an obligation on the spheres of government to oversee that duties imposed by the Constitution are being performed. Even though the court should not allocate houses it should serve as watchdog to ensure that houses are provided for the poor, disadvantaged and vulnerable.

With regard to the realisation of adequate housing, the United Kingdom enacted the Housing Act of 1996, Homelessness Act 2002 and Localism Act 2011 to progressively realise the right to access adequate housing. The local authority is empowered in terms of Part 6 of the Housing Act 1996 to maintain housing registration and have an allocation scheme in place to set the procedure to be followed in the allocation of social housing or accommodation.¹⁶⁹ The allocation scheme refers to the systematic plan or arrangement to achieve the allocation of housing in terms of section 166A of the Housing Act 1996. In terms of section 166A of the Housing Act 1996, the housing scheme should provide preferential treatment to poor, vulnerable and disadvantaged people. In South Africa every municipality appoints an official responsible for the allocation of housing (local authority) who reports to an official within the municipality who then allocates housing to the poor, vulnerable and disadvantaged members of the community. The government official within the municipality should also have an allocation scheme to cater for the preferential treatment of poor, disadvantaged and vulnerable people. In the United Kingdom, in terms of section 160ZA of the Housing Act 1996, the local authority should allocate houses to eligible and qualifying persons.¹⁷⁰ Part 6 of the Housing Act of 1996 as amended by Sections 145-147 of the Localism Act 2011 provides that the local authority are duty-bound to allocate accommodation to homeless persons as per allocation scheme.

¹⁶⁶ Ibid.

¹⁶⁷ Byrnes A, 2010, Second-Class Rights Yet Again? Economic, Social And Cultural Rights In The Report Of The National Human Rights Consultation, *UNSW Law Journal*, p. 206.

¹⁶⁸ McRae R. and Nicholson D., 2004, No place like Home: Homelessness in Australia and the Right to Adequate Housing, *Australian Journal of Human Rights*, p. 3.

¹⁶⁹ Section 166A of the Housing Act 1996.

¹⁷⁰ Section 160ZA(6) of the Housing Act 1996.

The right to adequate housing is enforced and protected by the local authority in the United Kingdom by allocating and providing housing to the homeless or those that are vulnerable to homelessness.¹⁷¹ The local authority conducts an inquiry to establish whether an applicant for housing assistance is eligible.¹⁷² An inquiry is based on the question of whether there is a reasonable belief that a person is homeless or threatens to become homeless. If the first question is satisfied that indeed a person is homeless or threatens to become homeless, the local authority may provide temporary accommodation after assessing the needs of the homeless person.¹⁷³ Alternatively, the local authority should secure temporary accommodation for the applicant until permanent accommodation is available to occupy.¹⁷⁴

The method of using the local authority to inquire as to whether a person is indeed homeless and is eligible to be assisted with housing helps to ensure that the resources are distributed to those that are in need. In South Africa, the RDP house is provided without proper inquiry as to whether a person applying for housing is indeed homeless. Failure to conduct such inquiry properly in South Africa is evidenced by people owning more than one RDP house and others selling RDP houses they have been provided with.¹⁷⁵ These trends have a potential effect on a government mandate to provide houses to people in need.

In the case of *R (ZH and CN) v London Borough of Newham and London Borough of Lewisham*, ZH and his mother moved from Liverpool to London.¹⁷⁶ ZH applied for homelessness assistance and the Newham borough provided temporary accommodation in terms of section 188(1) pending section 184 of the Housing Act 1996 on a private property licensed to be used for homeless accommodation for a period 28 days.¹⁷⁷ After 28 days, ZH's mother was ordered to leave the accommodation on the ground that she became homeless intentionally without a court order. The family challenged the eviction. From the judicial precedent of *Mohammed v Manek and Royal Borough of Kensington and Chelsea*, the court held that accommodation should be provided to the applicant pending the inquiry as to whether he is eligible for assistance.¹⁷⁸ Therefore, it is obligatory that the local authority, pending the inquiry, should provide temporary accommodation to the applicant.

In terms of section 26(3) of the Constitution, an order of the court must be issued for eviction to be carried out legally. The right to access to adequate housing places a positive obligation on the state to ensure that people are protected against

¹⁷¹ Ibid, section 183(1).

¹⁷² Ibid, section 184(1).

¹⁷³ Ibid, section 190(4).

¹⁷⁴ Ibid section 190(1) & (2).

¹⁷⁵ Lewis A, 2015, The RDP houses for sale scandal, available at <https://www.iol.co.za/news/crime-courts/the-rdp-houses-for-sale-scandal-1831598> Accessed on 21 March 2018.

¹⁷⁶ *R (ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UNITED KINGDOMSC, p. 62.

¹⁷⁷ Section 130 of the Social Security Contributions and Benefits Act 1992.

¹⁷⁸ *Mohammed v. Manek and Royal Borough of Kensington and Chelsea* (1995) 27 HLR p. 439.

unlawful eviction and infringement of enjoyment of adequate housing. For eviction to be carried out lawfully, a court order must be issued after the court has considered the interests of the occupier and of the landowner or landlord. In the case of *Dwele v Phalatse and others*,¹⁷⁹ the court held that an order of eviction be issued where there is no valid defence and it is just and equitable in the eyes of the court. Temporary accommodation is mostly provided in the case where poor, disadvantaged and vulnerable people are involved.¹⁸⁰

In South Africa, section 3 of the Protection from Eviction Act of 1977 protects applicants provided with temporary accommodation against eviction without a court order.¹⁸¹ In terms of section 5 of the Protection from Eviction Act 1977, the applicants should be given eviction notice within a reasonable time. In above-mentioned case of *R (ZH and CN) v. London Borough of Newham and London Borough of Lewisham*, ZH and his mother argued that the local authority should have notified them within a reasonable time of the intention to evict the former.¹⁸² ZH and his mother exercised their powers as empowered by the Supreme Court in the case of *Manchester CC v. Pinnock*¹⁸³ where it was held that occupiers of temporary or permanent accommodation have the power to challenge an eviction order under Article 8 of the ECHR against public officials.¹⁸⁴ The Homelessness Act of 2002 is against any action that might result in the loss of accommodation either intentionally or deliberately.

In the case of *Fazia Ali v. the United Kingdom*,¹⁸⁵ the applicant, a British national, was a homeless mother of two young children who applied for accommodation in terms of Part VII of the Housing Act 1996. The European Court of Human Rights found that the applicant's right to accommodation is regarded as civil rights in terms of Article 6 of the European Convention of Human Rights. The court ordered that the rights of the applicant be protected and that the British government is under obligation in terms of the Homelessness Act to provide the homeless people with adequate housing.

Elsewhere, in France, the French parliament, in 2007 adopted a law called *Droit au Logement Opposable* law in order for the effective enforcement of housing rights.¹⁸⁶ The *Droit au Logement Opposable* law was aimed at putting an end to homelessness and housing exclusion. The law placed an obligation on the state to ensure that there is access to housing to all without considering the intention behind being homeless. The adoption of the *Droit au Logement Opposable* law was

¹⁷⁹ *Dwele v. Phalatse and others* (11112/15) [2017] ZAGPJHC 146 (7 Jun 2017).

¹⁸⁰ *Grootboom case*.

¹⁸¹ Section 3 of the Protection from Eviction Act 1977.

¹⁸² *Hounslow LBC v. Powell* [2011] UNITED KINGDOMSC 8; *Leeds CC v. Hall* [2011] 2 AC 18; *Birmingham CC v. Frisby* [2011] HLR 23.

¹⁸³ *Manchester CC v. Pinnock* [2010] UNITED KINGDOMSC 45; [2011] 2 AC 104; [2011] HLR 7.

¹⁸⁴ Article 8(1) and 8(2) of the ECHR requires that the public authority should not interfere with the right of the society unless is necessary for accordance with a democratic society.

¹⁸⁵ *Fazia Ali v. the United Kingdom* (App. n° 40378/10) [20.10.2015].

¹⁸⁶ *Droit au Logement Opposable*, when translated to English refers to the enforcement of the right to housing.

influenced by the High Committee on Housing for the Disadvantaged to reduce a large number of homeless people. The Droit au Logement Opposable law made a provision that the applicant may take the local government to court if within 3 to 6 months, it failed to provide the applicant with housing or an accommodation offer. In the case of *Tchokontio v. France*, the French government violated the Tchokontio's right to housing by failing to rehouse the family which is considered a priority under the Droit au Logement Opposable law.¹⁸⁷

In the United Kingdom, except Ireland progressively realise the right to housing. Ireland has failed to implement measures that ensure that local authority provides the homeless with housing.¹⁸⁸ The European Committee of Social Rights found that Ireland violated Article 16 of the Revised Social Charter.¹⁸⁹ The Revised Social Charter ensures that families can access housing.¹⁹⁰ The European Convention of Human Rights requires the member state to engage in activities that will ensure that a human right is promoted and protected. The right to housing should be provided to people irrespective of their social background as long as the people are homeless.

6. Conclusion

This article gives content to what adequate housing entails by examining scholarly works and case laws that have established that for a house to be considered as adequate, it must not only be the structural building but also include other basic amenities and services which would ensure the comfort of the occupants of the house. The article highlights that in South Africa the right to access to adequate housing is constitutionally guaranteed and as such the citizens, particularly the poor and those that were denied it as a result of the apartheid segregation laws, are entitled under the new constitutional democratic dispensation. Therefore, the right to adequate housing connotes that people have the right to live in a house that is dignifying, safe and conducive. Various international legal instruments provide for human dignity as well as the Constitution of South African which guaranteed the right to dignity. However, endemic corruption is a serious barrier to access to

¹⁸⁷ *Fazia Ali v. the United Kingdom* (App. n° 40378/10) [20.10.2015].

¹⁸⁸ President Jean-Claude Juncker, State of the Union Address, European Parliament, 9 September 2015 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Brussels, 26.4.2017 COM(2017) 250 final available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-250-F1-EN-MAIN-PART-1.PDF>. Accessed on 03 March 2018 and see also European Commission, Interinstitutional Proclamation on the European Pillar of Social Rights, COM(2017) 251 final Available <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-250-F1-EN-MAIN-PART-1.PDF>. Accessed on the 03 March 2018.

¹⁸⁹ A press conference with tenants and supporting organisations took place Monday, 23 October 11 am at The Witness Gallery, The GPO, O'Connell Street, Dublin 1 available at www.housingrights-watch.org/news/collective-complaint-ireland-has-failed-provide-adequate-housing-conditions-local-authority Accessed on the 03 March 2018.

¹⁹⁰ Article 34(3) of the Charter of Fundamental Rights of the European Union, recognize that social and housing assistance should be provided to those that lack resources.

provision of adequate housing. It is mainly being perpetrated by public officials who have been given the responsibility to implement the constitutionally guaranteed right to access to adequate housing. Sometimes, the right might even have been hampered by lack of resources. However, the court has emphatically said that if there is an emergency where the occasion warrants provision of housing, government would have to look for the money for the purpose of fulfilling and realising the right by ensuring that adequate housing is made available to the needy.

The right to adequate housing is enforceable and states have obligations under international law to protect and provide houses to the needy, particularly the poor and the vulnerable. The right is also justiciable and the human rights protective bodies monitor states' compliance regularly. The provision and physical delivery of housing is not a political discretion or choice of the government any longer. The government has the obligation to fulfil this right, irrespective of inadequacy of resources, otherwise the government will be exposed to litigation and many case laws have confirmed that the government and its public authorities have to respect, protect, fulfil and deliver the right to housing.

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