

Best Protection Against Eviction?

A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution

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Abstract

This study focuses on two legal instruments that grant robust protection against eviction: the European Convention on Human Rights (ECHR) and the South African Constitution (SA Constitution). It compares the protection offered by these two instruments to ascertain which of these instruments offer the most comprehensive protection to unlawful occupiers. This is done so as to determine whether and to what extent these instruments should adopt the protections and approaches offered by the other. It is concluded that, although *prima facie* the instruments offer similar protection, the implementation of the protections under the SA Constitution offers greater protection. While this can be justified by the socio-economic realities in South Africa, some recommendations regarding the implementation of protections under the ECHR are made.

Keywords

eviction – South African Constitution – European Convention on Human Rights – tenure security – comparative analysis

1 Introduction

A home provides more than physical shelter.¹ It satisfies a range of psychological and social needs.² A home is a space for self-expression.³ It offers security and stability.⁴ Being deprived of one's home has 'adverse effects on physical and mental health'.⁵ Strong and effective legal protection against eviction – the permanent or temporary removal against their will of individuals, families and/or communities from the homes/and or land which they occupy – and its adverse effects is vital to safeguard their well-being.⁶

Legal instruments offer varied manners and degrees of protection against eviction from homes. Moreover, these instruments are also interpreted and implemented differently. Comparing some of these instruments to determine which protections are stronger or more effective can be a valuable exercise. On the one hand, it can lead to the adoption of stronger, more effective protections from other instruments. On the other hand, such a comparison might advocate a tempering of a very strong protection. It might highlight that the stronger protection is at the expense of the rights and interests of other people. At the very least a comparison would justify the different means and levels of protection based on the differing natures of the instruments or contexts wherein the instruments apply.

This study focuses on two legal instruments that seem to grant robust protection against eviction: the European Convention on Human Rights (the ECHR) and the South African Constitution (the SA Constitution).⁷ Article 8(2) of the ECHR provides that an eviction must be lawful, for a legitimate purpose and 'necessary in a democratic society'. In terms of Section 26(3) of the SA Constitution all evictions must be court-ordered. A court may only order an eviction if, after considering all the relevant circumstances,⁸ it concludes that the eviction will be just and equitable.⁹

1 L.F. O'Mahony, 'The meaning of home: from theory to practice', *IJLBE* 5(2) (2013) 156 at 157.

2 *Ibid* 162.

3 *Ibid*.

4 *Ibid*.

5 *Ibid* 157. See also S. Nettleton, 'Losing a Home Through Mortgage Repossession: the Views of Children', *Children and Society* (15)2 (2001) 82 at 82.

6 United Nations Human Settlements Programme. *Enhancing urban safety and security* (London: UN-Habitat, 2007) at 118.

7 The Constitution of the Republic of South Africa, 1996.

8 Section 26(3) of the SA Constitution.

9 Section 26(3) of the SA Constitution does not provide the 'just and equitable' standard in terms of which to consider the relevant circumstances. Section 4 of the Prevention of Illegal

This legal study aims to compare the protection offered by these two instruments to determine three things. First, it aims to assess the extent to which the protection under these instruments differs. Second, it aims to ascertain which of these instruments offer the most comprehensive protection to unlawful occupiers. Third, it aims to conclude whether and to what extent these instruments should adopt the protections and approaches offered by the other.

To embark on a comparative analysis the legal instruments involved must share “common characteristics, which serve as the common denominator.”¹⁰ Although we believe that these necessary common characteristics exist, we want to acknowledge the differences between these instruments first.

The SA Constitution is the highest national law of South Africa.¹¹ South Africa is classified as a developing country and serious inequality exists between its citizens.¹² The SA Constitution was, amongst others, enacted to prevent the kind of human rights violations that were characteristic to the Apartheid regime.¹³ As a constitutional state, no entity (person or state authority) may act contrary to the SA Constitution.¹⁴ An aggrieved party can apply to court for relief.¹⁵ The Constitutional Court is the highest court in the country.¹⁶ Relief granted by the Constitutional Court must be just and equitable and the court has a wide discretion in determining a remedy.¹⁷ An order

Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) does, however, include this standard. PIE was enacted to implement Section 26(3) of the Constitution and, hence, provides the requisite additional guidance for such implementation. The ‘just and equitable’ standard seems to be based on Section 172(1)(b) of the SA Constitution, which provides that the courts can make any order in constitutional matters that is just and equitable.

10 A.E. Örüci, ‘Methodology of comparative law’, in: J.M. Smits (ed), *Elgar Encyclopedia of Comparative Law, Second Edition* (Cheltenham: Edward Elgar Publishing, 2012) 560 at 561.

11 L. Meintjies-Van der Walt et al, *Introduction to South African law fresh perspectives, Third Edition* (Cape Town: Pearson Education and Prentice Hall, 2013) 44.

12 S. Terreblanche, ‘Constraints to Democracy and Public Reasoning in the New South Africa’, *Philosophy and Social Criticism* 41(1) (2015) 37 at 40, 44.

13 Preamble of the SA Constitution.

14 Section 2 of the SA Constitution.

15 Section 38 of the SA Constitution. This section deals with the right of persons to approach the court regarding the violation of a human right entrenched in the Bill of Rights (chapter 2 of the SA Constitution).

16 Section 167(3)(a) of the SA Constitution.

17 Section 172(1)(b) of the SA Constitution. The court has the responsibility to ‘forge new tools’ and ‘shape innovative remedies’; see *Fose v. Minister of Safety and Security* 1997 (3) SA 786 para 69. The discretion to grant relief that is just and equitable is not limited to the

by the Constitutional Court is binding on everyone in South Africa, including the state.¹⁸

The ECHR, on the other hand, is a treaty drafted by the European human rights organisation: the Council of Europe.¹⁹ As such, the 47 signatories to the treaty agree to be bound by its provisions.²⁰ The member states of the Council of Europe vary in levels of development, 13 of them being classified as developing countries.²¹ The ECHR is a response to the human rights violations of the Second World War and its purpose is to protect human rights across the whole of Europe.²² A primary use of the ECHR is for persons to bring complaints against their own governments for not complying with the provisions of the treaty.²³ After having exhausted national legal remedies, an aggrieved party can apply to the European Court of Human Rights (ECtHR) for relief. The court has the discretion to grant just satisfaction if necessary.²⁴ This can include an award of compensation, but is usually limited to declaratory orders.²⁵ The ECtHR cannot force a member state to

Constitutional Court, but applies to all courts deciding on constitutional matters; see Section 172(1)(b).

- 18 For the jurisdiction of South African courts, see F. Du Bois, 'The legal system', in: Du Bois (ed), *Wille's Principles of South African Law, Ninth Edition* (Cape Town: Juta, 2007) 114 at 121–129.
- 19 S. Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (New York: Cambridge University Press, 2006) 1.
- 20 This means that only four of the European countries are not members to the treaty. See Council of Europe. 2015. *Convention for the Protection of Human Rights and Fundamental Freedoms*. Retrieved 9 July 2015 <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.
- 21 'Developing countries are defined according to their Gross National Income (GNI) per capita per year. Countries with a GNI of US\$ 11,905 and less are defined as developing'. The International Statistical Institute. 2015. *Developing Countries*. Retrieved 9 July 2015 <http://www.isi-web.org/component/content/article/5-root/root/81-developing>. These member states are: Turkey, Bulgaria, Romania, Albania, Moldova, Macedonia, Ukraine, Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia and Montenegro.
- 22 Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (n 19) 1.
- 23 *Ibid.*
- 24 Article 41 of the ECHR. See also, Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (n 19) 154.
- 25 Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (n 19) 154, 155. This has developed over the years and courts are now more willing to award compensation, A. Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (Oxford: Oxford University Press, 2007) 52–53.

comply with its order and the order is only binding in so far as the member state chooses to comply.²⁶

Despite these and other differences,²⁷ the SA Constitution and the ECHR share an important 'common characteristic'. Both the SA Constitution and the ECHR are responses to injustice, oppression and violations of human rights in the past (i.e. Second World War and Apartheid) and share a commitment to democracy.²⁸ Rights entrenched by these instruments should be incorporated into the national laws of the countries.²⁹ Both instruments have a specialised court to hear matters directly relating to the provisions of the instrument. The ECtHR hears matters relating to the ECHR and the Constitutional Court hears matters relating to the SA Constitution.³⁰ Under both these instruments the specialised courts are primarily approached after all other remedies have been exhausted.³¹ In other words after lower (national) courts have been approached and lower (national) laws have been followed. Furthermore, both of the legal instruments offer comprehensive protection against eviction, as mentioned earlier.³² A comparison between the protections under these instruments will demonstrate which protection method is stronger and more effective. Whilst centred on the ECHR and the South African Constitution, the comparative analysis will be relevant for other jurisdictions facing similar issues.

This paper has been divided into four parts. The first part analyses protection against eviction under Article 8 ECHR. The second part examines protection against eviction under the South African Constitution. The third part conducts a micro-comparison based on the functional comparative analysis method.³³ In this part we describe, juxtapose and

26 Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (n 19) 155–156. The ECtHR can suspend the member state's right to vote on the Committee of Ministers or expel it from the Council of Europe.

27 See J.M. Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford: Hart Publishing, 2013) 94–108.

28 See G. van der Schyff, *Limitation of rights. A study of the European Convention and the South African Bill of Rights* (Nijmegen: Wolf Legal Publishers 2005) 1–2.

29 See, Article 1 of the ECHR; Section 39(2) of the SA Constitution;

30 See, Article 32 of the ECHR; Section 167(3) of the SA Constitution.

31 See, Article 35(1) of the ECHR. Unlike the ECHR, the SA Constitution does allow for matters to be brought directly to the Constitutional Court, see Section 167(6) of the SA Constitution. This happens only in exceptional circumstances, see Du Bois, 'The legal system', in: Du Bois (ed), *Wille's Principles of South African Law* (n 18) 121.

32 See Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (n 27) 67–71 and 96

33 See K. Zweigert and H. Kötz, *An introduction to comparative law* (Oxford: Clarendon Press, 1998) 34–47. Cf. M. Siems, *Comparative law* (Cambridge: Cambridge University Press, 2014) 13–28.

identify differences and similarities in the way the different instruments offer protect against eviction.³⁴ The final part presents conclusions and recommendations.

2 Protection Against Evictions under the ECHR

Article 8 of the ECHR protects a person's right to a home against interference.³⁵ An eviction is considered to be the most serious interference with a person's right to a home.³⁶ Interference is only permissible if such interference is lawful, aimed at achieving one of the goals listed in Article 8(2) and necessary in a democratic society.³⁷

In the remainder of this section the protection against eviction under the ECHR is discussed in more detail. In considering the implementation of these protections the focus is on decisions by the ECtHR. This is because ECtHR judgments constitute precedent that should be followed by lower courts. The discussion is separated into the three parts. The first two parts concern the two main categories of protections, namely procedural and substantive

34 See E. Örüciü, 'Developing Comparative law', in: E. Örüciü & D. Nelken (eds), *Comparative law. A Handbook* (Oxford: Hart Publishing, 2007) 43 at 49.

35 See C.U. Schmid and J.R. Dinse, 'European dimensions of residential tenancy law', *European Review of Contract Law* 9(3) (2013) 201–220; S. Nield, 'Article 8 Respect for the home - A human property right?', *King's Law Journal* 23(2) (2013) 147–171.

36 See *McCann v. United Kingdom* (2008) 47 EHRR 40 para 50.

37 It is uncertain whether a person is protected from interference by private parties, since Article 8(2) of the ECHR only refers to interference by a public authority. A possible interpretation is that this means private persons may not interfere with a person's right to a home at all. When a private party wants to evict someone from his property he has to do it in terms of legislation or a court order. The actual interference is therefore made by the public authority (either the legislature or the judiciary). Since evictions by private parties also seem to be subject to Article 8 this seems to be the only conclusion. This interpretation is confirmed in Article 1 of Protocol 1 that provides that 'no one shall be deprived of his possessions'. See also C. Ovey and R.C.A. White, *Jacobs and White: The European Convention on Human rights, Fourth Edition* (Oxford: Oxford University Press, 2006) 31–32, 344; Nield, 'Article 8 Respect for the home - A human property right?' (n 35) 147–171; M. Vols, M. Kiehl and J. Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany', *European Journal of Comparative Law and Governance* 2 (2015) 156 at 163.

protections.³⁸ The third part investigates the remedies available when these protections are violated or threatened to be violated. Effective remedies are crucial to protection against eviction. If available remedies are ineffective, the protection is unenforceable.

2.1 *Procedural Protections*

Certain procedural conditions regulate the interference with a person's right to a home. In other words, to evict a person from his home, certain requirements need to be fulfilled. Firstly, under Article 8(2) ECHR, the eviction must be in accordance with the law.³⁹ The eviction must be authorised by an act, other legal provision or case law, which authority has to be consistent with the rule of law.⁴⁰ Secondly, the eviction should be in the interest of one of the legitimate goals listed in Article 8(2) of the ECHR. This includes 'public safety', 'the prevention of disorder or crime', 'the protection of health or morals', and 'the protection of the rights of others'. Applicants for evictions usually do not encounter difficulty in meeting the first two procedural requirements. In most cases, the eviction is authorised by statute. It is also quite easy to show that an eviction is in the interest of a legitimate aim, such as the protection of the landowner's rights.⁴¹

38 Procedural protections refer to the procedures prescribed for a valid eviction. Procedures offer protection in themselves because it creates certainty. Requirements such as reasonable notice periods can be prescribed to give the evictee the opportunity to remedy any default on his side or seek alternative accommodation. Substantive protections involve more than requiring a procedure to be followed. It relates to the requirements placed on the authorities (such as the courts) in deciding whether an eviction should occur. This can include a standard which must be adhered to, such as that an eviction must be just and equitable (Section 26 of the SA Constitution). See D. Bilchitz and D. Mackintosh, 'PIE in the sky: Where is the constitutional framework in High Court eviction proceedings? *Marlboro Crisis Committee & others v. City of Johannesburg*' SALJ 131 (2014) 521 at 528.

39 Decisions where it was found that an eviction was not in accordance with the law include *Prokopovich v. Russia* Application No 58255/00, Merits, 18 November 2004 para 45; *Stanková v. Slovakia* Application No 7205/02; Merits, 9 October 2007 para 29.

40 D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2009) 344–348. See *Zrilić v. Croatia* Application No 46726/11, Merits, 3 October 2013 para 60.

41 See for example *Bjedov v. Croatia* Application No 42150/09, Merits, 29 May 2012 para 63; *Buckland v. United Kingdom* Application No 40060/08, Merits, 18 September 2012 at para 63; *Zrilić v. Croatia* (n 40) para 60. See also Vols, Kiehl and Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany' (n 37) 164.

The third procedural protection is in the form of a defence,⁴² available to the person to be evicted (the unlawful occupier).⁴³ In terms of this defence, the unlawful occupier argues that the adverse effects of the eviction are not proportional to the purpose it aims to achieve.⁴⁴ The proportionality defence stems from the requirement, in Article 8(2) of the ECHR, that any interference with the right to a home must be necessary in a democratic society.⁴⁵ An eviction will not be necessary if it is disproportionate to the legitimate aim it seeks to promote.⁴⁶

This defence right is considered a *procedural* protection, since raising the defence requires a certain procedure to be followed. It is the tool by which the unlawful occupier can force the proportionality of the eviction to be determined by a court.⁴⁷ Should the unlawful occupier fail to raise the defence, it is assumed that the eviction is reasonable and proportional.⁴⁸ Consequently, such an eviction can be granted based on the fulfilment of the first two procedural protections alone.

Debate exists regarding the amount of protection that this defence really offers.⁴⁹ The ECtHR has found that 'it will be only in very exceptional cases

42 See *Stanková v. Slovakia* (n 39) para 57; *Ćosić v. Croatia* Application No 28261/06, Merits, 15 January 2009 para. 22; *Zehentner v. Austria* (2011); 52 eHR 22 para 59; *Paulić v. Croatia* Application No 3572/06, Merits, 22 October 2009 para 43; *Kay e.a. v. United Kingdom* (2012); 54 eHR 30 at para 68; *Kryvitska & Kryvitskyy v. Ukraine* Application No 30856/03, Merits, 2 December 2010 para 44; *Gladysheva v. Russia* Application No 7097/10, Merits, 6 December 2011 para 94; *Igor Vasilchenko v. Russia* Application No 6571/04, Merits, 3 February 2011 paras 83–85; *Buckland v. United Kingdom* (n 41) para 65; *Zrilić v. Croatia* (n 40) paras 61–69. See also A. Remiche, 'Yordanova and others v. Bulgaria: The influence of the social right to adequate housing on the interpretation of the civil right to respect for one's home', *Human Rights Law Review* 12(4) (2012) 796–800.

43 For ease of reference persons facing eviction will be referred to as unlawful occupiers. The writers of this article understand that some evictions do not involve unlawful occupiers (e.g. tenants), but contend that the term is not ill-suited. Evictions will mostly involve unlawful occupiers (e.g. after a cancellation of a lease, a tenant becomes an unlawful occupier). Even owners-occupiers are regarded as unlawful occupiers if the law requires them to vacate the premises.

44 *Connors v. United Kingdom* Application No 66746/01, Merits, 27 May 2004 para 81.

45 See *Igor Vasilchenko v. Russia* (n 42) paras 81–85; *Buckland v. United Kingdom* (n 41) para 63.

46 *Connors v. United Kingdom* (n 44) para 81.

47 *McCann v. United Kingdom* (n 36) para 50.

48 See *McCann v. United Kingdom* (n 36) paras 28, 54; *Orlic v. Kroatija* Application No 48833/07, Merits, 21 June 2011 para 66; *Brežec v. Croatia* Application No 7177/10, Merits, 18 July 2013 at para 46.

49 See L.F. M'Hony, *Conceptualising Home. Theories, Laws and Policies* (Oxford: Hart Publishing, 2007) 477–481; Remiche, 'Yordanova and others v. Bulgaria: The influence of the

that an unlawful occupier will succeed in raising an arguable case on Article 8 grounds which would require a court to examine the issue in detail'.⁵⁰ In other words, although an unlawful occupier is always allowed to raise the defence, a national court can summarily decide on its prospect of success. Only in 'very exceptional cases' will it allow the defence.⁵¹ A justification for this approach is that the weighting of the interests in eviction matters has largely been predetermined by the eviction laws and it is ordinarily not the court's function to interfere with the laws and policies of member states.⁵²

From the above, three procedural protections under the ECHR are evident. An eviction must be lawful, for a legitimate aim and necessary in a democratic society. Although these protections seem strong, their interpretation and implementation weaken their force. The third protection is interpreted as merely an available (proportionality) defence that can be denied after a summary inquiry. Where an unlawful occupier, however, succeeds in raising an arguable case based on the proportionality defence, a court will have to assess whether the eviction was necessary in a democratic society. This requirement amounts to a substantive protection against eviction.⁵³

2.2 Substantive Protections

The proportionality assessment as substantive protection against eviction requires an investigation into whether the legitimate aim pursued by the eviction is proportional to the effect of the eviction on the unlawful occupiers. In doing so the interests of all involved are balanced.⁵⁴ The interests of the applicant to

social right to adequate housing on the interpretation of the civil right to respect for one's home' (n 42) 787–800; S. Nield, 'Clash of the titans: Article 8, occupiers and their home', in: S. Bright (ed), *Modern Studies in Property Law - Volume 6* (Oxford: Hart, 2011) at 102; Nield, 'Article 8 Respect for the home - A human property right?' (n 35) 147–171

50 *McCann v. United Kingdom* (n 36) para 54.

51 *Manchester City Council v. Pinnock & Ors* [2010] UKSC 45 para 61. *Kay e.a. v. United Kingdom* (n 42) para 73. See also, P. Marcus, 'Pinnock, Powell and proportionality: What's a landlord to do now?' Zenith Chambers. Retrieved 9 July 2015. http://www.zenithchambers.co.uk/cms/document/Pinnock_Powell_Proportionality_for_Landlords.pdf.

52 A.J. Van der Walt, *Property in the Margins* (Portland: Hart Publishing, 2009) 107–108. Van der Walt discusses the English decision of *Harrow London Borough Council v. Qazi* [2004] 1 AC 983 (HL).

53 See *McCann v. United Kingdom* (n 36) para 49 for the idea that the requirement that the eviction must be necessary in a democratic society includes both procedural and substantive elements.

54 *Chapman v. United Kingdom* Application No 27238/95, Merits, 18 January 2001 para 104.

achieve the legitimate aim (factors in favour of an eviction) are balanced against the interests of the unlawful occupiers and the adverse effect of the eviction (factors against an eviction).

In determining the weight of the interests of the applicant, the nature of this entity is pivotal. Where a private owner seeks an eviction, the applicant's interests often outweigh all other factors. This is evident from the argument, related above, that statutory laws predetermined that an eviction by the owner of an unlawful occupier will be necessary in a democratic society and, therefore, proportional. The interests of the applicant weigh less where the state is the applicant, especially where the state is not acting for the property interests of private parties.⁵⁵

In considering the weight of the interests of the unlawful occupiers, whether alternative accommodation is available constitutes an important factor.⁵⁶ The possibility of homelessness due to eviction adds weight against an eviction. This factor will, however, only be considered if it has been argued by the unlawful occupier and there is proof of this contention.⁵⁷ Furthermore, unlike where a private owner seeks an eviction, a lack of alternative accommodation alone does not ordinarily outweigh all other factors so as to amount to a violation of Article 8 of the ECHR.⁵⁸ It would be especially unlikely to prove a violation of Article 8 where the unlawful occupier never had a right of occupation.⁵⁹

Yordanova v. Bulgaria indicates the circumstances under which a violation could be proved in the absence of a prior right to the property. In this matter the unlawful occupiers were part of a vulnerable minority group (Roma)⁶⁰ and

55 *Bjedov v. Croatia* (n 41) paras 68, 70.

56 *Zrilić v. Croatia* (n 40) para 69; *Stanková v. Slovakia* (n 39) paras 61, 24; *Yordanova v. Bulgaria* Application No 25446/06, Merits, 24 April 2012 para 126; *Kryvitska & Kryvitsky v. Ukraine* (n 42) para 50; *Gladysheva v. Russia* (n 42) para 95; *Connors v. United Kingdom* (n 44) para 85; *Chapman v. United Kingdom* (n 54) paras 15, 103.

57 *Zrilić v. Croatia* (n 40) para 69; *Chapman v. United Kingdom* (n 54) paras 111–113.

58 In *Chapman v. United Kingdom* (n 54) para 98 the ECtHR found that just because there was statistically not enough space, the court cannot allow unlawful occupation, since that would be tantamount to imposing a housing duty on the owner of the land.

59 *Birmingham CC v. Lloyd* [2012] EWCA Civ 969, [18]; Nield, 'Article 8 Respect for the home - A human property right?' (n 35) 162.

60 The term Roma refers to people that are popularly known as gypsies. They often have an itinerant lifestyle (this is however not the case in *Yordanova v. Bulgaria*). In some places Roma are accepted as an ethnic group. See *Yordanova v. Bulgaria* (n 56) para 7; *Connors v. United Kingdom* (n 44) paras 57–58. For more on the marginalisation and vulnerability of Roma (especially in Hungary) see Á. Kende 'The Hungary of otherness: The Roma (gypsies) of Hungary' *Journal of European Area Studies* 8(2) (2000) 187–201.

were facing homelessness as a result of the eviction.⁶¹ They were unlawfully occupying state land. For around 45 years the state did not take steps against the unlawful occupiers.⁶² Had the state not suspended the running of prescription against state land, the unlawful occupiers would have become owners of the land through acquisitive prescription.⁶³ The ECtHR ruled that ‘the long history of undisturbed presence of the applicants’ families and the community they had formed’ as well as ‘the underprivileged status of the applicants’ group’ require that due consideration be given ‘the risk of their becoming homeless.’⁶⁴ In this case the court found the eviction to be disproportionate to the aim pursued.

As stated above, the *Yordanova*-case represents exceptional circumstances. Usually the ECtHR would not consider an eviction to be disproportionate to the aim pursued if no prior right to the property existed, despite the potential homelessness of the unlawful occupiers. Where the unlawful occupiers face homelessness and previously had a right to the property the scale is more easily tipped in favour of the unlawful occupier (especially where the state seeks the eviction). In *Bjedov v. Croatia*, for example, the state terminated the special protected tenancy of the elderly unlawful occupier.⁶⁵ In *Gladysheva v. Russia* the state tried to reclaim property bought by the occupier. The state claimed that the sale was invalid, since a previous ‘owner’ had fraudulently obtained the property from them and could, therefore, not validly own or sell the property.⁶⁶ In both these cases the eviction was found to be disproportionate to the aim pursued.

It is important to note that, despite the above cases, the ECtHR has rarely found that the decision to evict was disproportionate to the aim pursued. This is because it opines that states have ‘a margin of appreciation’ since national authorities are ‘better placed’ to make decisions affecting their own countries.⁶⁷ It is not the ECtHR’s role to replace the national authority’s decision with its view of what would be a more appropriate policy.⁶⁸ As a result, and especially

61 *Yordanova v. Bulgaria* (n 56) para 126.

62 *Yordanova v. Bulgaria* (n 56) para 17.

63 *Ibid*, para 18.

64 *Ibid*, paras 126, 133.

65 *Bjedov v. Croatia* (n 41) paras 5–16.

66 *Gladysheva v. Russia* (n 42) paras 7–19.

67 *Connors v. United Kingdom* (n 44) para 82.

68 *Buckley v. United Kingdom* Application No 20348/92, Merits, 29 September 1996 para 75. See also, *Chapman v. United Kingdom* (n 54) para 92.

where it comes to housing, it will accept the decision of the legislature unless it is ‘manifestly without reasonable foundation.’⁶⁹

This section indicates that, when allowed, the substantive protection under the ECHR seems quite robust. The implementation of this protection does not, however, favour unlawful occupiers. Only in exceptional circumstances does the ECtHR find that an eviction is disproportionate to the aim pursued.

2.3 Remedies

As stated earlier, the above procedural and substantive protections are unenforceable if the remedies for their violation are ineffective. It is, therefore, important to examine the remedies available to unlawful occupiers where it has been found that these protections were violated.

Decisions wherein it was found that an eviction violates Article 8 of the ECHR usually relate to the violation of a procedural protection. This includes that the eviction was not in accordance with the law, was not in pursuit of a legitimate aim or did not allow the unlawful occupier to raise the proportionality defence.⁷⁰ There are, however, cases in which the proportionality assessment is done and it is found that the eviction was not proportional to the legitimate aim and therefore not necessary in a democratic society.⁷¹ This amounts to a violation of a substantive protection.

The general rule is that if the ECtHR finds that there has been a violation of a right in the ECHR, the state should repair the violation and restore the *status quo ante*.⁷² This usually means finding that the unlawful occupier should apply for the case to be reopened by a national court.⁷³ Rarely does the ECtHR make

69 *Connors v. United Kingdom* (n 44) para 82.

70 Cases that found that the eviction was not in accordance with the law include *Prokopovich v. Russia* (n 39) para 45; *Stanková v. Slovakia* (n 39) para 29. This usually means that the country’s legal procedure for an eviction was not followed, such as obtaining a court order. Cases where the proportionality defence was not available include *Buckland v. United Kingdom* (n 41) para 70; *Paulić v. Croatia* (n 42) para 45; *Brežec v. Croatia* (n 48) para 50; *Orlic v. Kroatii* (n 48) para 71; *Igor Vasilchenko v. Russia* (n 42) para 85; *Kryvitska & Kryvitskyy v. Ukraine* (n 42) para 51; *McCann v. United Kingdom* (n 36) para 55. An opportunity to raise the proportionality defence is not the same as having the proportionality of the matter assessed by a court. As explained in section 3.1, a sufficient response to raising the proportionality defence is a summary decision regarding its potential success and a subsequent striking down thereof.

71 *Bjedov v. Croatia* (n 41) para 72; *Gladysheva v. Russia* (n 42) para 96; *Yordanova v. Bulgaria* (n 56) para 134.

72 *Bjedov v. Croatia* (n 41) para 78; *Brežec v. Croatia* (n 48) para 57; *Orlic v. Kroatii* (n 48) para 78.

73 *Ibid.*

a substantive finding that requires the state to do something specific. In *Gladysheva*, however, the ECtHR ordered that ‘the respondent State shall ensure, by appropriate means, within three months...the full restitution of the applicant’s title to the flat and the annulment of her eviction order’.⁷⁴

Such a direct order is quite unusual in this context. Ordinarily the remedy granted to the injured party is an award of damages. This is based on Article 41 of the ECHR that empowers the ECtHR to afford ‘just satisfaction’ if the national laws of the state concerned ‘allows only partial reparation to be made’. The amount of damages awarded is, however, usually much less than the amount claimed.⁷⁵ In *Stanková v. Slovakia*, for example, EUR 1 million was claimed and the ECtHR only awarded EUR 3 000.⁷⁶ This questions the effectiveness of the remedy.

From the above it is evident that remedies granted by the ECtHR are ordinarily not very specific or effective. The general approach is that the complainant should apply to have the matter reopened. This places a burden on the complainant, who has already suffered a rights violation. Compensation awards have also mostly been far less than were claimed.

3 Protection Against Evictions under the SA Constitution

The SA Constitution offers protection against the eviction from one’s home. Section 26(3) stipulates that a person can only be evicted from his home in execution of a court order. In deliberating the court order the court should

74 *Gladysheva v. Russia* (n 42) para 106. See also *Yordanova v. Bulgaria* (n 56) para 167, in which it was ordered that the eviction order must be repealed or suspended.

75 In *Bjedov v. Croatia* (n 41) paras 76, 79 the applicant claimed EUR 100 000 but was awarded EUR 2000. In *Buckland v. United Kingdom* (n 41) the applicant claimed EUR 11000 but was awarded EUR 4000. In *Stanková v. Slovakia* (n 39) paras 72–74 the applicant claimed EUR 1 million but was awarded EUR 3000. In *Orlic v. Kroatii* (n 48) paras 76–79 the applicant claimed EUR 50 000 to buy new flat, but was awarded EUR 2000. In *Kryvitska & Kryvitskyy v. Ukraine* (n 42) paras 61–63 the applicant claimed EUR 10 000 but was awarded EUR 6000. In *Gladysheva v. Russia* (n 42) paras 99–107 the applicant claimed USD 249 547 to buy a flat; the Court ordered the state to restore the applicant’s title and overturn eviction. It awarded EUR 9000 in damages. In *Connors v. United Kingdom* (n 44) paras 94–95 the applicant claimed GBP 100000 but was awarded ordered EUR 14000. In *McCann v. United Kingdom* (n 36) para 59 the Court found that there was only a procedural violation and that the unlawful occupiers would probably still have been evicted if the proportionality defence had been allowed. The applicant claimed EUR 50 000 and was awarded EUR 2000. Cf. *Igor Vasilchenko v. Russia* (n 42) where the applicant claimed EUR 7500 and was awarded that amount.

76 *Stanková v. Slovakia* (n 39) paras 72–74.

consider all relevant circumstances.⁷⁷ An eviction should only be ordered if, under the relevant circumstances, the court deems it just and equitable to evict.⁷⁸ Section 26(3) is given effect to by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).⁷⁹ The purpose of PIE is to provide procedural and substantive guidelines in implementing Section 26(3) of the SA Constitution.⁸⁰

Not only do the legal instruments in South Africa afford comprehensive protection against evictions, but the court, in interpreting and applying these instruments, has developed eviction law to strengthen the already robust protection against eviction.⁸¹ This extensive protection against eviction under the SA Constitution is justified when considering the Apartheid history of South Africa. Apartheid refers to a political era in South Africa that was notorious for its practice of racial segregation.⁸² Racial groups were forced to live apart in so-called 'group areas'.⁸³ It was unlawful to occupy or own land outside one's designated area.⁸⁴ This meant that, upon establishment of these areas, those people living outside their designated areas could be forcibly removed and displaced.⁸⁵ The allocation of land was not based on the size of a specific group

77 Section 26(3) of the SA Constitution.

78 Section 172(1)(b) of the SA Constitution.

79 The preamble of the PIE confirms this. This article focuses on evictions under PIE since it is the primary eviction instrument for urban evictions. Other eviction legislation, not discussed in detail in this article, is the Extension of Security of Tenure Act 62 of 1997; the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection Of Informal Rights Land Act 31 of 1996; and the National Building Regulations and Building Standards Act 103 of 1977. See J. Van Wyk, 'The Role of Local Government in Evictions' *PER/PELJ* 14(3) (2011) at 3. The latter act is dealt with insofar as it is relevant to the discussion, below, of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*).

80 L. Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' *HRLR* 8 (2008) 105 at 108.

81 See discussions below.

82 Racial segregation is described as 'the cornerstone' of Apartheid; see, *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR1268 (CC) at 9 (*PE Municipality*).

83 Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (n 80) 113.

84 See Sections 26 and 27 of the Group Areas Act 36 of 1966. The only exception was where land was occupied as an employee of the state, a visitor for no more than 90 days per year, a domestic servant, a patient in a hospital or asylum or someone with a permit issued under the authority of the minister.

85 On forcible removal in terms of national decree, see A. Pope, 'The Alternative Accommodation Conundrum: Trends and Patterns in Eviction Jurisprudence' *Speculum Juris* 1 (2011) at 12.

but favoured white people.⁸⁶ Often, the areas designated for black people were barren and far from the cities, making farming difficult and employment scarce.⁸⁷ As a result, black people often unlawfully moved to the cities, out of desperation, in search of work.⁸⁸ They lived in people's backyards and mushrooming informal settlements around the cities.⁸⁹ This was, of course, unlawful (since they were occupying spaces outside of their group areas) and was met with evictions.⁹⁰ Although a court order was required for such evictions, no additional protections were afforded to unlawful occupiers during Apartheid.⁹¹ Eviction orders could be obtained by summary proceedings. The only defence available to someone facing eviction was that of lawful occupation, which the occupier had the onus of proving.⁹² The strong protection under the constitutional era, as a direct response the Apartheid era, aims to prevent similar practices under the new regime.⁹³

In the remainder of this section the constitutional protections against evictions are discussed in more detail. In considering the implementation of these protections the focus is on decisions by the Constitutional Court. This is because Constitutional Court judgments constitute precedent that should be followed by lower courts. Like the ECtHR, the Constitutional Court specialises in hearing matters relating to the SA Constitution, preferably after all other remedies have been exhausted. By focusing on Constitutional Court decisions a comparison between the implementation under the ECHR and the SA Constitution is more legitimate.⁹⁴ As with the discussion on the ECHR protections, the discussion below focuses the procedural and substantive protections

86 So much so that the other two groups (around 80% of the population) were forced to occupy less than 15% of the land, see J. Zimmerman, 'Property on the Line: Is an Expropriation-centred Land Reform Constitutionally Permissible?' *SALJ* 2 (2005) 378 at 379.

87 *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes (Centre on Housing Rights and Evictions, amici curiae)* 2010 (3) SA 454 (CC) at 195 (*Joe Slovo*).

88 *PE Municipality* (n 82) at 10.

89 *Joe Slovo* (n 87) at 196–197.

90 *Ibid.*

91 Under the common law, the *rei vindicatio* was available for eviction by owners. See M. Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' *SERI Research Report* (2013) at 3. The most important Apartheid land laws were the Prevention of Illegal Squatting Act 52 of 1951 and the Group Areas Act 36 of 1966, see Van der Walt, *Property in the Margins* (n 52) 62.

92 Van der Walt, *Property in the Margins* (n 52) 57–58.

93 Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (n 80) 114.

94 Some of the irrelevant differences are eliminated.

against eviction, as well as the available remedies, under the South African Constitution.

3.1 *Procedural Protections*

Two procedural requirements are stipulated in Section 26(3) of the SA Constitution. The first is that evictions must be court-ordered.⁹⁵ This protection is fleshed out in PIE. This Act, amongst others,⁹⁶ stipulates that both private parties as well as the state can apply for eviction orders. Certain conditions apply. Private parties can only apply for evictions if they own or control the property.⁹⁷ Where the property is owned by a government-entity, such an entity can also apply for an eviction order.⁹⁸ Should the state not act in its capacity as owner of the property, an application can only be made if one of two conditions are met. The first condition is that state consent was required to occupy the land (or erect the building on the land) but the land was occupied (or the building erected) without obtaining such consent. The second condition is that the eviction is in the public interest, which includes that it is in the interest of the health and safety of either the unlawful occupiers or the public.⁹⁹

The second procedural requirement is that a court must consider all relevant circumstances (to determine whether an eviction will be just and equitable).¹⁰⁰ As a result, eviction matters cannot be heard summarily and a court cannot decide an eviction matter if all the relevant circumstances are not before it.¹⁰¹ One of the relevant circumstances to be considered is whether the unlawful occupiers have alternative accommodation. Section 26(2) of the SA Constitution places a duty on the state to provide access to adequate housing, progressively, within its available resources, by implementing reasonable legislative and other measures. In *Grootboom* this duty was interpreted to include a duty on the state to cater for emergency situations within its housing programme, including evictions that result in homelessness. The state should

95 Section 26(3) of the SA Constitution.

96 Other procedural requirements in PIE relate, for example, to the notice period prior to an eviction; see Section 4 of PIE.

97 Application by the owner or person in control of the property is made in terms of Section 4 of PIE.

98 In terms of s4 of PIE. An example of such a case is *Premier, Eastern Cape v. Mtshelakana* 2011 (5) SA 640 (ECM).

99 Section 6 of PIE.

100 Section 26(3) of the SA Constitution (read with Section 172(1)(b)).

101 *PE Municipality* (n 82) at 32.

provide temporary alternative accommodation to those facing homelessness due to eviction, within its available resources.¹⁰²

To consider the relevant circumstance of whether the unlawful occupiers have alternative accommodation the court, therefore, requires the state to be joined to the matter whenever there is a potential for homelessness.¹⁰³ Once joined,¹⁰⁴ the court usually requires the state to report on its capacity to provide alternative accommodation to the unlawful occupiers.¹⁰⁵ This requires the state to determine

102 *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001(1) SA 46 (CC) para 66 (*Grootboom*).

103 This should occur where the state is not already a party (as, for example, the applicant). As the first wrung of government, the local government, carries the primary duty in terms of Section 26(2) of the SA Constitution to fulfil the housing needs of the people within its jurisdiction and would therefore be the state-entity joined to the matter. See, Van Wyk, 'The Role of Local Government in Evictions' (n 79) 11. For the fact that local government should be joined, see *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 78 (*Blue Moonlight*). Lower court decisions that support this principle include: *City of Johannesburg v. Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 38 (*Changing Tides*); *Lingwood v. The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) para 38; *Sailing Queen Investments v. The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) para 20; *Chieftain Real Estate Incorporated in Ireland v. Tshwane Metropolitan Municipality* 2008 (5) SA 387 (T) para 32; *Cashbuild (South Africa) (Pty) Ltd v. Scott* 2007 (1) SA 332 (T) para 42. See also, G. Muller and S. Liebenberg, 'Developing the Law of Joinder in the Context of Eviction of People from their Homes' *SAJHR* 29 (2013) 554 at 557; Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' (n 91) 27; Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (n 80) 126. It has been found that these requirements only apply where unlawful occupiers are at risk of homelessness, see *Changing Tides* para 38; *Premier, Eastern Cape v. Mtshelakana* (n 98) para 11.

104 Or, if already a party as, for example, the applicant.

105 See *Blue Moonlight* (n 103) para 64; *Changing Tides* (n 103) para 40; *Sailing Queen Investments v. The Occupants La Colleen Court* (n 103) para 18; *Ritama Investments v. The Unlawful Occupiers of Erf 62, Wynberg* 2007 JOL 18960 (T) para 13. See Muller and Liebenberg 'Developing the Law of Joinder in the Context of Eviction of People from their Homes' (n 103) 565–566; Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' (n 91) 27. Courts have been quite strict on the state regarding the content of these reports. A general report explaining that it is unable to accommodate any additional people within its current housing scheme is normally not sufficient. Courts seek comprehensive reports that take into account the specific circumstances of the unlawful occupiers. See, *Changing Tides* (n 103) para 40. See also, Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' (n 91) 27.

the needs of the unlawful occupiers, by engaging with them meaningfully.¹⁰⁶ In fact, the state should ideally foresee the possibility of an eviction that might cause homelessness and engage with the unlawful occupiers before litigation commences.¹⁰⁷ This might result in an amicable solution and prevent undue interference with the rights and interests of the unlawful occupiers.¹⁰⁸

From the above it is clear that the SA Constitution offers several procedural protections against eviction. It stipulates that evictions must be court-ordered and that the court should consider all relevant circumstances in deciding whether an eviction would be just and equitable. To do this, several requirements are placed on the state including joinder, reporting and meaningful engagement. In addition to these procedural requirements, the SA Constitution offers strong substantive protection against eviction. These protections are discussed in the following section.

3.2 Substantive Protections

The requirement upon courts to consider all relevant circumstances also acts as a substantive protection.¹⁰⁹ The court has interpreted this to require a balancing of the interests of all those involved, based on the relevant circumstances. The parties involved include the applicant (factors/circumstances in favour of an eviction) and the unlawful occupiers (factors/circumstances in against an eviction).¹¹⁰ In balancing these interests a court should determine whether an eviction would be just and equitable.¹¹¹

Such general reports have, however, been accepted in some cases, see *Ives v. Rajah* 2012 (2) SA 167 (WCC) para 27.

106 *Olivia Road* (n 79) para 5. In *Joe Slovo* (n 87) para 167, meaningful engagement is referred to as 'a prerequisite of an eviction order'. Mediation might also fulfil this function, although it is a more formal process. See Van Wyk, 'The Role of Local Government in Evictions' (n 79) 15. The purpose of this requirement is that the state and the unlawful occupiers try to work together to negotiate a solution to the problem. See, *PE Municipality* (n 82) para 39; *Olivia Road* (n 79) para 12. Meaningful engagement can happen at any time during the proceedings, but courts prefer the state to attempt meaningful engagement before commencing litigation. As soon as they become aware of the unlawful occupation, see *Grootboom* (n 102) para 87; *Olivia Road* (n 79) para 10.

107 As soon as they become aware of the unlawful occupation, see *Grootboom* (n 102) para 87; *Olivia Road* (n 79) para 10.

108 *PE Municipality* (n 82) para 39; *Olivia Road* (n 79) para 12.

109 Section 26(3) of the SA Constitution.

110 For this explanation, see *PE Municipality* (n 82) paras 33, 37. The idea that the public interest should also be taken into account is mentioned in *Joe Slovo* (n 87) paras 99, 101.

111 This measure is found in Section 4 of PIE. It provides guidance to the court in considering all relevant circumstances. The measure is arguably based on Section 172(1)(b) of the SA

In determining the weight of the interests of the applicant, the nature of this entity constitutes an important factor. Where a private owner seeks an eviction, the court is reluctant to deny an eviction order, since that would violate the private owner's constitutional right to property.¹¹² This right is violated when people occupy an owner's land without consent and this violation continues until the eviction order is executed.¹¹³ Instead, it devises 'equalising' remedies to soften the adverse effect of the eviction on the unlawful occupiers, as explained below.¹¹⁴ The interests of the applicant weigh less where the state is the applicant. This is due to the state's housing duty (as discussed below).

In determining the weight of the interests of the unlawful occupiers, whether alternative accommodation is available is pivotal. The court usually considers whether alternative accommodation is available to unlawful occupiers to be the most important consideration when determining the just and equitability of an eviction. This is evidenced by the additional requirements placed on the state inferred from Section 26(2) of the SA Constitution.¹¹⁵ A finding that no alternative accommodation is available weighs heavily on the side of the unlawful occupier and means that a court is reluctant to evict an unlawful occupier if the eviction will leave him homeless.¹¹⁶ As a result, a report from the state (subsequent to meaningful engagement) that no alternative accommodation is available often results in the court finding that an eviction under those circumstances will not be just and equitable and would amount to a violation of this substantive protection.¹¹⁷

From the above it is clear that the SA Constitution offers substantive protection against eviction for unlawful occupiers, especially those facing homelessness. Even where private owners apply for an eviction the court will find that

Constitution that authorises the court to make any order that is just and equitable in constitutional matters.

112 Section 25(1) of the SA Constitution; *Changing Tides* (n 103) para 18.

113 *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 40 (*Modderklip*).

114 See section 3.3 below.

115 To be joined, report and engage meaningfully with the unlawful occupiers.

116 For the fact that courts consider this the most important factor and the effect of this, see, for example, *PE Municipality* (n 82) para 4; *Joe Slovo* (n 87) para 148; *Modderklip* (n 113) para 64; *Blue Moonlight* (n 103) para 40; *Changing Tides* (n 103) para 8; *Dihlabeng Local Municipality v. Makhotsa and Others* (569/2005) [2005] ZAFSHC 63 (22 September 2005) para 22; *Ark City of Refuge v. Bailing and Others* 2011 (1) BCLR 68 (WCC) at 18.

117 See, for example, *PE Municipality* (n 82) para 4; *Joe Slovo* (87) para 148; *Modderklip* (n 113) para 64; *Blue Moonlight* (n 103) para 40; *Changing Tides* (n 103) para 8; *Dihlabeng Local Municipality v. Makhotsa* (n 116) para 22; *Ark City of Refuge v. Bailing* (n 116) para 18.

an eviction, which leaves the unlawful occupiers homeless, is usually not just and equitable. In such cases it often devises 'equalising' remedies to balance these rights, as is discussed in the section below.

3.3 Remedies

This subsection considers the remedies available to the unlawful occupier where the procedural or substantive protections, discussed above, are infringed. The court has a duty to grant just and equitable relief in eviction matters.¹¹⁸ This is based on Section 172(1)(b) of the SA Constitution, which authorises the court to grant any order that is 'just and equitable' in constitutional matters, giving the court a very wide discretion in drafting orders.¹¹⁹

Evictions that violate the procedural protections against eviction might result in a refusal or reversal of the eviction order.¹²⁰ An example of such a violation is where a court order was not obtained prior to the eviction.¹²¹ Where the owner is a private party this further limitation of the owner's constitutional

118 *Blue Moonlight* (n 103) para 11; *Randfontein Municipality v. Grobler and others* (543/08) [2009] ZASCA 129 (29 September 2009) paras 92, 104, 232; *Pheko and Others v. Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 48.

119 *Blue Moonlight* (n 103) para 11; *Pheko v. Ekurhuleni Metropolitan Municipality* (n 118) para 48. Section 172(1)(b) applies to all courts dealing with constitutional matters, including lower courts. Instead of simply denying evictions, which do not seem just and equitable, courts sometimes order evictions together with "equalising" remedies. Their prerogative to create remedies to address the unique issues of the case might also be based on Section 38 of the SA Constitution. This section authorises the court to grant appropriate relief to anyone whose human right has been or is threatened to be infringed. In *Fose v. Minister of Safety and Security* (n 17) para 69 the court found this section to grant the court a wide discretion 'forge new tools' and 'shape innovative remedies'. Evictions that violate the procedural or substantive protections discussed above can be argued to infringe Section 26(1) and/or (3) of the SA Constitution. In *Grootboom* (n 102), for example, the court found that the unlawful occupiers did not have alternative accommodation because the state had failed to fulfil its housing duty in terms of Section 26(2) of the SA Constitution. This amounted to a violation of the unlawful occupiers' right of access to adequate housing in terms of Section 26(1). Section 26(3) is violated when the a court order was not obtained and where all relevant circumstances were not considered. The consideration of all relevant circumstances, as interpreted by the court, includes a determination of whether the eviction will be just and equitable. An eviction that will not be just and equitable could arguably amount to a violation of Section 26(3) of the SA Constitution, since a proper consideration of all relevant circumstances would have prevented such an outcome.

120 *Dihlabeng Local Municipality v. Makhotsa* (n116).

121 *Schubart Park Residents' Association and Others v. City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

right might be justified by the fact that the owner is blameworthy under the circumstances. However, in some circumstances, where the procedural departure is insubstantial a court might still grant the eviction order.¹²² Such violations usually involve defective notices. Where the purpose of the notice is fulfilled its defectiveness might not hamper the eviction proceedings and warrant a remedy.¹²³ Procedural violations relating to non-fulfilment of the additional duties placed on the state where unlawful occupiers face homelessness usually result in a postponement of the eviction matter.¹²⁴ It might, however, also weigh as a relevant circumstance against an eviction order.¹²⁵

As stated earlier, a violation of the substantive protections against eviction often involves a finding that an eviction would not be just and equitable because it will leave the unlawful occupiers homeless. Where the state seeks the eviction and no housing interests of private parties are involved, the remedy has been to deny or reverse the eviction order.¹²⁶ Where a private owner seeks the eviction the constitutional rights of the owner and that of the unlawful occupier are at odds. In an attempt to balance these interests, the court turns to the state.¹²⁷ If the state is able to provide temporary accommodation in terms of Section 26(2) of the SA Constitution, the unlawful occupiers will have alternative accommodation; making the eviction just and equitable.

The state, however, often reports that it is unable to accommodate anyone within its current housing programme.¹²⁸ The court has not readily accepted such reports, especially not where they only addressed the state's housing programme generally and did not deal with the specific circumstances of the unlawful occupiers.¹²⁹ Instead of respecting the state's findings, the court has scrutinised the state's budgetary and housing decisions. It has even ordered the state to provide alternative accommodation to unlawful occupiers, despite its

122 *Mainik CC v Ntuli and Others* (81/05/01) [2005] ZAKZHC 10 (25 August 2005).

123 *Ibid*, paras 3–9.

124 See for example *Ives v. Rajah* (n 105) where the matter was postponed so that the state could be joined and could lodge a report and *Olivia Road* (n 79) where the matter was postponed so that the state could meaningfully engage with the unlawful occupiers.

125 *PE Municipality* (n 82) para 47.

126 See for example the *PE Municipality* case (n 82).

127 See sections 3.2 and 3.3 above.

128 See, Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' (n 91) 27.

129 *Changing Tides* (n 103) para 40; Clark, 'Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government' (n 91) 27. Such general reports have, however, been accepted in some cases, see *Ives v. Rajah* (n 105) para 27.

allegations regarding insufficient capacity. In *Blue Moonlight*, for example, the state indicated that it was unable to provide alternative accommodation to the unlawful occupiers.¹³⁰ Nevertheless, the court criticised the state's budget and ordered the state to provide temporary alternative accommodation to the unlawful occupiers with money not specifically allocated to housing.¹³¹

An order that the state is to provide alternative accommodation removes the factor that the unlawful occupiers will be homeless from the scale. Such an order, therefore, equalises the balance between the interests of parties by mitigating the adverse effect of the eviction on the unlawful occupier.

An alternative approach to ordering the state to provide alternative accommodation has been to allow the continued unlawful occupation of the land and order the state to pay constitutional damages to the landowner. This approach was followed in the *Modderklip* case. *Modderklip* involved the unlawful occupation of private land by over 40 000 people.¹³² These occupiers had nowhere else to go and the state indicated that it was unable to provide them with alternative accommodation.¹³³ The court ordered the state to pay the landowner constitutional damages equivalent to the amount that he would have received, had the property been expropriated.¹³⁴ The damages were justified according to the court, because the state did not do enough to protect the owner's right to property.¹³⁵ An order that the state is to pay compensate the landowner equalises the balance between the interests of parties by mitigating the adverse effect of the eviction on the private owner.

The remedies granted under the SA Constitution are very strong, especially where an eviction is not deemed just and equitable because the unlawful occupiers lack alternative accommodation. Remedies granted by the court under these circumstances include, on the one hand, denying the eviction order and mitigating the adverse effect on the private owner, where applicable, by ordering

130 Para 70.

131 In addition to ordering the state to provide alternative accommodation, the court has specified the standard of housing that is to be provided. In *Joe Slovo*, paras 104, 132, 136, the standards set by the court surpassed the standards stipulated in the state's housing programme for emergency situations. See, *Incremental Interventions: Emergency Housing Programme*, part 3 of the National Housing Code (2009). The court's standards were financially unattainable to such an extent that the state had to apply to have the order set aside. *Residents of Joe Slovo Community, Western Cape v. Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC) para 6.

132 *Modderklip* (n 113) para 8.

133 *Ibid* para 24.

134 *Ibid* para 68.

135 *Ibid* para 50.

the state to pay constitutional damages. On the other hand, it includes, upholding the eviction order and mitigating the adverse effect on the unlawful occupiers by ordering the state to provide alternative accommodation.

4 Comparative Analysis

From the above it is clear that both the ECHR and the South African Constitution protects extensively against the eviction from homes. These instruments have different methods of providing this protection. This section compares the procedural and substantive protections of the two instruments. It also compares the remedies available to unlawful occupiers should the protections be violated.

4.1 *Procedural Protections*

Both instruments procedurally protect against eviction by requiring the eviction to be authorised by law. Paragraph 2 of Article 8 ECHR expressly states that an eviction must be lawful. Despite the fact that the South African Constitution does not contain a similar provision, all eviction proceedings in South Africa are subject to the rule of law and must, therefore, be authorised by law.¹³⁶

A further procedural protection offered by both instruments is that the eviction must be for a specific purpose. The ECHR lists the potential goals that would justify an eviction, including the protection of rights of others (e.g. the neighbours, the landlord), public interest and public order. In terms of PIE, an eviction can be made by the owner of the land (hence, for the purpose of protecting the owner's right to property) or by the state for the purpose of protecting the public interest or public order.¹³⁷

Both instruments allow for the matter to be heard by a court. The ECHR provides, as defence for the evictee, the possibility to request that a court determines the proportionality of the eviction. It is, however, not required that a court checks the proportionality before the eviction takes place.¹³⁸ In South Africa, this protection is stronger. All evictions must be court-ordered.

¹³⁶ S1(c) of the SA Constitution.

¹³⁷ The public order is protected if someone is evicted because he required the state's consent to occupy the land or erect a structure on the land and failed to do so.

¹³⁸ In some European countries (e.g. the United Kingdom, Germany, the Netherlands), however, it is required that a court approves an eviction in advance. See Vols, Kiehl and Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany' (n 37) 177.

There is no discretion. Whenever someone is to be evicted from a home a court must be involved before the actual eviction takes place.

Not only must all eviction matters be heard by a court under the SA Constitution, the court is required to consider all relevant circumstances to determine whether an eviction would be just and equitable. Where there is potential homelessness states are even required to intervene before a possible eviction. This prevents a violation of the unlawful occupiers' rights. The ECHR does not require the involvement of a court or early intervention by the state. As a result people often only approach the court after their rights have been violated. This might adversely influence the remedies granted to them, as is argued below.

On the face of it, the procedural protections offered by these two instruments are quite similar. Both require evictions to be lawful and for a legitimate purpose. Both instruments allow for a court to hear the matter. The procedural protection in South Africa is, however, stronger, since it requires that *all* evictions be court-ordered and not just those in which the unlawful occupier requests such. Moreover, despite the supposed availability of this defence to those facing eviction under the ECHR, the ECtHR has confirmed that 'only in very exceptional cases that an applicant will succeed in raising' the defence.¹³⁹ As explained, under the ECHR, complainants usually only approach the court after their rights had been violated. This is problematic, since a protection should ideally prevent interferences from occurring, rather than remedying the violation afterwards.

4.2 *Substantive Protections*

While South Africa offers stronger procedural protection against eviction, it is important to determine which of these instruments offers stronger substantive protection. This part considers how the substantive protections under these instruments differ.

Both instruments have an objective measure against which to test whether an eviction is appropriate. Under the ECHR this measure is the principle of proportionality, whereas under the South African Constitution this measure is just and equitableness. For both of these tests a consideration of all the relevant circumstances is required, whereby the interests of the affected parties are balanced.¹⁴⁰ The substantive protections, therefore, seem very similar. However, the difference lies in how this analysis is performed.

¹³⁹ *McCann v. United Kingdom* (n 36) para 54.

¹⁴⁰ The proportionality defence requires a weighing up of the interests of those concerned, see Van der Walt, *Property in the Margins* (n 52) 106; Nield, 'Article 8 Respect for the home - A human property right?' (n 35) 156-157.

In balancing the interests under the two different instruments, the court tends to weigh certain factors or relevant circumstances, more heavily. Under both instruments the fact that the property is owned privately is of importance, as well as the fact that an eviction will leave the unlawful occupiers homeless. When both these factors weigh in the balance, the courts under the different instruments do not seem to react in the same way. Under the ECHR the fact that the private owner is seeking the eviction seems to trump the potential homelessness of the unlawful occupiers. Under the SA Constitution this is not necessarily the case.

The South African Constitution affords much more weight to the potential homelessness of unlawful occupiers than the ECHR. This is clear from the fact that, in South Africa, the court has placed duties on the state to report on its ability to provide alternative accommodation to unlawful occupiers and to meaningfully engage with unlawful occupiers as soon as it becomes aware of their potential homelessness. As a result, where the two factors (private owner versus homelessness) both weigh in the balance the court often only allows the eviction if the state is ordered to provide alternative accommodation to the unlawful occupiers.¹⁴¹ The ECtHR does not give as much weight to the fact that the eviction will cause homelessness. Only where certain other factors also weigh in the balance will the interests of the unlawful occupiers outweigh those of the applicant. These factors include that the state is seeking the eviction, that the unlawful occupier had a previous right to the property and that the unlawful occupiers are part of a vulnerable group and their occupation had been extremely long.

A reason for the fact that the ECtHR is less likely to conclude that evictions without alternative accommodation are disproportionate to the aim pursued might be that the ECHR is an international treaty. The ECtHR is much more reluctant to order that there has been a substantive violation of a right in the ECHR. As an international court the ECtHR is not in the best position to judge the policies and decisions of the national authorities. Hence, it affords a margin of appreciation to the national authorities in making decisions regarding evictions.¹⁴² The court, in South Africa, is not hesitant to find that an eviction will not be just and equitable. The court is extremely prescriptive, to the point that it has been criticised for violating the separation of powers doctrine, since it interferes with the policies and decisions of the executive authority.¹⁴³

¹⁴¹ See 4.3 below.

¹⁴² See Y. Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*, (Antwerp: Intersentia, 2002).

¹⁴³ *Ekurhuleni Metropolitan Municipality v. Dada NO and Others* 2009 (4) SA 463 (SCA) para 14; *Emfuleni Local Municipality v. Builders Advancement Services CC and Others* 2010 (4) SA

A further justification for the seemingly deviating approaches might be that South Africa has the additional responsibility to address the large-scale displacement of the past, as well as the extreme poverty and homelessness that are suffered throughout the country. Often the unlawful occupiers are part of vulnerable groups who were previously marginalised and have occupied the land for a long time. This requires much more compassion and caution in dealing with potential homelessness. This sentiment is shared by the ECtHR, as is clear from the *Yordanova* case. It could be argued that the approaches are not necessarily different, but that the circumstances differ. More cases are heard in South Africa involving poor and extremely vulnerable groups and, hence, there are more cases in which the court finds in favour of the unlawful occupiers. The fact that very few ECtHR cases find in favour of the unlawful occupiers might be because there are very few cases involving marginalised, vulnerable groups.

The above comparison indicates that these instruments offer very similar substantive protections against eviction. However, the implementation and interpretation of these protections seem to differ. The court, in South Africa, seems to be more inclined to find that a substantive protection had been violated. This could be ascribed to the status of the ECtHR as international court and as such being more hesitant to interfere with the policies and decisions of the member states. It could also be ascribed to the different circumstances in which the evictions occur, in that, possibly, in South Africa more cases involving vulnerable and marginalised groups in need of special protection are heard.

4.3 Remedies

Arguably the biggest difference between these instruments is the remedies granted where a protection was violated or is threatened to be violated. This part aims to compare the remedies offered under the instruments to determine which instrument provides better protection.

The remedies granted by the ECtHR are usually limited to a declaration that there has been a violation of rights. This declaration is sometimes accompanied by an award of damages. However, this award is often substantially less than the amount claimed. The reason for this is that the ECtHR expects the state involved in the violation to repair the violation and restore the *status quo ante*. Only where full reparation is not possible under the laws of the state are damages awarded. As explained, the ECtHR rarely instructs the state on how

133 (GSJ) para 28. The ECtHR warns against veering into the political sphere when it comes to decisions on housing, in *Chapman v. United Kingdom* (n 54) para 99.

to repair the violation. Rather, it advises the unlawful occupier to apply for the case to be reheard. Only in a few cases have the ECtHR actually given the state specific instructions, such as reversing the eviction.

In comparison, the remedies granted under the South African Constitution often include specific instructions. Where the court finds that an eviction under the circumstances violates a procedural or substantive protection, remedies include: denying the eviction order or upholding the order subject to the state providing alternative accommodation.¹⁴⁴ Although the ECtHR has found that an 'obligation to secure shelter for particularly vulnerable individuals may flow from Article 8 in exceptional cases', such as where underprivileged minorities are involved, it is yet to make such an order.¹⁴⁵

The reluctance of the ECtHR to make specific orders relates to its status as an international court. It is not in the best position to decide what would be the best way to solve a violation. In this respect the court, in South Africa, has been criticised. It has been argued that, in ordering the state to provide alternative accommodation the court violates the Separation of Powers doctrine.¹⁴⁶ This is because housing policies and the provision of housing usually falls within the powers of the executive authority. The court is not in the best position to decide on such matters.

Moreover, since the ECHR does not entrench a right to housing, the ECtHR does not have the same basis for ordering the state to provide alternative accommodation as the court.¹⁴⁷ Unlike the ECHR, the SA Constitution entrenches a right of access to adequate housing. A duty is placed on the state to fulfil this right, which includes catering for emergency housing situations, such as evictions.¹⁴⁸

It is important to note that the ECtHR usually only hears a matter once an eviction order had already been granted and executed. A reluctance to order a reversal of the eviction order might relate to the fact that the unlawful occupiers usually no longer occupy the land. Had they still been in occupation, a finding that an eviction would violate their rights would have resulted in them remaining in possession of the land. Where the interference has already

144 When the eviction is refused the court can accompany such an order with an award of damages to the private owner.

145 *Yordanova v. Bulgaria* (n 56) para 130, 133.

146 *Erkhuleni Metropolitan Municipality v. Dada* (n 142) para 14; *Emfuleni Local Municipality v. Builders Advancement Services cc* (n 142) para 28.

147 *Yordanova v. Bulgaria* (n 56) para 130; *Chapman v. United Kingdom* (n 54) para 99. Cf. P. Kenna & D. Gailiute, 'Growing coordination in housing rights jurisprudence in Europe?', *European Human Rights Law Review* 6 (2013) 606.

148 Sections 26(1) and (2) of the SA Constitution.

occurred, the unlawful occupiers are, therefore, prejudiced. In eviction matters under the SA Constitution unlawful occupiers are often still in occupation of the land. This is either because the court is the court of first instance or because, despite an eviction, the unlawful occupiers remain on the land pending the outcome of the case.¹⁴⁹ As a result, a finding that an eviction would violate their rights often results in allowing their continued occupation of the land.¹⁵⁰

Furthermore, as explained above, the circumstances of the evictions under these instruments might play a role. Given the history of South Africa and the socio-economic status of its people, there might be a greater need for eviction orders that do not result in the homelessness of the unlawful occupiers.

The remedies ordered under the SA Constitution are much stronger than those ordered under the ECHR. In South Africa, the court gives specific instructions in their orders, whereas the ECtHR is very reluctant to do the same. Justification for this disparity might relate to the fact that the ECtHR is an international court, the ECHR does not entrench a right to housing, the ECtHR usually hears matters after the violation has occurred and the circumstances of the evictions under the two instruments differ.

5 Conclusion

The ECHR and the South African Constitution can be heralded for providing comprehensive protection against eviction. The aim of this study was to determine to what extent the protections under these instruments differ. From this, the study proposed to ascertain which of these instruments offers the stronger protection and whether the protections offered under the respective instruments should be adopted by the other.

It was found that both instruments offer procedural and substantive protections, as well as certain remedies for the violation of these protections. Both instruments require an eviction to be lawful and for a legitimate purpose. Having a court determine the appropriateness of the eviction is possible under both instruments. The South African instrument, however, requires *all* evictions to be court ordered, whereas under the ECHR a court only gets involved if the evictee raises the proportionality defence. As a result, the South African Constitution offers the strongest procedural protection against evictions.

149 This could be because the matter is being appealed (as was the case in *PE Municipality*) or because the eviction was not court ordered and the unlawful occupiers was seeking relief from the court (as was the case in *Pheko v. Ekurhuleni Metropolitan Municipality* (n 118)).

150 Unless the state provides them with alternative accommodation.

By only requiring the court to consider the proportionality of an eviction if raised as a defence, the ECHR might be unfairly discriminating against evictees. However, this also saves a lot of costs, since an eviction that is clearly proportional does not have to go to court. Nonetheless, in the interest of justice and the *audi alteram partem* principle, a requirement that a court hears all eviction matters will be more appropriate. Evictees might not be aware of their right to raise proportionality as a defence. To protect them, the court should consider the proportionality of the eviction, even when unopposed.

On the surface, the two instruments seem to offer equal substantive protection. A court must test the eviction against an objective standard. In doing to it must balance the interests of the affected parties and consider all relevant circumstances. However, the interpretation and approach of the courts to this protection seem to differ substantially, in that the ECtHR seems more hesitant to find that the substantive protection had been violated. This might, however, be due to the fact the evictions under the SA Constitution more often involve people from vulnerable, marginalised groups. The fact that the ECtHR less often finds that there was a violation of a substantive protection against eviction might, therefore, not point to a weaker level of protection, but rather a difference in circumstances.

The remedies ordered by the court, in South Africa, are stronger than those ordered by the ECtHR. South African remedies often include specific instructions, whereas the ECtHR is very reluctant to do the same. Justification for this disparity relates to the fact that the ECtHR is an international court and, hence, is hesitant to interfere with the policies and decisions of the member state's national authorities. The South African court is more inclined to interfere with the policies and decisions of the executive authority. Such interference could constitute a violation of the Separation of Powers doctrine. It might, therefore, be appropriate that the South African court aligns its approach with the ECtHR and tempers its interference with the functions of the executive authority.

As stated above the ECHR is, unlike the SA Constitution, an international treaty. The European minimum level of protection that arises from the ECHR and the European case law has to be implemented and interpreted at a national level by national courts. Consequently, different interpretations and implementation models may exist in the different European states. It would be interesting to compare these different European interpretations (at a lower court level) and models with the South African interpretation and model. This future comparative analysis could deepen our understanding of the differences in protection against eviction and help develop a fair, effective and just model to ensure tenure security.

In conclusion, the different protections offered by these two instruments can be justified in terms of the different natures of the instruments and the different circumstances in which they apply. It is recommended that the ECtHR strengthens the protection against eviction under the ECHR by adopting the approach under the SA Constitution and requiring a proportionality assessment by a court in all eviction matters. Furthermore, it is recommended that the South African court tempers its protection against eviction under the SA Constitution by adopting the approach under the ECHR and its caution to interfere in policy decisions that fall outside its functions.