MUNICIPALITIES AND THE PROVISION OF ALTERNATIVE ACCOMMODATION TO EVICTED RESIDENTS

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ACKNOWLEDGEMENTS

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Dedication

I would like to thank my parents, Peter and Mapule Wetbooi for their support. They encouraged me, checked on me and held my hand even when I wanted to give up. I am privileged to have you. Mommy, this one is for you.

To my sisters who are always there for me when I need them.

Special thanks to my children and grandchildren

Abstract

The demand for housing in South Africa is more than what the state can provide. This is demonstrated by reported cases of unauthorized occupation of land and the increased litigation in housing rights rendering housing as the most litigated socio-economic right in the constitutional democracy. Although there have been laws such as PIE in place to deal with procedural requirements of eviction, illegal eviction has continued to take place in municipalities. Provision for alternative accommodation has become a strict requirement for the courts to grant eviction. The responsibility to provide alternative accommodation has been given to municipalities. The research explores challenges accompanied by the provision of alternative accommodation by municipalities to evicted residents through a case study by the City of Tshwane.

Contents

LIST OF ABBREVIATIONS AND ACRONYMS

ICESCR	International Covenant on Economic Social and Cultural Rights
CESCR	Committee of Economic Social and Cultural Rights
ConCourt	Constitutional Court
CoT	City of Tshwane
EHP	Emergency Housing Programme
LRH	Lawyers for Human Rights
MFMA	Municipal Finance Management Act of 2003
NHR	National Housing Register
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
SDF	Spatial Development Framework
UISP	Upgrading Informal Settlement Programme
NUSP	National Upgrading Support Programme
PIE	Prevention of Illegal Act from and Unlawful Occupation of Land Act, 1998
SERI	Social and Economic Rights Institute
SACN	South African Cities Network
TRA	Temporary Relocation Area

CHAPTER 1

Introduction

The right to housing and the protection of arbitrary evictions is guaranteed in the Constitution of South Africa. The housing rights have over the years been contested through the courts of law and resulted in a seminal case of Grootboom which found that the state's housing policy fell short of addressing the short-term needs of those in desperate situations. This led to the introduction of the Emergency Housing Programme which places the responsibility to provide alternative accommodation to evicted people to municipalities.

As will be seen through the report, the high level of litigation has provided a framework for eviction and the provision of alternative accommodation by municipalities. It has pronounced on obligations of the state and concluded that "all spheres of government were to cooperate and devise a coordinated public housing plan which properly took care of the need to provide immediate relief and accommodation for persons in emergencies" (Govindjee, 2013 p.70). Although the Constitution advocates for cooperation among branches of government, the inclusion of socio-economic rights places the judiciary in a more powerful position, through its power to review the policies of other branches government which have financial consequences. The court's approach focuses on state programmes rather than individual relief to the affected parties. It is for that reason that the focus of this research looks at the state's programme to address the short-term housing needs of evicted residents not the experiences of residents.

Seen through the lens of accountability, the report explores how the state collectively ensures that it provides housing needs to the most vulnerable who are facing prospects of homelessness. The research uses the City of Tshwane as a case study to explore how they have responded to the provision of alternative accommodation to evicted residents. The data was collected through literature review, document analysis, the review of court cases as well as semi-structured interviews of relevant senior officials and expert interviews from Lawyers

for Human Rights who have been involved and represented communities in cases that took place in the city of Tshwane and other parts of the country.

The findings show litigation alone is not enough to hold the state accountable for the implementation of housing rights. The municipalities are forced to provide alternative accommodation without the necessary mandates. The municipalities and the state do not have a proactive and coordinated approach to providing alternative accommodation to people in desperate circumstances. The increased involvement of the courts in housing rights demonstrates that the executive is failing in its duty to provide access to housing as encapsulated in the Constitution. As such the communities turn to the courts to adjudicate their rights to access housing.

1.1 Background

The housing crisis in South Africa can be traced back to the history of South Africa particularly, the impact of laws such as the 'Group Areas Act no. 41 of 1950', 'Prevention of Illegal Squatting Act of 1951', and other laws which were used to undertake forced removals and evictions to settle Africans in the peripheries. During Apartheid, evictions were used as instruments to entrench racial segregation and discriminatory practices. The eviction practice continued even post-Apartheid and has rendered access to housing the most litigated socio-economic right in post-apartheid South Africa (Clark, Dugard, Tissington & Wilson, 2016).

Apartheid and colonial laws influenced the spatial structure of South Africa and contributed to the housing crisis in South Africa. Importantly, land use planning was used to achieve the racial and spatial segregation vision of apartheid (Strauss and Liebenberg, 2014). The laws such as the Black Land Act 27 of 1913, and The Group Areas Act No.41 of 1950, were used to allocate areas according to different race groups (O' Malley, 2004). The townships were allocated on the outskirts of cities or towns, with rudimentary services reserved for the Africans. The Group Areas Act as noted by Malley "influenced land allocation planning". The Prevention of Illegal Squatting Act of 1951, dealt with eviction from public and private land and gave the then Minister of Native Affairs authority to remove Africans from private or public land. The Minister of Native Affairs had powers to authorize local authorities to

establish resettlement camps where the “so-called squatters” could be moved (Davenport 1987 in O’ Malley). There was a concerted effort to prevent Black people from living in urban areas, however the need for “cheap labour” resulted in some relaxation and enabled urbanization. According to Strauss and Liebenberg, Black people were accommodated in formalized townships in terms of the Black (Urban Areas) Consolidation Act 25 of 1945 (Strauss and Liebenburg, 2014). The townships were characterized by poor services, long distances to economic activities and bad planning. The informal settlement began to emerge during this time, mainly because people wanted access to economic opportunities, and started occupying vacant land near the cities to be close to employment and economic opportunities. To that effect, rapid urbanization increased in the 1980s, resulting in some of the well-known settlements such as Orange Farm, and Freedom Square. (Mabin, 2005). Urbanization continued to increase at a fast rate in the post-apartheid dispensation particularly in the large Metropolitan areas and secondary cities leading to continued problems of unauthorized land occupation and subsequent evictions.

The discriminatory laws have been repealed in the democratic dispensation for example, the Prevention of Illegal Squatting Act of 1951 was replaced by the Prevention of Illegal Eviction Act of 1998 (PIE). Although PIE criminalizes un-procedural evictions (Huchzermeyer, 2003) government departments, particularly local government still conduct eviction without following due process. Evictions continued to take place in post-apartheid South Africa even with the changing laws and the introduction of the transformative Constitution. Wilson attributes this to the approach taken by the state in “regeneration and development projects” as well as the “common law rights” of property rights owners. Evictions have been used to make land buildings available for regeneration and development projects (Wilson, 2011). To manage the processes of eviction, the courts developed a framework which required municipalities to provide alternative accommodation as a condition to grant a court order for eviction.

It is against this background that a case study will be undertaken to explore the provision of alternative accommodation to evicted residents in municipalities using the City of Tshwane as a case study. As posited by van Wyk, the Constitutional Court has over the years “created

a framework within which municipalities react and deal with evictions" (van Wyk, 2011, p. 67).

1.2 Problem Statement

Municipalities have on many occasions been ordered by the courts to provide alternative accommodation to those facing eviction as a precondition to grant eviction orders. However, despite these cases, municipalities have either been reluctant to comply with these obligations or they cannot simply comply. Interestingly, municipalities themselves have contested the provision of alternative accommodation, citing various reasons for non-compliance. For example, in the Blue Moonlight case, the City of Johannesburg argued that it had no obligation and resources to provide alternative accommodation to occupants evicted from private property. It contended that their obligations are limited to applying for funding for EHP to the provincial government. However, the Constitutional Court dismissed their argument and ruled that the City had the duty to "plan and budget" for its housing obligation and could not solely rely on the funding applications from provinces (SERI, 2016).

The court rulings and the frameworks provided by case laws on eviction and the provision of alternative accommodation by municipalities highlight contradictions within the state's response towards the provision of adequate housing. To that end, compliance with the court orders is still largely a problem in municipalities as demonstrated by repeat litigation housing issues.

Planning for emergency is cited by municipalities as problematic, particularly where there is "illegal land occupation" in areas where there are long-term plans for development for permanent housing. As observed by various commentators, municipalities perceive their role as mainly enforcement of by-laws, related to building regulations as well as health and safety, as such eviction is seen as part of enforcement (Clark, Durgat, Tessington and Wilson, 2016). Moreover, for local governments, there is a general association of land invasion with criminal intent or 'unjustified personal gain' which explains the emphasis on enforcement (Huchzemeyer, 2003). Therefore, there is a reluctance to regard eviction related to land invasion as an emergency. This view has led to the tightening of anti-invasion strategies by

municipalities to control unplanned settlements and eviction of unauthorized occupants without following procedure. These strategies, however, do not resolve the systematic challenges associated with the provision of shelter and access to well-located land by the poor particularly in urban areas. Due to the challenges associated with illegal occupation of land, enforcement and criminal framing of unplanned settlements, lack of proper co-ordination between the spheres of government as well as lack of clarity regarding the funding of alternative accommodation, there has been an ad hoc implementation of emergency housing in municipalities.

1.3 Research Questions

How has the City of Tshwane responded to housing emergencies and the provision of alternative accommodation to people who have been evicted or facing eviction as prescribed by Court rulings?

The sub-questions

- How has the City of Tshwane complied with the court rulings involving the provision of alternative housing to the people evicted or those facing eviction?
- How has the CoT modified its planning processes to prevent homelessness due to eviction?
- What has been the impact of court rulings on the provision of alternative accommodation to those evicted or facing eviction in the City of Tshwane?

1.4 Purpose of the Research

The purpose of the Research was to explore the extent to which the City of Tshwane is fulfilling its role in the provision of alternative accommodation to people who have been evicted or facing eviction. The framework developed by the Courts over time requires the state to provide unlawful occupiers with an alternative accommodation as a condition of their eviction. The provision of alternative accommodation is also seen as a short-term measure for those living in intolerable conditions, homeless or facing the prospects of homelessness.

The research intends to explore the extent to which the CoT has modified its processes to support the housing rights and through the provision of alternative accommodation.

This will be done by reviewing seminal cases, which provided precedents and the framework for what is required from municipalities to prepare for Alternative accommodation. This will be compared by how the City of Tshwane has reacted and dealt with alternative accommodation.

1.5 The structure of the study

The study is divided into six chapters which are outlined as follows:

Chapter One: Introduction and background

This chapter introduces the research and provides a background to the study, the objectives of the study as well a research question which the research seeks to answer.

Chapter Two: Literature Review

The chapter on literature review discusses the themes that have been identified which are relevant to the understanding of the research topic. The themes are discussed to provide guidance and understanding to the discussed. The conceptual framework is explained at this stage to provide the lens through which the research will be analysed.

Chapter Three: Research Methodology

The Chapter represents the research tools of the research study. It describes the research design employed and the procedure followed in collecting data, sampling procedures, as well as ethical considerations.

Chapter Four: Presentation of Findings

The findings from interviews and document analysis are presented in a qualitative form to provide an understanding on how the City responds on the provision of alternative accommodation in relation to what is expected by legislation, court rulings.

Chapter Five: Analysis of findings

The findings are discussed and analysed in terms of literature and the conceptual theory to answer the research questions.

Six: Conclusion

The chapter presents the summary and the highlights of the research report, the approach undertaken in the report with special emphasis on the findings and the analysis thereof.

CHAPTER 2

2. LITERATURE REVIEW

2.1 Introduction

There is growing evidence that the demand for housing in South Africa is more than what the state can provide. This is demonstrated by reported cases of "land invasion" as referred to in government quarters or "informal occupation of land" as referred to by housing rights activists. In turn, the government often react to the illegal occupation of land by evicting and destroying property of poor people in informal settlements which often results in homelessness. Communities have turned to the courts to adjudicate for the rights to access to housing. The courts established that the state has the obligation of assist those in desperate need. The literature review begins with examining the Constitution and the relevant housing legislation to establish what was envisaged by transformation and housing rights. This then provides a context for understanding the constitutional jurisprudence established by the courts through various cases, starting with the landmark Grootboom case. This is then followed by examining the court approaches in their role of interpreting and adjudicating constitutional obligations of the state in housing rights in particular that of the local government. The role of local government in housing is then located through its powers and functions and through its role in providing for alternative accommodation for evicted people facing homelessness or facing a threat of eviction. This is analysed through the framework of accountability by the state.

2.2 Constitution and its transformative vision and housing rights

The democratic government of 1994 announced restructuring of apartheid geographies of exclusion through RDP as one of their priorities. Access to housing was considered a high priority along with other social policies such as health and education. Hence a target of

building 1 million houses nationally in 10 years (Housing White Paper, 1994). Subsequently when the Constitution of the Republic of South Africa, of 1996 was adopted, housing was included in the Bill of Rights and the right to access to adequate housing was recognized as articulated in section 26 (1) which states that "Everyone has the right to have access to adequate housing". Importantly Section 26 (3) of the Constitution provides that, *"No one *may be evicted from their home, or have their/ home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".* As highlighted by Chenwi, evictions may only be carried out only after a court order has been served and if such the process will not result in homelessness.

Subsequent to the provisions of the Constitution are other legislative prescriptions that regulates the procedure for evictions, particularly at local government that are worth mentioning are the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) as well as the National Building Regulations and Building Standards Act 103 of 1977 (NBRBSA). PIE and NBRBSA regulates large scale evictions including, unlawful occupation of land, unsafe or unhealthy buildings that need to be renovated or where people must be moved to make way for a new development. It is through the provisions of section 26 of the Constitution that people faced with homelessness have sought to approach the courts to adjudicate on their rights to access to adequate housing.

2.3 Framework for Housing Rights: Grootboom vs the state and other landmark cases

The Government of the Republic of South Africa v Irene Grootboom

The Grootboom case was the first housing right and the second socio-economic rights case to be adjudicated by the Constitutional Court. The case involved 900 individuals evicted from the private land in Wallacedene, Cape Town. It was heard by lower courts, and subsequently appealed until it reached the Constitutional Court. The case focussed on the interpretation of access to housing rights and had to deal with obligations of various spheres of government. The Court distinguished between negative obligations to refrain from depriving access to housing and positive obligations to take measure to provide access to housing. The courts

described its role, to determine whether the state took reasonable measures as envisaged by the Constitution to provide access to housing.

Secondly, as stated by Wesson (2004), it confirmed the justiciability of the socio-economic rights and "laid the foundation for future socio-economic rights" (Wesson, 2004, p285). The Constitutional Court found the housing programme was unconstitutional, as it did not cater for short-term housing needs for people in desperate need. The Constitutional Court also concluded that "all spheres of government were to cooperate and devise a coordinated public housing plan which properly took care of the need to provide immediate relief and accommodation for persons in emergency situations" (Govindjee, 2013 p. 70). As noted by Christiansen (2008), the Courts' remedial orders have tended to focus on improvement of government programmes rather than specific relief to affected party. Therefore, the impact of these orders can be evaluated on how government programmes impact on the intended beneficiaries.

Importantly, the ConCourt stated that the right to housing is more than just bricks and mortar, land basic services such as water, sewer and the building are part of access to housing (Visser; 2009). The Grootboom outcome led to the adoption of the Emergency Housing Programme (EHP) contained in chapter 12 of the Housing Code, which places the responsibility of provision of alternative accommodation to municipalities. In terms of the policy, the municipalities must "plan proactively" for emergency housing situations, investigate the need for emergency housing within their areas of jurisdiction, and to apply to the provincial government, in the event they were unable to budget for emergency. The Grootboom case, required the state to plan for those who would be rendered homeless by eviction albeit on a temporary basis. According to Tissington, Grootboom outcome is in line with section 26 of the Constitution. As explained by Tessington "*the Court found that the state had no direct obligation to provide a specific set of goods on demand to inadequately housed individuals. Rather, the state's positive obligations under section 26 of the Constitution was to adopt and implement a policy within its available resources which would ensure access to housing over time".* with the focus on devising a reasonable policy which would address short, medium and longtime housing plans. (Tessington, 2010, p 16). Tessington explains that in Grootboom

case, the court focussed on state's obligation assist the most vulnerable as a short-term measure and avoided to interpret section 26 as "a right to housing on demand and positioned it "as shelter on demand".

Olivier Road

Olivier Road involved an intention by the City of Johannesburg (CoJ) to evict about 300 people who were occupying bad buildings using National Building Regulations and Building Standards Act 103 of 1997 (NBRA), the Health Act and the City by-laws on the grounds that the buildings were unsafe, unhygienic, and not fit for human habitation. This was part of the CoJ's urban regeneration strategy. When the occupiers succeeded in challenging the CoJ's decision at the High Court, CoJ appealed the outcome and the case was heard by the SCA, which reinstated the eviction order on the basis that the City was not obliged to provide alternative accommodation in terms of NBRA. The case was eventually heard in the Constitutional Court and established the following principles; firstly, the relevant provisions which precluded judicial oversight i.e. obtaining a court order before an eviction can take place were declared unconstitutional, secondly, the court ruled that the provision of alternative accommodation will be an in important consideration in case of eviction if there is a possibility of homelessness. Lastly, the Olivia Road case resulted in the adoption of "Meaningful Engagement" as one of the standards in the adjudication of eviction and alternative accommodation, which was first heard in the Port Elizabeth v Occupiers case. This led to the parties eventually reaching a settlement agreement, wherein the City committed to providing two buildings to the occupiers (Tissington, 2010).

Blue Moonlight

The case involved about 81 occupants of disused factories and warehouses building in Saratoga Avenue in Berea who faced eviction by the private owner. All the occupants lived in the buildings for more than six months. The owner was aware that the building was occupied prior to purchasing. The owner purchased a building, with the intention to redevelop the property and realise its investment potential. The owners approached the court to seek

eviction of the occupants and further requested the Court to order the City to provide information on how it dealt with issues of provision of alternative accommodation on other similar cases. The occupants opposed eviction on the basis that it would render them homeless. The CoJ argued that it had no statutory obligation to provide for alternative accommodation for evicted occupiers from private land as such it did not make budgetary provision for such cases, it argued that funding for emergencies should come from the provincial government dealing with housing. When the case reached the Constitutional Court, the court considered whether it would be "just and equitable to evict" the occupants (Wilson, 2004) The case resulted in important findings from the court which can be summed as follows; Firstly, the owners are entitled to evict the occupiers, however, eviction would not be just and equitable if the City is not able to provide alternative accommodation. This means that in terms of occupation of private property, the owners' rights to property may be delayed to enable the state to discharge its duty of providing alternative accommodation. Secondly, the state cannot discriminate those who face the possibilities of homelessness from private evictions and state evictions. The Courts ruled that people evicted from private and public properties should have equal protection as prescribed in the Constitution. Thirdly, municipalities have the responsibility to plan and budget to give effect to alternative accommodation, it is not acceptable to deflect its responsibility to provincial and national government (SERI, 2000-2016). The importance of location for evicted people was dealt with, the court granted the eviction and ordered that alternative accommodation was granted as near as possible to the area where the occupants were residing at the time of eviction.

51 Olivier Road

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The outcomes of the litigations, pointed to the gaps in the overall housing strategy of the country, which lacked measures to provide relief for those facing emergencies, or those in desperate need whilst waiting for state subsidised housing. Whilst it has been acknowledged that many houses have been built through the state subsidy programme since 1994, the emphasis on this type of housing delivery, with less attention to other forms of housing delivery has been criticized for unintentionally reinforcing inequalities and apartheid spatial legacies (Strauss & Liebenberg, 2014). The low-cost houses have been built in the peripheral urban edges far from economic and social activities. Because of the location of the low-cost settlements at the outskirts, local municipalities have had to extend the infrastructure systems in these peripheral areas which have low prospects of growth (Pieterse, 2017).

2.4 Judicial Approach in litigating Housing Rights

The judiciary plays a central role in the adjudication of socio-economic rights. This is due to the fact that, as part of transformation, enforceable socio-economic rights were included in the Constitution. The main role of the judiciary is to "interpret, adjudicate legal disputes and declare unconstitutionality of Acts contravening the Constitution..," (Mangena, 2019, p 23). All branches of the state, the Legislature, the Executive and the Judiciary all have their defined roles according to the Constitution with founding doctrine of separation of powers. The Constitution further emphasises the independence of the judiciary to ensure its effectiveness.

However, the judiciary has been accused of overreaching its powers, particularly by the executives and some academic commentators. Judicial overreach as explained, is the encroachment of the judiciary in matters that fall within the Executive or Legislative mandate and therefore contravening the principles of separation of powers. The judicial enforcement of socio-economic rights has been a contentious issue to such an extent that there were strong arguments as to whether they should be included as enforceable rights in the Constitution. The main points of contention are, firstly, the influence of the Judiciary on policy formulation as well as rulings that impact of budgetary allocation which are within the domain of the Executive. It should be noted, however that, as stated by Ngang (2014), it is unavoidable for the courts not to "encroach" into the state terrain in order to give meaning as the courts are empowered to enforce constitutional rights. Ngang, (2014), further explains that judicial enforcement of socio-economic rights stems from the "transformative vision" that was envisaged by their inclusion in the Constitution. To that extent, the state is obliged to take positive actions to realise those rights, and " to subject the state to a greater measure of accountability" (Ngang, 2014, p680). Contrary to the criticism of judicial overreach, social rights activists have criticised the courts for not using the power at their disposal to provide clear enforceable orders. As pointed out by Christiansen (2008) "the courts have been criticized far more for excessive restraint it has shown than for judicial overreaching" (Christiansen, 2008 p377). To strike a balance the Courts have developed a "Reasonableness Approach" to adjudicate socio-economic rights including housing rights. As Chenwi puts it, the Courts adopted the "reasonable approach as a means of giving leeway to the political branches of government to make the necessary and appropriate policy choices to meet their socio-economic rights obligations" (Chenwi, 2015 p77).

The Grootboom case was the first housing right and the second socio-economic rights case to be adjudicated by the Constitutional Court. This was a seminal case, as it outlined the state's obligation, particularly that of local government towards the right to housing. Secondly, as stated by Wesson (2004), it confirmed the justiciability of the socio-economic rights and "laid the foundation for future socio-economic rights" (Wesson, 2004, p285). The Constitutional Court found the housing programme was unconstitutional, on the basis that it did not cater for short-term housing needs for people in desperate need. The Constitutional

Court also concluded that "all spheres of government were to cooperate and devise a coordinated public housing plan which properly took care of the need to provide immediate relief and accommodation for persons in emergency situations" (Govindjee, 2013 p. 70). As noted by Christiansen (2008), the Courts' remedial orders have tended to focus on improvement of government programmes rather than specific relief to affected party. Therefore, the impact of these orders can be evaluated on how government programmes impact on the intended beneficiaries.

2.5 The Role of local government in planning and alternative accommodation

Local government's mandate is the "creation of the liveable, integrated cities, town and rural areas" (The White Paper on Local Government, 1998). In this regard, metros in particular are responsible for urban governance and planning, as noted by Pieterse (2020) they are constitutionally and fiscally empowered to expend their resources to fulfil their developmental mandate which is premised on redressing spatial segregation and access to opportunities (Pieterse, 2020). However, the vision to develop alternative compact integrated cities has not been achieved, mainly because much of the low lost housing development have been happening in the peripheries, far from social and economic activities. The spatial planning systems used achieved the opposite of the envisaged policy aims. Although spatial frameworks have been used as a form planning, Todes (2008), argues that "spatial frameworks have been too broad and too utopian and have been contradicted by both national policy and trends in the property and housing market" (Todes, 2008, p9). The inability to use the land use management to achieve equity and sustainability, "low capacity for spatial planning" failure to provide access to well-located land to the poor, and most importantly failure to use existing fiscal resources to change spatial patterns are among some of the shortcomings that have been identified in the planning processes (Harrison & Todes, 2013). Notwithstanding the above-mentioned challenges, Todes (2008) warns of limitations of planning to transform the cities and posits that, urban spatial change is complex, slow and

often path dependent, and therefore special attention must be given to align spatial planning tool with desired policy imperatives (Todes, 2008).

As explained so succinctly by De Visser, the courts recognizes the state's responsibility to provide emergency housing holistically, "the court did not distinguish between the obligations of the various spheres… but made it clear that all spheres of government are responsible to the rights to provide adequate housing (De Visser, 2009, p.213). Therefore, municipalities are required to develop institutional capacity to collaborate with other departments and develop holistic approaches and urban decision making for the benefit of the poor (de Visser, 2009; SACN 2014). The framework prescribed by the courts does not take into consideration the limitations, faced municipalities in implementing housing function not matched by commensurate funding. As noted by (De Visser, 2009), the court made it clear that the state has a clear duty for those in emergencies and therefore must be accompanied by necessary budgetary requirements. Municipalities are confronted with various challenges, among them competing priorities, relationship with the other spheres of government, particularly with regard to mandates, planning coordination and provision of resource. To that extent, requirement to provide alternative accommodation to those who may face homelessness prior to granting eviction order has been a contentious issue for municipalities.

The municipality is bound to provide temporary housing in terms of the EHP Framework. According to (Van Wyk, 2011 p.67), "the availability of suitable alternative accommodation is but one of the factors to be considered by a court when proceedings are instituted by the municipality". He further asserts that "*there is no overriding requirement that alternative land must be made available as a prerequisite before a court may grant an eviction order",* demonstrated in Baartman v Port Elizabeth Municipality. However, where the framework is absolutely clear is for the provision of temporary accommodation by the municipalities.
However, as the empirical research from my report will show, the principles established by the courts have raised many questions about the state's as a collective (i.e. organs of the state) to advance the housing rights through their respective roles as envisaged in the Constitution. As noted by many housing activists, the response for emergency housing has been upheld through court battles to fulfil housing rights. The fundamental issues funding for

emergencies, functional mandates and institutional competencies of the courts remains a challenge.

The Impact of housing policies on Municipalities

In South Africa, the housing function is created around the model of cooperative governance, whereby the primary mandate has been given to national and provincial departments and decentralized governance where the national government is responsible for policy formulation and provincial and local government are responsible for delivery of programmes (van Niekerk, 2012). The Constitution requires coordinated support to local government by the National and provincial government. However, in the context of human settlement, the coordination has been largely fragmented, and other housing related issues have been scattered in other Departments. As noted by Turok, the government handled urban issues through separate policies rather than integrated approach (Turok, 2016). For example, the focus of housing department was on achieving quantitative targets within a specified period, whilst not integrating other related aspects such as land release, spatial development, transport issues which were handled by other departments and would sometimes contradict each other.

Secondly, provinces have a duty to support, exercise oversight and strengthen the capacity of municipalities to ensure effective housing development (de Visser, 2009). However, in the human settlement terrain, provinces have been perceived more as competitors, and not overseers and supporters of local government. Provinces have been accused of delivering housing projects without following due process within municipal jurisdiction, which has caused discontent with the communities and created problems for municipalities.

This points to a gap in the governance and fiscal institutional arrangements, whereby provinces "are not required to be accountable to the electorate, as tax revenues are raised and disbursed through national government…" as observed by van Niekerk (van Niekerk, 2012, p620). The provincial departments are therefore in a position choose what to prioritize and fund without the pressure of direct accountability to the constituencies. This state of affairs places municipalities in a precarious position, particularly when they have to respond

to emergency housing situations, as funding for emergencies is allocated to provinces as grants and have remained very low.

The state has a collective responsibility towards access to housing, each sphere has distinct responsibilities towards housing. Importantly, those obligations must be accompanied by appropriate resources which are commensurate with the expected functions and mandate. However, as noted by De Visser (2009), cooperation is crucial in the South African context, more so where division of functions are blurry, and if not attended to, it can lead to complications in decentralization arrangements. The weak, devolution of powers may have an impact on the fiscal arrangements of other spheres of government, particularly local government.

Although the local government does not carry the primary constitutional mandate of housing in terms of schedule 4 and 5, it nevertheless plays a crucial role in the realization of access to adequate housing. Local government mandate in human settlement lies particularly in the planning functions. Firstly, through the processes of Integrated Development Planning (IDP) and consultation with various stakeholders, municipalities must set housing delivery goals in their areas of jurisdiction as prescribed in the Housing Act of 1997. Secondly, through spatial planning, land use management, infrastructure development and town planning issues. Through these powers and functions the municipalities should be able to influence the extent, the location and different options for which human settlements can take place (Tissington, 2010). However, housing policy is heavily reliant on the "RDP" type of housing, with little attention with to other housing delivery options. This is a big shortcoming given the huge backlog, waiting period and other challenges related to this mode of housing delivery. Given the strategic positioning and the planning mandate of big cities and metros in urban shelter rights, it is an opportunity missed to create sustainable human settlements.

Importantly, as posited by Turok and Saladin (2014), the lack of comprehensive urban and spatial policy lead to the implementation of contradictory policies being pursued at the same time. For example, whilst the Department of Human Settlement advocated for accelerated housing provision in the outskirts through "mega projects", the Treasury and COGTA, in later

years pushed for the increased role of cities in promoting integrated cities and compaction. Furthermore, links between planning and housing delivery in the post-apartheid have remained inadequate and failed to deal with the spatial legacies of apartheid. Many authors have attributed this situation to the ambivalence of government towards planning with the "fragmented and incoherent framework which rendered the entire planning system with inefficient, costly and confusing" (Strauss & Liebenberg: 2014, p434). Although spatial frameworks have been used for planning in post-apartheid South Africa, they have been critiqued for their failure to dent the apartheid spatial legacy, for example, Todes (2008) offers the following reasons for these failures; spatial frameworks are too broad, not linked to infrastructure and land use management and generally not followed in decision making processes and contradicted by some of the national policy priorities such as those in housing (Todes, 2008). The sentiment is shared by (Turok, 2016) who argues that the preoccupation with mega projects at provincial level, often overlooks the planning processes at municipal level. However, the introduction of Spatial Planning and Land Use Management Act, of 2013 (SPLUMA) is an attempt by government to address issues of spatial justice by linking spatial development frameworks and land use planning, importantly it attempts to address development issues that were previously neglected such upgrading of informal settlements, former homelands and requires proper coordination of spatial issues at all levels of government. Although SPLUMA has potential to transform spatial division through planning, Strauss & Liebenberg (2014) warns that its objectives may be threatened by continued "urban evictions".

South African cities have also struggled with population growth and migration. As noted in (Turok and Saladin, 2014) urbanization has not kept up with population growth in the main cities. They note that 60% of South Africa's total population occurred in main metros which only occupies 2% of the country. The impact of this urbanization means that there are more people living informal dwellings in metros than anywhere in the country. In South Africa, research has shown that migration is characterised mostly by internal migration. According to the Cities Network report (2014), 44% of residents in Gauteng were South Africans as compared to 4% cross border migrants, although these figures do not include undocumented migrants. Cities are main centres of urbanization and experience various types of migration

patterns which have an impact on urban space and thus urban governance. They further note that, temporary cross-border migration for education, shopping and medical care have increased in recent years. The declining household size and splitting of households have led to an increase in households and youth migration (Todes, 2008). The lack of a reliable data on migration and population growth, coupled with lack of a comprehensive policy on urbanisation, results in cities being less prepared to deal with urban growth and the demands placed on infrastructure. To that extent, cities face enormous challenges of competing development imperatives associated with urban governance such as striving to be a "world class city", investment attraction, and land access which as Corolia observes places the "implementation of emergency housing as a case of problematic and complex prioritisation" (Cirolia, 2014, p 408).

Emergency Housing Programme (EHP)

The EHP Programme that was introduced to enable municipalities to "provide temporary relief to people in urban and rural areas who find themselves in emergencies". Assistance can be provided by providing accommodation, relocation assistance, provision of land and engineering services (DHS: Emergency Housing Programme). Evictions or threats of eviction are expressly stated in the EHP as part of emergencies. In terms of eviction, the EHP, temporary alternative accommodation can be provided either as the first phase 'towards permanent housing solution' or towards a development of a permanent settlement by availing land to those affected. Unlike other housing programmes, there is no beneficiary qualification in terms of based on income or citizenship or even those who have previously benefitted from government subsidy programmes. However, as noted by various housing commentators there has been reluctance by the municipalities to use the programme for emergencies, particularly for evictions. There has also been reluctance by provinces to release funding for emergencies and municipalities have reported various challenges when attempting to apply for the funding (SERI, 2018). The HSRC report (HSRC, 2015) noted that not all provinces even have EHP as one of their housing instruments, for example Gauteng Department of Human Settlements does not have a unit that deals with EHP (HSRC, 2015). There is different application of the EHP across the country, for example the draft reviewed policy of the City of Johannesburg (CoJ) (CoJ, 2021) distinguishes between emergencies

caused by natural disasters and emergencies because of evictions CoJ, 2021 p.14). The CoT did not have any policy of EHP at the time of the interview. The emergency housing programme has been used as a tool to conduct eviction, as the courts cannot order evictions with the provision of alternative accommodation by municipalities. There have been instances where evictions have been denied by the courts where alternative accommodation has not been provided as witnessed in the Schubart case when the court refused to issue an eviction order in the absence of alternative accommodation.

2.6 Theoretical Framework

The concept of accountability is key when analyzing the provision of alternative accommodation by the municipality. In South Africa, the framework for Constitutional democracy is firmly rooted in the enforcement of socio-economic rights. Section 26(2) of the Constitution places the obligation of the state to "take reasonable legislative and other measure, within its available resources, to achieve progressive realization of the 'housing' right". As such "every sphere of government and every organ of government, is obliged to respect, protect these rights" as articulated in the Constitution.

To that extent, the courts have had to adjudicate on the most contested socio-economic right (housing) in South Africa. The court's decision has largely focused on the state's programme and policies rather than individual relief to those who are vulnerable. As such Courts play a major role in enforcing the constitution by holding the state accountable for their role in socio-economic rights obligations. Housing rights organizations, such as the Socio-Economic Rights Institute (SERI) and Lawyers for Human Rights have actively sought to use litigation to hold the state accountable for its constitutional housing obligations by participating in litigation of socioeconomic rights. This has been pursued through "jurisprudence of accountability" to force the state to meet its socio-economic obligations. As noted by Ngang (2014), accountability requires the formulation and implementation of relevant policies and programmes to ensure the implementation of rights as well as appropriate remedies in case of violations (Ngang, 2014). Successful litigation and positive outcomes require compliance

from the state, through cooperation by spheres of government and particularly by municipalities where implementation takes place.

Accountability involves those who are entrusted with responsibility and those who have the power to review it. There is also a distinction between different types of accountabilities expressed in the literature, these involve vertical accountability and horizontal accountability amongst others. Vertical accountability may include accountability between spheres of government for example, when municipalities account to the national and provincial government or the executive giving account to the legislature. Horizontal accountability relates to accountability among branches of government, or accountability that takes place amongst equals, or "when judicial institutions hold other institutions accountable such as when a constitutional court, or in some countries supreme court judges, investigate the lawfulness of executive decisions and acts by legislature, the accountability relationship is horizontal" (Lindberg 2009, p14). Wesson (2004) points out that the Grootboom case established an important collaboration between the state and the judiciary whereby the judiciary reviews the state's programme and identifies gaps that do not meet the constitutional requirements, however, the state is then given the responsibility of taking reasonable steps to remedy the situation (Wesson, 2004).

The research explores the state's response to the emergency housing needs particularly to those who have been evicted or those who are facing the possibility of homelessness as a result of eviction at a municipal level. Importantly, how is the city accountable for complying with the court rulings for provision alternative accommodation for people who have been evicted or facing eviction?

CHAPTER 3: RESEARCH METHODOLOGY

The Chapter describes and discusses the research methods undertaken to conduct the research and produce a report. This includes research design, data collection method, ethical consideration and limitations for research.

3.1 Research Approach

A qualitative research study was undertaken, as this study was a suitable method for this purpose. Bryman (2012) explains that the qualitative research design is suitable when the researcher seeks to gain a deeper understanding of the phenomena as important considering that the provision of alternative accommodation by the municipalities has been a topic that has received attention, given the frequency of land and building occupation and highly publicized eviction cases. Therefore, this research sought to explore, how the City of Tshwane has responded to the provision of alternative accommodation where eviction took place drawing from principles established by the courts. The focus on cases adjudicated by courts gives context to the central role of adjudication in shaping how the state should respond to the question of alternative accommodation. Whilst the provision of emergency housing covers other areas of emergencies such as natural disasters like fire, the focus of this study is on eviction cases initiated by the CoT or private landowners where the CoT was involved. A comparison of the framework established by case law against the subsequent response by the City was analysed to get an in-depth understanding of how the city dealt with cases of eviction and alternative accommodation.

3.1.1 Research Design

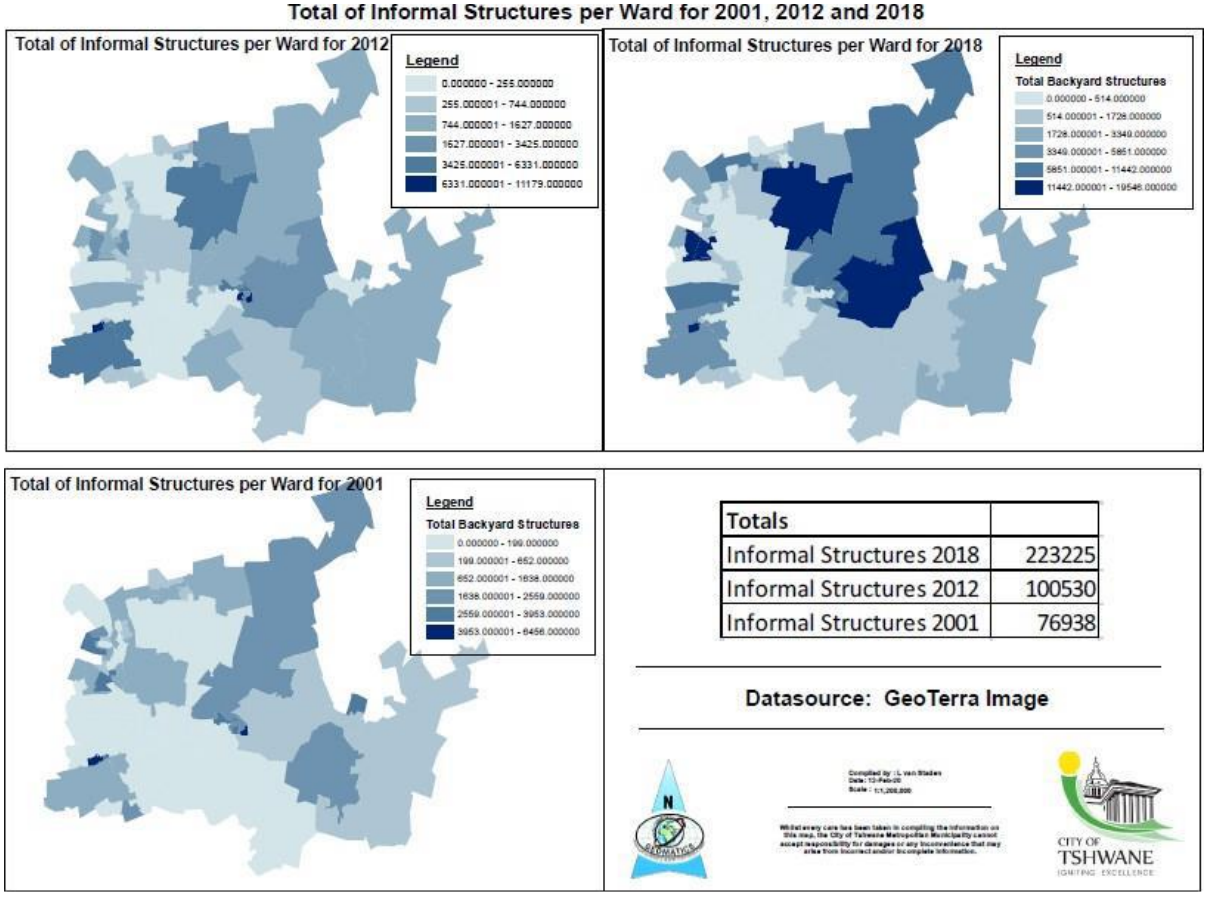
A research design is defined as a "framework for collecting and analysing data" (Bryman, 2012 p.46). A case study design was chosen for this purpose. The City of Tshwane Metropolitan Municipality was chosen as a case study for this topic. CoT is one of the three metros in Gauteng province. CoT is confronted with a huge demand for housing due to urbanization and migration and has been ordered by the courts on occasion provide alternative

accommodation on those affected by eviction. The City of Tshwane is the largest metropolitan municipality in size as compared with the City of Johannesburg and the City of Ekurhuleni in the province. The city has an annual population growth of 2.92% which is higher than that of the province and the country. The city borders three provinces namely, Limpopo, Northwest and Mpumalanga. CoT is confronted with a huge demand for housing due to urbanization and in-migration and its location.

Housing context in the City of Tshwane

According to the Tshwane Spatial Development Framework, 2030 there has been a significant increase in the informal structures and backyard structures from 2001 to 2018. The informal structures have increased from 76 398 in 2001 to 223 225 in 2018, which marks 290% increase. The backyard structures increased from 28 829 to 168 215, 76,6% increase. The backyard units are more prevalent in what the city refers to as urban cores, whilst informal structures are more prevalent in urban peripheries. According to the SDF the trends show that, although people search for work opportunities in urban areas, there has been increased population growth in rural and peripheral areas where there is accessible public transportation (Tshwane SDF 2030, p136). This can be attributed to affordability in the urban peripheries as compared to urban core. The CoT seems more inclined to encourage this form of development as evidenced by intention “to develop rural settlement strategy aimed at retaining existing rural and agricultural areas. The CoT does not address the locational issues of low income group in the urban core which has been a source of court challenges, for example the Turnover Trading case which is discussed in the report.

Total of Informal Structures per Ward for 2001, 2012 and 2018



The city has faced numerous cases of “illegal land occupation” and has been ordered by the courts on occasions to provide alternative accommodation on those affected by eviction. At least three of the eviction cases in Tshwane have been adjudicated at the Constitutional Court of South Africa. Much of the academic research has focused on other metros such as the City of Johannesburg and the City of Cape Town, and less so on the City of Tshwane. It is for that reason that the City of Tshwane was chosen as a case study and for its location and profile. A single case study with a comparative analysis of framework provided by the seminal housing court cases and the implementation of court decisions by the City of Tshwane.

3.1.2 Research tools and their application

The research used both secondary data and primary data. The first part involved literature review of relevant academic articles, document review of strategy documents such as Integrated Development Plans (IDPs), spatial development framework (SDF) of the CoT, applicable council resolutions. Court orders of the selected cases were studied as part of the data to inform the research.

Table 1

Court Cases Reviewed	Implications
Government of the Republic of South Africa v Grootboom	Seminal Case that established a framework for housing.
Modderklip	The case emphasized the interconnectedness of the state and to require the state to pay constitutional damages to the property owner for the violation of property rights
Port Elizabeth	The Port Elizabeth required municipalities to have a programme that is able to respond to the housing needs.
51 Olivier Road	Eviction on the basis of Unsafe buildings. Application of National Building Regulations and Building Standards Act 103 of 1997 (NBRA)
Blue Moonlight	Provision of alternative accommodation for people evicted from private property. Importance for location for evicted people

Skuurweplaas & Mooiplaats	A case in CoT which dealt with people who have occupied land for a period less than six months
Schubart	A case in CoT. The process of dealing with unsafe buildings. Meaningful Engagement
Turnover Trading 191 (Properiety Limited v Mosehla and further occupiers	Coverage PIE, whether courts can authorize provision of alternative accommodation on the basis of eviction for economic reasons

Semi-structured interview schedule was prepared beforehand as a basis for interviews with follow-up questions were necessary. This allowed the interviewees to elaborate on specific topics and provide their insights and context. Interviews were conducted individually with the senior official mentioned below, through microsoft teams and lasted 45 -60 minutes. The lawyers for human rights requested to a have a joint interview as they were working in the same division.

Table 2

City of Tshwane	Lawyers for Human Rights (Expert Interviews)
Divisional Head for Human Settlement Planning	Ms Louis du Plessis
Divisional Head for Housing Administration	Ms Deborah Raduba
Deputy Director for Spatial Development	Ms Namugaya Kisuule

3.1.3 Procedure for Gaining Access.

The researcher gained access to the city, through the Knowledge Management Business Unit. The unit coordinates research application and permissions that are conducted at the City of Tshwane. The researcher sought permission in writing to conduct research using the City of Tshwane as a case study. Permission was given in writing and forms part of the

documentation and annexures for this research. The researcher has also signed a confidentiality letter provided by the City of Tshwane which expressly specifies confidentiality requirements to conduct research.

3.2 Sampling

The study involved a non-probability, purposive sampling approach which is appropriate for a case study in qualitative research. Etikan (2016), refers to purposive sampling as the "deliberate choice of a participant due to qualities the participant possesses" (Etikan, 2016 p.2). Thus, conducting research on housing, will require the selection of data sources where the likelihood of getting information is high. According to Stake (1995) cited in (Gentles, 2015 p. 15), "sampling in case studies applies to selecting cases and selecting data sources". To that effect, a sample was drawn from eviction cases that took place in the City of Tshwane with data sources from document analysis, interviews with senior management from Human Settlement section, Town Planning & Land Use Management, of the municipality. Housing rights activists who have been involved in the litigations or are considered experts in the field were also interviewed. Interviews were conducted with the Divisional Head for Human Settlement Planning, the Divisional Head for Housing Administration, and the Deputy Director for Spatial Development. The interviewees are responsible for human settlements and deal with day-to-day issues of human settlement planning, unauthorized land occupation, court orders and alternative accommodation. The Spatial planning was interviewed based on their role in overall planning for the City. An interview could not be secured for the Development Compliance section due to time limitations, however, they work closely with Human Settlement Planning which was interviewed.

Expert interviews were conducted with two representatives from Lawyers for Human Rights (LHR) who have been involved in housing litigations in the Tshwane region. A joint interview was conducted with Ms Louise Du Plessis and Ms Deborah Raduba both responsible for Land and Housing Programme. Although the interviews were arranged separately on different dates, on the day of the interview, the interviewees indicated that they worked in the same section, and requested to be interviewed together. The interviewees were involved in several eviction cases throughout the country.

A sample was also drawn from the seminal housing court cases and a few cases in the CoT.

3.3 Process of Analysis

Process analysis involved interviews and content analysis. Themes were identified and analysed to interpret data. As observed by Braun & Clarke, cited in (Wagner, Kawulich & Garner, 2012) "a good thematic analysis needs to make sure that the interpretations of the data are consistent with the theoretical framework". As cautioned by Yin, (2003) the objective of data analysis is to ensure that data sources are merged to get the overall picture of the case. Therefore, the data collection method must support the research questions to ensure that the data analysis is meaningful. The thematic framework was initially developed when the researcher familiarized with the topic through literature review. Themes emerged from the literature on the subject and came strongly during the interview phase. The research was analyzed based on the following themes: (i) Constitution and its transformative vision and housing rights; (ii) Grootboom and selected cases which have provided a framework for housing rights (iii) The judicial approach in litigating housing rights (iv) The role local government in planning and alternative accommodation. The themes were used to present research findings and discuss those findings.

3.4 Limitations and scope of the research

The focus of the study was limited to policies and programmes of one metropolitan municipality regarding the provision of alternative accommodation. Although there are many similarities with other similar metros as demonstrated in the literature review. The particular findings are for the City of Tshwane. The scope of the study did not include interviews from the communities affected by eviction and recipients of alternative accommodation.

In terms of positionality, the researcher works for the City of Tshwane entity, however, Tshwane Economic Development Agency (TEDA) is not a direct employee of the City of Tshwane. The approval has been granted to conduct research in the City. Although TEDA is the implementing agent of the City of Tshwane, the research does not present a conflict of

interest. The research topic is different to the job that the researcher performs at the agency. The point of entry to the city was through the Knowledge Management section, which linked me up with relevant departments for my research.

3.5 Ethics

The researcher is bound by the ethical requirements as prescribed by the University of the Witwatersrand. The aim of the research is for academic purposes and as such bound by ethical guidelines provided by the University and the confidentiality clause required by the City of Tshwane. Importantly, the researcher will ensure that research participants are protected from any harm and do not suffer intentional reputational damage by disclosing confidential information. Therefore, ethical considerations have been considered through all stages of the research process by ensuring that the information provided is kept safe. The purpose of the research was explained to the participants. As observed by Long and Dorn, cited in (Wagner, Kawulich & Garner, 2012 p. 67) "deception occurs when the researcher fails to present herself as a researcher to facilitate data collection…. by not giving a full, detailed explanation". To that extent, the purpose of the research was explained, expectations from the participants and any potential benefits or risks of to the participants. The purpose of the research was also explained to interviewees outside of the city, i.e., expert interviews. This process of explaining the purpose of the research was crucial in this regard to demonstrate that there was no conflict of interest whatsoever and that the research was purely for academic purposes and not in any way connected to my job.

CHAPTER 4:

PRESENTATION OF FINDINGS

The chapter focuses on the presentation of findings drawn from primary sources (interviews) conducted with management in human settlement and planning sections from the City Tshwane as well as secondary sources from document reviews. The secondary sources include published articles, conference papers, court documents and grey literature. The main documents from the City of Tshwane the Integrated Development Plan (IDP), and the Spatial Development Framework (SDF) Human Settlement Plan were reviewed.

The interviews were also held with the lawyers activists /lawyers as experts in the field, though their involvement in eviction cases in Tshwane and other parts of the country. Having chosen the qualitative research method, a thematic content analysis was used. In presenting the findings, it was important to present findings based on the document analysis as well as responses from the interview from the perspective of the city. The findings seek to answer the research questions and have been presented according to the themes identified.

4.1 How has the CoT complied with the court rulings involving the provision of alternative accommodation to people evicted or those facing eviction?

4.1 Programmes and Plans

According to the framework of the case law and the Emergency Housing Programme (EHP), municipalities must have a programme in place, which will cater for the short-term needs of the most vulnerable in place who face the threat of homelessness municipalities must investigate the need in their areas, and proactively plan for it and apply for funding in the form of grants to provincial department the municipalities. Alternatively, municipalities must make provisions from their budget to provide for the short-term needs of those who are evicted or face the threat of eviction.

While acknowledging the requirement to have a programme for emergency housing in place, the City of Tshwane indicated that, in terms of the housing code they do not have the "primary obligation" for houses. They indicated that they follow the prescripts of the housing code for guidance and therefore they have not developed a separate policy for emergency housing for the City. It was emphasised that provinces are responsible for building top structures whilst the City is responsible for the provision of land. The city feels that all spheres of government are responsible for the Emergency Housing Programme as proclaimed in the Grootboom case. In terms of the EHP, provinces through the MEC are required to ringfence funding for emergencies annually and municipalities have to apply for such funding which, includes people who are evicted. As alluded to by Ms Thring, the process of application "is laborious, bureaucratic, and cumbersome" and subject to approval by the MEC. The city finds itself in an 'awkward position of expending resources on something which is not their actual mandate'. The city reported that, although they collaborate with other spheres of government, including human settlement provincial departments on other housing programmes, they find it difficult to get support for funding emergency housing. The City's explanation stems from the South African fiscal framework which bases its funding and budgeting according to the mandate. There is a misalignment between court rulings and the ability of the city to implement due to insufficient decision-making and funding mandates.

For example, in the recent court ruling (2021), where occupants were evicted from Lyttleton, the Court ordered that they be provided with alternative accommodation for six (6) months. The municipality spent, R6m to provide temporary alternative accommodation in Sunderland Ridge which was unplanned and not budgeted for. The city cannot budget for 'emergencies' as this is in contravention of the Municipal Finance Management Act of 2003 (MFMA) which governs municipal finances. Whilst the municipality insists that does not budget for emergencies, it has, however, indicated that it has been forced to apply for emergency procurement to comply with court decision to provide alternative accommodation. The expectation that the city makes budgetary allocation for temporary/emergency accommodation when the housing is not a municipal function puts a strain on municipal resources. When the court orders for temporary accommodation, especially from private land it forces the city to apply for emergency procurement because it is not an item that is

budgeted for by the municipality which is not a good practice in terms of MFMA. It further noted that the erection of the temporary structure is more costly than the permanent structure. When preparing for temporary accommodation it is not only the structure that is available, but some form of basic services that will have to be included.

4.1.1 Planning for Emergencies and Alternative Accommodation

Local government mandate in human settlement lies mainly in planning, firstly in terms of integrated plan (IDP) and their role in spatial development framework (SDF) as well as land use management. Municipalities must set housing delivery goals in their areas of jurisdiction and identify and designate land for housing development as required by the Housing Act. To that effect, they are in a better position to plan because of the information they have at their disposal. Moreover, according to the White Paper in Local Government municipalities have a mandate to "create liveable, integrated cities". Metros have a particular role in urban governance given, that cities are the first port of call for people seeking opportunities and employment. The municipalities have been given the responsibilities of managing the urbanization, and relief of the poor from the homeless in their respective areas (Cities Network, 2014).

The link between planning and human settlement remains inadequate internally within the City and with outside stakeholders. The SDF and the IDP do not address the EHP or temporary accommodation. When asked about the impact on human settlement planning, the respondent from the city reported that "*the impact on future human settlement planning has been disruptive, expensive and delaying us in terms of implementing the sustainable municipal human settlement plan which is a core component of the Integrated Development Plan".* The statement shows that the process of providing alternative accommodation is not accepted or seen as part of resolving housing issues in the City. They indicated that planning for an emergency seems to be difficult as they cannot predict what types of emergencies are going to occur, moreover the illegal occupation of land may not have been borne out of emergency but of other factors such as business opportunities and politics.

There was a strong sentiment from the city that the Emergency Housing Programme and the PIE law are being abused, firstly as a queue-jumping method to the existing beneficiaries in the National Housing Register (NHR) which serves as a waiting list. Resources are often diverted to alternative accommodation for those who have been awarded by the Court as opposed to the people who are on the waiting list. They raised concern over "orchestrated and invasions" particularly on the land which has been earmarked for development, they described the practice as sometimes "political expedience" as well clear act of criminality which must be dealt with in terms of the Criminal Procedures Act, instead of PIE as there are loopholes used by both occupants and rights activists. It was felt that the court rulings were disruptive, expensive and delaying the city from achieving integrated human settlements as articulated in the Integrated Development Plan. The frequency and the magnitude of illegal land occupation place a strain on the capacity and the resources of the city and the city will not be able to cope with all these acts. These responses show that the state remains opposed to the illegal occupation of land and perceive it as a criminal act rather than a housing shortage matter. To mitigate the impact on the City's resources they have reported that the city has put control measures in place to minimize the occurrences of illegal occupation where they would have to be required to provide alternative accommodation.

In the new dispensation, there was a vision to create a greater role of local government. To that effect, local government is constitutionally mandated to create inclusive cities for all residents. The developmental objects of local government are derived from chapter 7 of the Constitution which states that they 'must structure and manage their administration and budgeting and planning processes to give priority to the basic needs of the community and promote the social and development of the community". Local government is also included as part of the state to "respect, protect, promote and fulfil fundamental human rights". The role of municipalities in housing is premised on its capacity as a point of delivery. Therefore, municipality's role is centred mainly around planning capacity in terms of its powers and functions. In the South African context, the right to housing is inextricably connected to the right to the city as articulated by the Cities Network (SACN, 2014). The municipal role has been heightened by a series of court cases that created a municipal framework in housing,

particularly for the urban poor. The creation of Emergency Housing has been allocated to local government through Chapter 12 of the housing code with the funding arrangements based on application from the provincial departments of Human Settlements.

There are other pieces of legislation that give effect to section 26 (3) among others; Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE); Extension of Security of Tenure Act 62 of 1997 (ESTA); National Building Regulations and Building Standard Act 103 of 1977 (NBRBSA); Informal Land Rights Act and other relevant legislation. The focus of the research is on PIE, as it regulates unlawful occupation of land and buildings and involves large-scale evictions in the urban realm. NBRBSA is worth noting, as an important piece of legislation in the context of evictions. Prior to the Olivia Road case, the municipalities could demolish a dilapidated building, and order the occupants to vacate such building through a written notice using the NBRBSA. There was no requirement to obtain a court order to evict occupants from an unsafe building or to provide an alternative accommodation (Strauss and Liebenberg, 2014). As such, municipalities used NBRSA to evacuate occupants without a court order. The specific provisions in the NBRSA, section 12 (6) were declared unconstitutional "for failing to incorporate judicial oversight into eviction proceedings…" (Strauss and Liebenberg, 2014 p.437). To that extent, municipalities must implement the health, safety and disaster legislation in a manner that will not lead to homelessness. As such all evictions must be preceded by the Court order as well as a determination of the availability of alternative accommodation if there is a possibility of homelessness. This point was emphasised by Ms Roduba from the LHR, when she made a clear distinction, between lawful and unlawful evictions as follows *"Unlawful eviction is when somebody comes randomly without a court order. Lawful eviction comes in terms of PIE or Ester. PIE specifically mentions alternative accommodation. Alternative accommodation has become a strict requirement for eviction to happen. People's personal circumstances have to be taken into consideration to ensure that it is just and equitable "*. She further elaborated that people become more susceptible to being evicted without alternative accommodation when they are not represented. It is clear from this statement that the laws relating to eviction have to be in line with the Constitution and be subjected to the oversight of judiciary as stipulated in PIE.

4.1.2 Relocation and engagement with affected parties

The question was posed to establish what the city considered successful in resettling or relocating occupants and providing alternative accommodation where the City initiated resettlement or relocation. This is what the Divisional Head of Human Settlement Planning had to say, "We managed successfully in other places as part of Informal Settlement Upgrading, by engaging with the affected communities such as Nellmapius extensions 21,22,24, Refiloe Manor and extension 7. We put a framework in place to engage with relevant stakeholders in order to speed up a process". Interestingly, there are instances where the city initiates the court processes where they also demonstrate availability of alternative accommodation, for example, it was reported that they are in the process of relocating 400 people settled in Gomora to a newly established Orchard extension 110 and through engagement 380 people have agreed to move. The remaining 20 have built on the Sasol and Rand Water servitudes and have not agreed to move. The city indicated that they would apply for a court order to evict them and demonstrate that they can provide alternative accommodation for those people. It was interesting to note that in instances where the city initiates the process of resettlement, they were willing to offer alternative accommodation.

It further reported that a framework was developed by the city for identified areas that needed formalization such as Nellmapius (various extensions), they identified a greenfield subdivided it and followed town planning and legal processes and consulted with affected beneficiaries for serviced stands and started the process for relocation. Mr Chipu also made a point that they engage with the affected people as expected and as prescribed by legislation with the following statement "Engagements are not about court orders, public participation is prescribed in terms of the Constitution and local government legislation… relocation happens for various reasons for example, when there is a greenfield development e.g. relocation of people of Gomora to Orchard extension". In cases where people have built on a servitude, the city approaches the Court to grant eviction order and demonstrate that it has

alternative accommodation. The city acknowledged that there needs to be clarification with people who need space for economic activities as it is not covered by PIE Act.

In responding to what has worked well in implementing court decisions, the resettlement of Lyttleton was cited, as it met all the Court conditions. However, it was emphasised that it is not the best practice, as it was not budgeted for, and the city had to apply for section 36 of the Municipal Finance Management Act, to get approval. The City is of the opinion that the land invasions should applied in terms of Criminal Procedures Act, not PIE Act as is currently the case. It was argued that the PIE Act is abused by illegal occupants and human rights activists.

From the responses advanced by the city, it can be concluded that the city does not have objections with providing alternative accommodation and resettling occupants when it is initiated by the city, for example, as mentioned in the Lyttleton settlement above where residents were settled in servitude, the process of relocation was smooth according to the city. Interestingly, the city reported that where alternative accommodation was short-term and there was successful integration into the existing community, the project can be regarded as successful. Interestingly, the LRH viewed a successful project as the one where residents were settled for a longer period without disruptions, and less overcrowding as it witnessed in Skuurweplaats and Mooiplaats.

The Emergency Housing Programme is still riddled with many uncertainties. Twenty years after the promulgation of the housing code where the emergency housing programme was adopted, followed by numerous court cases, the city does not have a dedicated budget for the Emergency Housing Programme. There is a duty on the government to set aside resources to provide relief to people facing eviction. Concurrent housing functions of other spheres of government and the accompanying funding arrangements have contributed to the poor implementation of urban rights. The municipal planning instruments such as SDF and IDP are not optimised by the city to deal with urban shelter challenges. Moreover, the illegal occupation of land is not perceived as an emergency like other natural disasters expressed in

the EHP. The city is of the opinion that illegal occupation of land is an act of criminality and should be dealt with as such.

4.1.3 The implications of Eviction laws, Constitution and PIE

The PIE Act outlines procedures to be followed before the eviction can take place. Issues considered by PIE are among others; duration of occupation (more than six months), relevant circumstances of the individuals and other considerations, this implies that a case-by-case approach is followed to consider the circumstances. Section 4 (6) states the court must consider if it is 'just and equitable' to grant an eviction order if an illegal occupant has occupied the land in question for less than six months. The crucial factor to be considered by PIE; is whether the eviction will result in homelessness and the availability of alternative accommodation. For example, this consideration was made when the Constitutional Court ruled in favour of the occupants of Skuurweplaas and Mooiplaats who had been there for less than six months.

When asked about the role of the Constitution in housing rights, the Divisional Head for Human Settlement Planning, Mr Chipu acknowledged the rationale behind the inclusion of housing rights in the Constitution and further elaborated that section 26 (3) of Constitution was to ensure that no one was forcibly removed from their homes as was the case during apartheid years, he added that, the drafters of the Constitution wanted to ensure that people are not displaced and disrupted by arbitrary evictions. He confirmed that the inclusion of section 26 of the Constitution is in line with the "vision of our forefathers" or those who advocated housing rights in the Constitution. Interestingly, he emphasized, that the litigations on eviction and the requirement of the provision for alternative accommodation is not a response to the Constitution, but rather a requirement from the Prevention of Illegal Eviction and Unlawful Occupation of Land (PIE) Act. Having acknowledged the spirit of the law, he further explained that the court's decisions have had negative implications on the city, noting that people who illegally occupy the land for more than six months expect to be provided with alternative accommodation when evicted or moved for various reasons. He argued that the Court's focus on temporary accommodation is detrimental to the housing

programme as many people may not necessarily be looking for temporary accommodation but may be looking for permanent accommodation. The court rulings force the city to spend a lot of resources on temporary accommodation when more resources will still be needed for more permanent accommodation. However, the LRH disagreed with the assertion that funding was a problem when it comes to the provision of alternative accommodation. Ms Du Plessis argued that the courts have set the bar very low by accepting a rudimentary form of accommodation as an alternative accommodation. She explained that the CoT normally provide open fields with very basic services as an alternative accommodation, which she believes does not cost much. For that reason, it was felt that the bar had been set too low for the provision of alternative accommodation.

4.2 Overview of cases in Tshwane

Skurweplaas and Mooiplaats

The Constitutional Court judgement of Skurweplaas v PPC Aggregate Quarries (Skurweplaas), and Occupiers of portion 25 of the Farm Mooiplaats v Golden Thread was delivered on the same day. Both properties were occupied by people from the overcrowded neighbouring informal settlements of Itireleng. Overcrowding in Itireleng resulted in settlement developing into the Mooiplaats farm. The owners of the Mooiplaats obtained an eviction order and subsequently evicted occupiers from the farm. The occupants then moved to Skurweplaas. The owners of Skurweplaas obtained the order to evict, but the number of occupants kept increasing resulting in the occupation of both properties. When the cases reached the Constitutional Court, the principles of Blue Moonlight judgement were applied which affirmed the municipality's duty to provide alternative accommodation and added additional measures. Firstly, the Court required that occupants be provided with alternative accommodation as a condition for eviction even though occupation was less than six months as per PIE requirements. Secondly, the Court concluded that PPC Quarries could not prove that it intends 'to use the property gainfully in the foreseeable future' hence eviction could not be affected on an urgent basis before the alternative accommodation could be finalized.

The Court therefore concluded that it was not "just and equitable" to evict the occupants without alternative accommodation. Thirdly, the City was ordered to furnish information on the occupants to determine who will become homeless and provide information within a month to the court prior to eviction. The Court expressed strong exception to the city when it referred to occupiers as invaders expressed in the following statement "*this description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental, and comes close to criminalising the occupiers"* par 3. The Skuurweplaas and Mooiplaats outlined in detail the obligations of the property owners and municipalities in eviction, thus expanding on the Blue Moonlight case.

Progress since the judgements

The cases of Skuurweplaas and Mooiplaas form part of the cases that were adjudicated by the Constitutional Court. Although the court processes were challenging and confrontational, the occupants were eventually relocated and settled to the West of Pretoria. This is one instance where the LHR conceded that the provision of alternative accommodation had some success. When asked about instances where the city was able to resettle successfully through engagement with affected parties, Ms du Plessis from LHR responded as follows "Skuuweplaas/Mooiplaats were relocated in an orderly manner, but the one was in private land and the other one was in municipal land. The were relocated to West of Pretoria. They are not overcrowded, and I don't think that Tshwane would like to move them". Although there was reluctance from the representative of the LRH to acknowledge the resettlement that was done successfully, one can conclude some elements such as stability, lack of overcrowding is some of the factors considered important by the activists in the implementation of EHP.

Schubart Park Residents Association v Tshwane Metropolitan Municipality

The case involved residents of Schubart Park, a residential complex, consisting of four buildings in the Pretoria city centre and the City of Tshwane. The complex was built in 1970s

as part of the subsidised scheme for civil servants and was taken over, by the City of Tshwane in the 1990s. The buildings had over the years deteriorated due to poor management and lack of maintenance. According to the city the building was occupied by many people not known to the city. Residents embarked on a protest regarding unbearable living conditions in the complex. This prompted the city to evict the residents due to unsafe buildings. The residents challenged the eviction, seeking an order to allow them back to their homes. The case was dismissed by the Pretoria High Court based on the conditional tender presented by the CoT, which required residents to meet certain conditions to be offered temporary accommodation. It found out that the removal was not permanent and ordered that parties engage and reach an agreement on a suitable alternative accommodation. The parties could not reach an agreement and the matter was referred to the Constitutional Court. The ConCourt was asked to consider whether the removal of residents was in line with section 26 (3). The Constitutional Court set aside the order of the High Court ruled in favour of the residents and ordered the City to have a 'meaningful engagement' with the residents on how restoration would occur. It ruled that meaningful engagement must happen at every stage of the process until reoccupation.

During the interview, the Divisional Head for Housing Administration, Ms Petal Thring reported that they have been providing accommodation for Schubart Park residents at the City's expense since 2012 when they lost the case against the residents of Schubart Park. She reported that they initially expected the temporary accommodation to last for a short period i.e. six to twelve months is now 10 years. The city indicated that a lot of people who reside at Schubart Park can afford to pay rent but are refusing. They indicated that the city does not have the capacity to collect individual information of people who reside in the place. Judging from the responses, it looks like the city has not found a resolution to the matter. The city indicated that they intend to take the matter back to the Constitutional Court as it is their view, that the judges got it wrong. However, as Ms du Plessis pointed out, the Schubart case is a typical example of how the city mismanages their obligations and explained as follows; " If you look at Schubart case, it costs Tshwane about R2m a month to maintain Schubart Park, with that kind of money they could have built something or been more creative to utilize that money. They do not want to do it properly or be creative so it can be more beneficial".

Turnover Trading 191 (Proprietary) Limited v Mosehla April and further Occupiers

The case involved a group of individuals who occupied private property for several years (Turnover Trading) running the recycling business. The case started in 2017 and was finalized in 2021 during lockdown. The applicant (Turnover Trading) indicated that he intends to develop a hotel and conference centre on the property with a contract already concluded, and therefore seeking an eviction order. The municipality joined the applicant and reported that they have alternative accommodation and will relocate the occupants to Sunderland Ridge which is 15km away. They also provided details on the nature of the accommodation. They further indicated that they have had face to face engagements with occupiers. The City emphasised that recycling is not permitted in that area in terms of the Land Use Scheme and therefore illegal. The occupants opposed the eviction based on deprivation of their livelihood as they conducted their business activities at their place of abode. The alternative accommodation as proposed would not allow business to carry on. The Court found out that it was just and equitable to evict occupiers as any risk of homelessness was addressed. The Court upheld the rights of the applicant and indicated that *"it would not be just and equitable to the applicant (and would defeat the applicant's section 25 rights) if the occupiers were allowed to remain on the property any longer than 30 days or until such time as they are provided with accommodation that allows them to conduct their waste recycling business"*. Par 190 The court dismissed the occupiers for their right to work assertion, and pointed out as it will be tantamount to abuse of PIE, as the Constitutional obligation relate with housing emergencies. The judge held that the occupiers cannot rely on the infringement of work as a basis to resist eviction. Mr Chipu mentioned that the case is a demonstration of the abuse of the systems, by activists who take the city to court and abuse the application of PIE. It was indicated that alternative accommodation cannot be provided on the basis of work opportunity. That would mean that majority of people will lay claim to the City. The finding raises fundamental questions around the interpretation and the spirit of the law

(Constitution) regarding the shelter rights and access to social and economic activities which cannot be resolved by temporary measures.

The cases demonstrate that the municipalities have had difficulties in recognising their role of provision of alternative accommodation. The cases have been fiercely defended and some were concluded in the Constitutional Court. For example, the Schubart case shows that the city has not found a workable solution to deal with tenants at Schubart Park, ten years after the cases was concluded, and have reported that they are still considering further legal options to deal with the matter. Although there are cases that can be regarded as good practices, such as the settled communities of Skuurweplaas and Mooiplaats, there are challenges faced by the city in the implementation emergency housing. The findings raise important aspects on the long-term effects of the court rulings as admitted by the divisional head of housing administration when she reported that a lot of people who can afford rental are not paying, as they know that the law is on their side. The city needs to reflect on their approach on managing some of the projects. However, as pointed out by the LHR, the city does not manage Schubart Park properly.

4.3 Has the City modified its planning processes to accommodate evicted people?

The municipalities have the obligations to set housing goals designate land for housing as well as managing land use. According to Visser (2009) the rights of local government towards housing rights come with "the obligation to *respect, protect and promote* the fundamental rights of the Constitution" (Visser, 2009 p.204). They further have housing related obligations to "initiate, plan and coordinate housing development in their area of jurisdiction" (Visser, 2009 p.207). The obligations listed for local government are what Visser refers to as "minimum obligations to promote right to shelter". Importantly, the duty to provide alternative accommodation through EHP lies with the municipalities. Although the municipalities do not have a primary obligation for the fulfilment of the right to housing as articulated by Visser (2009), they have powers and functions related to housing such as

building regulations; portable water; waste disposal and land identification. All these powers are within the ambit of the city to plan for emergency accommodation. It must however be "emergency accommodation informal and can be terminated by the city at any given time, there is no security of tenure for the vulnerable people" as argued by Ms du Plessis. She argued that the temporary accommodation must meet certain standards as prescribed by the courts.

Housing is a concurrent function between the national department and the provincial departments. The provinces have the authority of approving projects and allocating funding for different housing projects (Cities Network, 2014). As articulated by Visser the primary obligation for the fulfilment of the right to housing does not lie with the municipalities, instead they have powers and functions that are related to housing This explains the adhoc application of the programme.

The ConCourt alluded to the responsibility of all spheres of government's housing obligations and declared that "each sphere of government must accept responsibility for the particular parts of the programme". Subsequently, the responsibility to provide for short-term emergency housing for people in crisis and alternative accommodation for people facing eviction was given to the municipalities through the introduction of the Emergency Housing Policy (EHP) contained in chapter 12 of the Housing Code. According to the policy, the municipalities must investigate the need for emergency housing in their areas and proactively plan for it. This was the argument of the CoT, where both divisional heads are of the opinion that the courts do not have sufficient understanding of how the state function particularly at municipal level. Mr Chipu, went on to say that "The court outcomes are contrary to the municipal finance and procurement processes. Importantly they have impact to the mandates of different spheres of government. *"as far as the national housing code is concerned, that will not be the primary obligation of the municipality. The provincial government is mainly responsible for building top structures in terms of powers and functions. But the City will be responsible for provision of the land and on that basis there's a view that they all spheres of government will then have responsibility in terms of providing emergency*

accommodation. So, it puts us in an awkward position that will not necessarily be our mandate".

Given the position of the CoT it can be concluded that the City has not devised a programmatic and a coherent approach to eviction to alternative accommodation. This is not the position of the City of Tshwane only, as noted in the cases that have been discussed for example.

4.3.4 Abuse of the Emergency Housing Programme

There was a strong sentiment from the city that the Emergency Housing Programme and the PIE law are being abused, firstly as a queue-jumping method to the existing beneficiaries in the National Housing Register (NHR) which serves as a waiting list. Resources are often diverted to alternative accommodation to those who have been awarded by the Court as opposed to the people who are on the waiting list. The raised the concern over "orchestrated and invasions" particularly on the land which has been earmarked for development, they described the practice as sometimes "political expedience" as well clear act of criminality which must be dealt with in terms of Criminal Procedures Act, instead of PIE as there are loopholes used by both occupants and rights activists. It was felt that the court rulings are disruptive, expensive and delaying the City in terms of achieving integrated human settlements as articulated in the Integrated Development Plan. The frequency and the magnitude of illegal land occupation place a strain on the capacity and the resources of the City and they city will not be able to cope with all these acts. These responses shows that the state remains opposed to the illegal occupation of and perceive it as a criminal act rather than housing shortage matter. In order to mitigate the impact on the City's resources they have reported that the city has put control measures in place to minimize the occurrences of illegal occupation where they would have to be required to provide alternative accommodation.

Summary of Findings

From the discussion it can be concluded that the Emergency Housing Programme is still riddled with many uncertainties, in almost twenty years after its adoption and many court cases that followed, the city does not have a clear programme and the budget for emergency housing as prescribed by the courts. The issues of reconciling the courts outcomes and what is needed to provide for emergency housing still needs to be clarified. The concurrent functions of housing function with other spheres of government and funding arrangements has contributed to the implementation concerns for urban rights. The municipal planning instruments SDF, IDP seems inadequate to provide sufficiently for urban shelter. The illegal occupation of land is not perceived as an emergency like other natural disasters that are catered for in the act, as a result the City is the opinion that illegal occupation of land is an act of criminality and should be dealt with as such.

CHAPTER 5

5. DISCUSSION OF FINDINGS

This chapter deals with the main questions of the research study to explore the extent to which the city has fulfilled its role in providing alternative accommodation to evicted people as prescribed by the court rulings. The analysis will be presented according to the research questions. The themes that were identified will not be lost but will be presented as sub-headings to the research questions.

5.1 How has the City of Tshwane complied with the court rulings involving the provision of alternative accommodation?

The emerging themes from the interviews and documents analysis have raised policy and coordination issues that have implications on the implementation of the provision of alternative accommodation to the people who have been evicted by the city.

5.1.1 Programmes and Plans

After the Grootboom case ruled that the housing policy did not cater for the needs of the most desperate who are homeless or face the prospects of homelessness, the state was required to develop a policy which catered for the emergency needs to the most desperate. This resulted in the Emergency Housing Programme (EHP) which was given to municipalities. Although municipalities must have the programme in place, such a programme must pass the Constitutional test. As demonstrated in the Blue Moonlight case, the Constitutional Court declared the housing policy of the City of Johannesburg (CoJ) unconstitutional on the basis that it excluded occupants who were evicted from the private land. The adoption of a emergency housing programme must be budgeted and accounted for like all other municipal programme. According to the EHP, municipalities must investigate the need in their areas,

and proactively plan for it and apply for funding in the form of grants to provincial department the municipalities, it is up to the provinces to approve or disapprove funding. This argument was rejected by the courts in the Blue Moonlight case where the city's argument was that it had not budgeted for temporary accommodation for the homeless victims, the court argued that the omission of the budget was based on the city' s erroneous understanding of its duties. This situation is exacerbated by the fact that in Gauteng province there is no ringfenced allocation for emergency housing. It must be mentioned that municipalities are amenable to respond to other emergencies brought by natural disasters like floods and seasonal fires. The opposition of provision of alternative accommodation to illegal occupation of land is viewed as criminal and not considered an emergency. To that extent there is resistance to implementation, as demonstrated by the number of cases that taken to courts.

5.1.2 Availability of alternative accommodation

Evidently, pressure to provide alternative/emergency accommodation is enormous on municipalities. The emergency accommodation alone happens on the backdrop of other emergency situations that require state's response like floods, fires, and severe housing shortage. As indicated in the housing code, the aim of the EHP is to address the needs of the household who are facing emergency housing situation. As correctly pointed out by Cirolia, (Cirolia, 2014) there is a blurred line between emergency and non-emergency housing in South African cities particularly in the context of informal settlements. To this effect, municipalities have to contend with different urban challenges and priorities on top of complying with court orders for provision of alternative accommodation. Given the systemic housing shortage in South Africa and haphazard housing coordination the EHP is more than just a temporary measure, it requires adequate programmatic budgeting, balancing between property rights and housing needs for the poor. The municipalities have argued that the temporary accommodation has become more of a permanent accommodation due to systemic housing shortages.

It has become a practice that the courts will not issue that eviction order if the municipality cannot prove the availability of alternative accommodation. In subsequent cases following Grootboom the courts expanded the requirements for eviction and provision for alternative accommodation. To this end, courts ruled on the constitutionality of certain sections of the National Building Regulations and Building Standards Act of 103 (NBRSA), which dealt with health and safety issues of dilapidated buildings in 51 Olivier Road Case. Until that point, municipalities had authority to order occupants of unsafe building to vacate the said building without the court order. The evictions in terms or health and safety now require a court order as well as the availability for alternative accommodation as one of the aspects to be considered before a court order can be issued. The municipalities are required to enforce the health and safety and disaster management with the consideration to prevent homelessness.

In the PE municipality case, the court indicated that in the interests of justice and equity, the courts will be reluctant to grant eviction order against relatively settled occupiers, unless the court is satisfied of the available alternative accommodation as required by PIE. The courts have also required the city to provide alternative accommodation for people who occupied the land in less than six months, as witnessed in then Skurweplaas and Mooiplaats case. It argued that 'other relevant circumstances" might have to be considered where eviction might lead to homelessness. This happened even though there is no unqualified right from municipalities to prevent homelessness.

5.1.3 Provision of resources for Alternative Accommodation

The provision for resources for emergency accommodation is the most contentious issue in the provision of emergency accommodation. The Constitutional Court ruling in the Blue Moonlight established that "it is not good enough for the City to state that it has not budgeted for something, if it should have indeed planned and budgeted for it in the fulfilment of its obligations" (Blue Moon light, para 74). Although this was established by the courts, it is not an easy task given the powers and functions of the municipalities, particularly when it comes to large scale evictions which will require resources. The availability of resources, is an

important aspect to consider, given that it is also acknowledged in section 26 (2) of the Constitution where is it stated that "the state must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right (*housing*)". The process can be compounded when provinces have not ringfenced the emergency fund. In addition, the application process to provinces is cumbersome and the approval is at the discretion of the MEC. To that extent, the municipalities have resorted to using emergency procurement to fund the alternative accommodation, when compelled by the courts. As reported earlier, the city had to apply for section 36 of the MFMA to provide emergency shelter in Lyttleton. This is not unique to the City of Tshwane, as it also reflected in various reports of SERI series.

5.1.4 Housing the poor vs Property Rights

The tension between property rights and the housing rights come as a result of unlawful occupation of land or property and unlawful occupiers' claim to access to housing and protection from arbitrary eviction. The Blue Moonlight case clarified the position of private property eviction which may result in homelessness. In an attempt to try to balance the property rights of section 25 with the rights to adequate housing of section 26 of the Constitution, the court ruled that private owners might have to delay enjoyment of their rights to property in instances where eviction may lead to homelessness. In this case, the courts may withhold providing eviction order until the city is able to provide for temporary shelter. The link between the date of eviction and availability of alternative accommodation was established. This principle was further applied in the Skuurweplaas and Mooiplaats case where the date for eviction coincided with the availability of provision of alternative accommodation. Although the arrangement to withhold rights is meant to be a temporary measure, the courts have no control on how long the state, or the municipality can take to find alternative accommodation. Although it can be said that the courts are limited in terms of their ability to create remedies towards the poor, some commentators are of the view, that it is up to the state to step up. For example, in terms of conflict between private property and access of housing to the poor, particularly where the properties are not used gainfully, the state still has the power to expropriate the property for housing (Strydom and Viljoen, 2014).

However, municipalities are reluctant to exercise their power for fear of jeopardising their rates base. To that extent the regeneration projects are more favoured as a means of generating revenue for the cities.

Evictions brought by private landowners raises serious challenges that need further considerations. For example, in the case of Blue Moonlight, the developer was aware of the people occupying the property when it was purchased and sought eviction so that he could redevelop the property. This is one of the shortcomings of the court outcome that have been criticized by some commentators. For example, Williams (2014) contends that this mandate is tantamount to subsidizing the private property owners who want to profit from these hijacked buildings. In this case, the resultant homelessness is not created as an emergency, but through development process. The State of the Cities report (2011) reported the process of regenerating neighbourhoods, particularly inner cities has led to buildings being sold to the investors and existing residents being evicted. To that effect it has been suggested that there must be considerations for private developers to bear some of the relocation costs to alternative accommodation.

5.1.5 Criminalisation of homelessness

There has been a question as to whether all illegal occupation of land and resultant eviction result in homelessness and therefore require alternative accommodation. As mooted by Smith, not all eviction result in homelessness, he further asserts that personal circumstances of occupiers will have to be thoroughly determined to ensure a real case of homelessness. This kind of argument is flawed as it fails to appreciate the plight of poor people who come to the city search of better prospects.

Many factors have been advanced by the state, one such is the orchestrated criminal activities to occupy land. This is at the heart of the stance taken by municipality to evict and fight the cases in court. It also explains the tough stance and response when dealing with land occupation, where there is strict surveillance to combat occupation of land, and where it happens, to evict before occupants are settled. This tough approach presents a missed

opportunity by the city to recognise that cities function as reception areas or gateway for better opportunities, and therefore cities must anticipate this and plan accordingly and collect information, on migration patterns and provide for shelter needs. It is important for cities to recognise the inevitability of population growth and migration which cannot be wished away. Municipalities must be supported by the national government on by resolving policies of national interests.

5.2 Has the City modified its planning processes to prevent homelessness.

The provision for alternative accommodation for evicted occupants is not finding expression in the planning processes of the City. The are many factors which may be influencing this state of affairs, as noted by Cirolia (2014), the EHP is mainly used for eviction from private properties and public land for various reasons such as human settlement development, regeneration projects, health and safety and other reasons. The rate at which the illegal land occupation occurs seems to exceed the resources to provide alternative accommodation. The emergency housing policy points to legislation and policy shortcomings which affect implementation at the local level. The link between planning and human settlements is inadequate even at the municipal level. Spatial Development Frameworks (SDFs) developed at municipalities do not adequately address issues of informality regarded as they are regarded as housing issues. Todes (2008) attributes the ineffectiveness of spatial development frameworks as being too broad and not used for decision making process. Other factors that affect planning at municipal level relate to unclear policy positions or contradicting national policies which have a direct bearing on municipal planning for alternative accommodation. Unclear policy mandate on urbanization cannot be resolved at local government level, similarly clear policy direction on migration has to be led at national level.

5.2.1 Shortcomings of national housing strategy

Municipalities are required to provide information on personal circumstances of the occupants before the court, the magnitude of the cases compared to the resources and

capacities at the local government level may not be enough. Cirollia cautions that issues faced by municipalities may be valid. She contends that the EHP, has become a "de facto housing programme for addressing the risky and hazardous conditions of non-qualifiers" (Cirollia, 2014 p.405). These are the issues that are usually raised by municipalities but are rejected by the courts, for instance the EHP does not differentiate between citizens and non-citizens, all are expected to be provided with alternative accommodation if evicted. This situation is seen a queue jumping and creates tensions between those on the waiting list and those who benefit from the programme, as such increases risk and vulnerability to those affected. The existence of waiting list that operates in a fair manner has been disputed by activists, who maintain that housing allocation process is varied and random. This view was also raised by the Lawyers for Human Rights who disputed the queue-jumping narrative and argued that most of the evicted people do not qualify for the state's RDP as many of them are not citizens and therefore are not on the housing 'waiting list', after all the alternative accommodation provided are informal rights that can be terminated at any time. Although EHP does not discriminate against non-citizens, the HSRC, (HRSC, 2015) recommends that there needs to be a housing programme beyond the EHP which assist affected parties equally without creating the impression that non-nationals are given a given preference at the expense of poor South Africans. This further expanded by the representatives of LRC who maintain that cities should move beyond alternative accommodation and provide security of tenure, by availing municipal land and providing title deeds, so that people can build their own houses.

5.3 What has been an impact of Court rulings on the provision of alternative accommodation

Litigation in housing cases made an impact in the way the state, particularly the Cities should respond to people who are may be faced with homelessness. Firstly, it entrenched the right for alternative accommodation in case of evictions. The cases have led to changes in housing policy which is attempting to look at broader human settlement issues, importantly the promulgation of the emergency housing programme. The landmark cases have also led to some municipalities to adopt some "security driven approach" to avoid illegal occupation of

land to avoid being forced provide alternative accommodation to those that they feel want to by-pass the process housing allocation.

5.3.1 State responsibility for crisis/emergency housing

The states policy on housing was criticized not having short term plan or emergency plan for people who are homeless whilst they are still waiting for the subsidized housing. Many have criticized the Constitutional Court for not adopting the minimum core in the Grootboom case. However, Wesson (2004) puts a strong case that the adoption of the minimum core would have meant that the state prioritizes the minimum core instead of the noncore and diverted all the resources to the core until the need has been satisfied, in the case of Grootboom the resources would have been diverted to emergency relief. Instead, the judgement opted for a "collaborative approach" between the state and the judiciary by identifying a gap in the housing policy and ordering that it be corrected, when it directed that the state must cater for short term needs of the most vulnerable. It did not direct, the amount of resources that should be allocated to needs of those vulnerable. The decision was left to the state to determine those details and the courts only set guidelines to what is reasonable. The state was given the latitude to develop and implement the programme that would best accommodate the needs of those identified. It can be stated that the Grootboom case, confirmed that contribution that each of the branch of state should provide in the attainment of the housing right. The other crucial aspect that was determined by the Constitutional Court in the Grootboom is the responsibility of all spheres of government in housing when they indicated that:

"*Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state'section 26 obligations…"*

In terms of emergency housing needs the CC went on to say that "effective implementation requires at least adequate budgetary support by nation government, this in turn requires recognition of the obligation to meet immediate needs in the nationwide housing programme". The statements above reiterate the importance of intergovernmental

cooperation between the spheres of state for the programme to work. Although the Emergency Housing Programme was ultimately promulgated, and placed as the primary responsibility of the municipalities, the programme needs prioritization, and budgetary support from other spheres of government for it to work. It is crucially important that other related programmes which have an impact on housing, for example land release programme, national planning framework and provision of infrastructure on the emergency housing are done to support this outcome. That being said, the outcome of the cases provides the state with the opportunity to organize itself through decentralized devolution of powers to cities to implement the shortcomings that have been identified by the courts. The role of provinces in particular should be interrogated, in terms of support for this programme. The provincial departments of housing hold the fiscal and functional mandate for housing, and need to support to municipalities. As noted by the Human Rights Commission (HRC, 2015) reported that only six (6) out of nine (9) provinces allocated a budget for emergency housing, with Gauteng as one of the provinces which do not have emergency housing programme. At the time of writing this report, there was still no ringfenced budget allocation for emergency housing in Gauteng.

Inconsistencies in court rulings

Although the courts have provided a framework for provision of alternative accommodation, through application of PIE and other related legislation. There has been inconsistency in the application of the law on similar circumstances. For example, in Turnover Trading 191 vs Mosehla April and further occupiers, the judge ruled that the provision of alternative arrangements on the basis of suitable business activities are not covered by PIE and that business activities are not an element of section 26 of the Constitution. However, in a different case of Rycloff-Belleggings (Pty) Ltd v Ntobekhaya Bonkolo and others in October 2022, Judge Wright of high court ordered the City of Johannesburg to provide alternative accommodation to unauthorized occupants of Randjiesfontein in Midrand to continue with their recycling business (Magagula, 2022). This was a direct contradiction to earlier ruling of Turnover trading which specifically ruled that economic activities are not covered by the PIE

Act. Although these two rulings are not from the Constitutional Court, they still have a bearing on the operations of municipalities.

5.4 Enforcement of Housing Rights through litigation

The declaration in the Constitution that it wants to heal the country and the divisions of the past in the new democratic South Africa demonstrates an ambitious and the mammoth task that the country envisioned to transform the country. The Constitution of South Africa is renowned for having judiciable socio-economic rights including the right to be protected from arbitrary eviction without alternative accommodation. By incorporating socio-economic rights in the Constitution and declaring their justiciability has given the judiciary greater role and wider powers as the "guardian" of the Constitution. Litigation has been one of the important tools used to claim the housing rights and to hold the Executive accountable. The history of housing particularly in eviction has been a major part of our history, it is still part of our reality in the post-apartheid South Africa. This is evidenced by the number cases that are referred to court and thus declaring housing as one of the most litigated socio-economic right in the current dispensation.

The inclusion of socio-economic rights in the constitution was fiercely contested in the earlier stages of democracy. The concern centred around the institutional capacity of the courts to adjudicate on matters that would have impact on policy making process and would have budgetary implication from the state. Importantly, the concerns were raised around they impact it would have in the separation of powers. However, since the declaration of the justiciability of rights, the debates then shifted, to how should the socio-economic rights be enforced. At the root of the enforcement of the socio-economic rights is the role played by the organs of the state in defining these rights and entitlements. Many academics and activists have criticized the courts for its failure to adopt the minimum core as prescribed by the ICESCR. They argue that minimum core set standards which must be adopted by the state may not yield the expected results to those intended for this right. Those who support this view are of the opinion that the courts adopted a weak form of review, which does not live up to the expectations of transformative project envisaged by the Constitution. Both of

these arguments are right, however, considering the composition of our constitution as well as the accountability framework, all organs of the state need to work together to achieve socio-economic rights, including the right to housing.

On the other side of the debates are those who support the court's measured approach which avoids encroaching in the terrain of the legislative and executive powers. They argue that the courts are not institutionally equipped does not possess the necessary information to determine the contents of the socio-economic rights. However, as opined by Christiansen (2008), the courts have sought to balance the concerns by adopting its own unique model which he refers to as "differentiated model" which recognizes the institutional weaknesses of the judiciary without abandoning its role in contributing the transformation vision. To that extent the courts have been able to hold the executive accountable by identifying when their policies and programmes were inconsistent with the constitution with a certain amount deference to the executive to develop or correct those policies. This approach acknowledges that the judiciary needs other branches of the state to achieve the envisaged transformation. This view is further supported by Fuo (2015) who contends that the primary right to give content to the socio-economic rights lies with the legislative and executive branches of government, the judiciary gives content through interpretation. He suggests that minimum core should be considered at policy making process to give content to socio economic rights. In that case, the government can be held accountable for the quality of their response for those rights. The courts can compel the state to define the contents of socio-economic rights from which the court can base their adjudication (Ngang, 2014) This is after all what was been envisaged by the Constitution the attainment of rights to all branches of government. Thus, as further expressed by Christiansen, "the courts' role as the interpreter of laws cannot possibly include power to effectuate significant social change in the absence of, or in opposition to other branches of government" (Christiansen, 2008 p390). It can therefore be concluded that for rights to be transformational, they need to be enforced, secondly, the cooperation of all organs of the state is crucial to give effect to those rights as prescribed by section 7 (2) of the Constitution.

CHAPTER 6

6. CONCLUSION

The report has discussed the municipal response to their obligation to provide alternative accommodation to people who have been evicted or facing eviction. The discussion explored the envisaged transformation of housing in the bill of rights and the responsibilities of the various organs of the state is discharging their mandate to transform housing and shelter rights. The framework developed by the courts and the resultant legislation which gave rise to the obligations of the municipalities and the collective responsibilities of the spheres of government. The obligations were analysed in the context of accountability mechanism of all spheres and branches of government.

The findings indicate that there has been an inconsistent and haphazard application of EHP. In most cases the city has not complied or adequately complied with the court orders as witnessed by long court processes where cases have been referred back to court and further orders being made. In such cases the city has begrudgingly been forced by the courts to provide alternative accommodation to evicted people. The discontent stems from the fact that some of the eviction cases are not perceived by the city as emergencies, but orchestrated criminal activities aimed at taking advantage of the system. At the core of the challenges of the non-implementation of court orders are unclear and unfunded mandate, fragmented and uncoordinated housing issues, particularly the link between temporary accommodation and government's RDP low-cost housing. The national and provincial government have been a missing link in the provision of emergency housing. The clarification of funding mandates, a comprehensive urban policy and migration policy has a bearing on the effectiveness of municipalities to deal with housing demands.

Litigation in housing rights has been used to hold the state accountable for the implementation of housing rights. The courts have the power to review the implementation of the housing rights by the state. Although the strategy has been successful in identifying

policy gaps as it did in the housing policy, the success has been limited due to non-implementation of court orders. The courts have been perceived encroaching on the powers of the executive by deciding of policy changes and budgetary issues which are the prerogative of the executive. The approach taken by the courts fail to take into the consideration the complexity of governance arrangements in the human settlement terrain which cannot be resolved through litigation. The high involvement of the courts can be attributed by the state's failure to develop a comprehensive human settlement policy that takes care of the short-term needs of those in desperate situation and the lack of accountability by the state departments to provide for the large section of the society. The court's inconsistent application of the law has also had a negative impact on the municipalities' ability to plan. The example of Turnover trading and the Rycloff Bellegings is a case in point, where similar circumstance yielded different outcomes. The discussion on the cases and the courts approaches indicate that litigation as a form of accountability has limited success and should be applied as a last resort. The Executive need resolve the governance arrangements to provide housing rights.

It can be concluded that the transformational vision of the Constitution has not been achieved, even with promulgation of laws such as PIE which prohibits unprocedural eviction and provides that alternative accommodation be provided to evicted people. The city's ability to operationalise its role to provide alternative accommodation to evicted people is hampered by government's lack of clear policy position on issues affecting housing, such as national urban policy and migration policy. The proper decentralization of housing mandate accompanied funding mandate contribute to the resistance by the city plan for alternative accommodation.

The cities need to adopt a more proactive and sustainable approach in their planning mandate to create liveable integrated cities. To achieve this, they need to use instruments at their disposal such as the spatial development frameworks, land use management to change the spatial patterns. Links between planning and housing delivery should be more explicit. The spatial development frameworks should inform decisions on infrastructure and land use management to house the poor.

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