MAKING SPACE FOR SOCIAL CHANGE: PRO-POOR PROPERTY RIGHTS LITIGATION IN POST-APARTHEID SOUTH AFRICA

STUART WILSON

Forty years ago, in a now-famous dissent from the standard Marxist analysis of law, EP Thompson observed that "the rhetoric and rules of society are something a great deal more than sham".[1] In his path-breaking study of the implementation of the Black Act – a piece of legislation which sought to protect the property rights of a prosperous commercial elite against petty crime and civil disobedience, by rapidly and substantially enlarging the use of the death penalty – Thompson suggested that, in clothing the enforcement of their interests in the rule of law, that commercial class had to accept significant limitations on the exercise of what would otherwise have been irresistible force. Although the English propertied class of the early 18th century was "a political oligarchy inventing callous and oppressive laws to serve its own interests" it cannot be concluded that "the rule of law itself was humbug". He went on "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good". To overlook this "is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger".[2]

Thompson's observations about the way in which legal forms curb the exercise of power in wicked legal systems were taken up in South Africa under Apartheid as a way of explaining the participation of lawyers and judges in the Apartheid legal system. Apartheid was presented as a legally regulated and

[1] Edward Palmer Thompson, *Whigs and Hunters: The Origins of the Black Act*, Pantheon (1975), p 265.
[2] Ibid. p 266.

sanctioned system of social ordering that was implemented in a fair and predictable manner. Ideas of fairness, freedom and equality embedded in the law could accordingly be turned against the system to ameliorate some of its most pernicious effects in specific contexts, and, perhaps more importantly, to expose Apartheid as a system of government which was anything but fair, predictable and law-governed.[3]

However, Thompson's suggestive remarks on the role of law in unjust societies can be pushed further. For Thompson, law was able to limit and direct power because, at least in modern capitalist societies, law is imbricated in every important social and economic relationship. It exists at multiple levels and is embedded in a range of different social contexts. There is no meaningful separation, for example, between "law" and "economics", because economics can only be studied as a set of pre-defined normative relationships between people, resources, capital, commodity and labour. In other words social power relationships are "simultaneously economic, social and moral".[4] Law plays a vital role in structuring these relationships precisely because it is a set of normative claims about the right forms of social order that is backed up by authority.

If law structures social relationships in the way Thompson suggests it does, then it also shapes the opportunities for action available to ordinary men and women in everyday contexts. Based on Thompson's insight, I want to suggest that the power of law as an agent of social change lies in its ability to create or destroy spaces in which socially subordinate groups - the poor, racial minorities, women, sexual minorities and indigenous populations – can think and act to give effect to their plans and aspirations.

[3] Rick Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*, Routledge (1995).
[4] EP Thompson *Poverty of Theory* Merlin Press (1978), p 289.

Law can neither be reduced to handmaiden of base economic and social interests nor instrument in the hands of the savvy activist. Law is embedded in the fabric of everyday social practices. It shapes perceptions, expectations, moral world-views and concrete action – not just on the operatic terrain of political struggle, but in the mundane interactions that constitute everyday life. Changes in the law shape these everyday practices by helping to define the boundaries of the possible.

Nowhere is this account of the relationship between law and social change more obviously illustrated than in the rules and practices of property law. Property law defines the scope of access to material goods. It embodies "how we, as a society have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others".[5] It not only shapes important terms of social participation; it affects the ways men and women exist in space. The rules of land tenure define where ordinary people may live and the terms on which they can stay there. The rules applicable to consumer credit define the extent of the monetary resources they can deploy to meet their material wants and needs. The rules of consumer credit also provide for the forfeit of homes, cars and other goods which are necessary to chart a course through everyday life.

In short, the rules of property law form part of the social fabric. They are deeply immersed in the background noise of everyday life. Often without conscious thought, they shape basic social expectations and behaviour. For that reason, the rules of property law are often thought to be static. But they are not.

[5] Laura S. Underkuffler-Freund, Property: A Special Right, 71 Notre Dame Law Review (1996) 1033, 1046

We live in the grip of a pervasive "ownership model" of property.[6] This model posits property as tangible goods or incorporeal rights over which individuals or corporations have exclusive control. The world is carved up into domains of ownership – exclusive control of a right or an object, and freedom to do with it as one wishes. We have lived with this ownership model since at least the late Roman Republic.[7] And, although we accept that an owner's complete freedom to use his property entirely as he wishes is a fiction (ownership of a shotgun does not entitle its owner to use it to kill people), social claims on ownership interests have been carved out as exceptions to a general rule: that property is something controlled, dominated, and from which other social claims are excluded in favour of the personal use and enjoyment of its owner. To be sure, an owner can enter into various contracts alienating one of the incidents of his ownership. He can lease his property to a tenant. He can encumber it as security for a debt. He can sell it. He can even lay waste to it on a whim. But these limitations on ownership rights are granted by the consent of the owner, and are usually revocable, on notice, more or less at the owner's will.

Redistributive claims, concerns about inequality, poverty and social needs have always been located outside property law. It has seldom been accepted that the structure of property rights itself is affected by concerns about inequality. Rather, it is the distribution of property rights on the ownership model that has traditionally been the concern of the state, not the nature of those property rights. Welfare states have generally aimed to enhance the capacity of individual men and women to purchase property rights on the open market through welfare payments, or to provide goods to individual men and women by establishing relationships modelled on traditional property law

[6] Joseph William Singer, *Entitlement: the Paradoxes of Property*, Yale (2000)p. 2-3.
[7]David Graeber, Debt: The First 5000 Years, Melville House (2001), pp. **??**

categories. For example, the state may provide housing by paying out a rent voucher, renting out its own public housing, or transferring ownership of land and a house to and individual. In each case, the ownership model of property rights is reinforced, or at least left unchallenged.

What if that changed? I want to argue that, at least in South Africa, some of the most basic structures of property law have undergone substantial alteration since the end of Apartheid, and that these alterations have created spaces in which ordinary people have begun to reshape the terms on which they access land, tenure, credit and commercial urban space.

At the end of Apartheid South African property law was a substantially unreformed artefact of the law of the Province of Holland in the seventeenth century Netherlands. The property regime inherited from seventeenth century Holland was itself heavily influenced legal concepts and principles dating back as far as the late Roman Republic. Apart from planning law, land administration, and statutes providing for expropriation[8] and limitations on prescription,[9] this Roman-Dutch common law of property was largely free from statutory interference. This "common law" of property is a system of largely inflexible rules which created a hierarchy of rights in property. At the top of the hierarchy sits ownership – complete control or "dominium" over a thing, defined as the freedom to deal in one's property entirely as one wishes. Without limiting the generality of the concept of dominium, common law writers have sought to develop the concept of ownership as a "bundle" of rights and powers over a

[8] Prescription Act 68 of 1969.
[9] Expropriation Act 63 of 1975.

thing.[10] The usual list includes the right to use, enjoy the fruits of, consume, possess, dispose of, vindicate and defend the owned property.[11]

Although the common law does place some internal limitations on the rights of owners, for example through the law of nuisance (governing the circumstances under which a landowner can be interdicted from using his land to the prejudice of his neighbours) and the law of estoppel (which potentially limits an owner's right to vindicate property he has negligently represented is in fact the property of another), these limits are relatively slight and highly specific. In particular, except to the extent that an owner chooses to limit or sell one or more of his ownership rights, the common law does not limit ownership rights to achieve redistributive ends, or to meet perhaps urgent and pressing social needs of non-owners. So, for example, the *rei vindcatio*, which is the common law action through which an owner recovers possession of his property from another, does not recognise the social consequences of dispossessing a holder of an owner's property as any reason not to permit the owner to repossess it. Potential homelessness, for example, would never have been recognised as a reason not to allow a property owner to repossess his land from a person living on it. Only the existence of a counter-veiling common law right is sufficient to defeat an owner's vindicatory action.[12]

The common law accordingly parcels the world off into a series of (almost) absolute domains within which, in the absence of his agreement to limit his rights (for example by leasing his property or putting it up as security for a debt) an owner has exclusive rights to possess and deal in his property as he sees fit, without regard for the economic needs or well-being of others.

[10] A M Honore "Ownership", *Oxford Essays in Jurisprudence*, Oxford Univeristy Press (1961), p. 370.
[11] Du Bois et al, *Willies Principles of South African Law* (9 ed), Juta (2007), p 470.
[12] *Chetty v Naidoo* 1974 (3) SA 13 (A).

The common law regime accordingly lends itself to the creation of at least two classes of person. First there is the "property insider". A property insider is a holder of a recognised common law right in property. The ultimate property insider is a common law owner, with his virtually unfettered rights to possess and use his property as he sees fit. But property insiders are also lessees, mortgagees, holders of servitudes, usufructories and so on: people who hold rights against the owner of a thing because the owner has chosen to encumber his property by creating a subordinate right in it. These subordinate rights can sometimes be quite extensive. Leases can be very long. A mortgagee can have extensive rights to sell an owner's property in execution of a debt. A usufructory has a lifetime right to use and take the fruits of the relevant property. However, these rights are all conceptualised as a "subtraction from the dominium"[13] of the owner. In other words, subordinate common law rights are held from the owner, are always temporary, and will revert to the owner once the conditions necessary for their termination are satisfied.

A "property outsider" is someone who uses property without any common law rights to do so. Although the common law acknowledges the existence of property outsiders by, for example, recognising precarious occupation,[14] and the possibility that prescription may turn an ostensibly unlawful possessor of property into an owner after 30 years,[15] it assigns them no substantive rights. The *mandament van spolie* accords thin procedural protection to a possessor – even an unlawful possessor – who is dispossessed of property without due process of law.[16] Before the advent of the Constitution,

[13] *Ex Parte Geldenhuys* 1926 OPD 155.
[14] *Malan v Nabygelegen Estates* 1946 AD 562, p. 573.
[15] Section 6 of the Prescription Act 68 of 1969.
[16] As Voet famously put it even a thief can bring a spoliation application: see Voet **??**

however, even this protection was fairly easy to oust by statute.[17] Fundamentally, a property outsider is, at best, tolerated, and at worst, subject to prompt dispossession, more or less at the will of the property owner. Property outsiders include people who once had common law rights, but who no longer do so – for example tenants who are holding over and debtors whose loans have been called up. They are outsiders because the common law provides no protection for them from the moment their common law rights have been terminated at the will of the owner – whether by the exercise of what has been called a landlord's "bare power"[18] to terminate a lease on notice, or because of the consequences that follow on a debtor's default on a credit agreement. The common law affords property outsiders no positive right to acquire property, and tacitly assumes that property outsiders will have sufficient resource endowments to acquire some form of property right, and become an "insider" again.

However, in the conditions of extreme inequality that characterise the South African economy, this assumption simply cannot be made. A large proportion of the South African population is unemployed, unable to access credit and effectively locked-out of urban rental land and housing markets.[19] In these circumstances neither the common law of property itself nor the economy provide an easy route between property outsider and property insider status.

Accordingly, models of property law that address the rights and obligations of owners and holders of lesser common law rights have begun to look increasingly anachronistic. Traditional legal analysis tends to be focussed on relationships between owners, holders of other common law rights and,

[17] Prevention of Illegal Squatting amendment Act 42 of 1975.
[18] *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC), para 10.
[19] SERI, *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg* (November 2013).

where relevant, the state. What contemporary property law writing has all but ignored is how the law deals with people who have no common law rights at all. Relationships between people with and without common law property rights is one of the most contentious political debates in contemporary South Africa. Yet this debate it is not a mainstream concern of property law.

It clearly should be. The study of a system of law that does not ask questions about the interests that system tends to exclude or subordinate is, at best, incomplete. More fundamentally, however, it is important to recognise that, in the last 20 years, there have been many constitutional, statutory and jurisprudential developments that have attempted to address the needs of property outsiders. In doing so, these developments have not only punctured the ownership model of property law, but they have begun to carve out spaces in which the processes of dispossession that help sustain rampant economic inequality can be challenged.

It is to an outline of these developments that I now turn.

The rights of unlawful occupiers

The most dramatic post-Apartheid reform of property law has perhaps been the way in which the section 26 (3) of the Constitution and the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 ("the PIE Act") has sought to re-balance the relationship between landowners and unlawful occupiers.

The regime in force before the advent of the Constitution, 1996, accorded virtually no rights to unlawful occupiers. In 1975 an amendment to the Prevention of Illegal Squatting Act 52 of 1951 had taken away even the most elementary common law protection against eviction without due process of law

from occupiers who had never had the landowner's consent or another legal right of occupation. The situation was not much better for those who once had the consent of the landowner or another right in law to occupy land, or whose right of occupation was unclear. In *Chetty v Naidoo*[20] the Appellate Division had cast the onus on defendants in eviction proceedings to prove their rights of occupation, unless the landowner had acknowledged upfront that some right of occupation had previously existed. Even then, if there was a dispute about what sort of right that was, the defendant still bore the full onus of proving the nature of the right and the fact that it had not been validly terminated.

The interaction between Apartheid "anti-squatting" legislation and the common law placed landowners in a position of overwhelming dominance. Most of the time, all the owner had to prove was his ownership and the fact of occupation by the defendant. From those two facts, it was generally presumed that, in the absence of counter-veiling evidence, an eviction order would follow. Few poor people of dubious title who faced eviction from land would have been able to afford a lawyer to challenge their eviction in court by providing that evidence (if it existed). Even those fortunate enough to get into court had almost no substantive rights. The displacement of countless poor black people – almost certainly several million people over the 46 years between 1948 and 1994 – has been documented in at least two book-length studies on the subject.[21] It is, however, unlikely that we will ever be able to quantify the human cost of these evictions.

Towards the end of Apartheid there were attempts to ameliorate the worst aspects of the statutory regime. In *Komani NO v Bantu Affairs*

[20] 1974 (3) SA 13 (A).

[21] Christina Murray and Catherine O'Regan, *No Place To Rest: Forced Removals and the Law in South Africa* Oxford University Press (1990); Cherryl Walker and Laurine Platzky, The Surplus People: Forced Removals in South Africa, Surplus People's Project (1985).

Administration Board, Peninsula Area[22] the appellate division declared invalid an influx control measure which precluded a man from living together with his wife in a "white" urban area. In *S v Govender*,[23] the Transvaal Supreme Court ruled that eviction in terms of section 42 (2) of the Group Areas Act 36 of 1966 did not automatically follow upon conviction for the offence of living in a group area designated for another racial group without a permit. In that matter, Govender, an Indian, was convicted of residing in a white group area without a permit. Govender was sentenced to 15 days imprisonment or a fine of R50, suspended for three years on condition that she was not convicted again of the same offence. Without being asked to do so, the presiding Magistrate also ordered her ejectment from her home. On appeal, Goldstone J held that an order for ejectment need not necessarily follow upon conviction for contravening section 42 (2). Whether to order ejectment was a matter of wide discretion. An ejectment order should only be made after "the fullest enquiry" involving "many considerations", including the hardship which would follow upon ejectment.[24] In short, an order for ejectment may only be made after considering all the relevant circumstances.

Despite these exceptions (which attempted to blunt the force of Apartheid legislation rather than the common law), for most people, dispossession, even if proceeded by some legal process, was likely to have been swift, brutal and final.

Section 26 (3) of the final, post-Apartheid Constitution was an attempt to level the playing-field, and unseat landowners from their dominant position in eviction proceedings. It provides that "no-one may be evicted from their home,

[22] 1980 (4) SA 448 (A).
[23] 1986 (3) 969 (T).
[24] Ibid 971.

or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". Its implications, though not immediately accepted by the post-Apartheid courts, were far-reaching. Instead of casting the onus to resist an eviction order on the defendant, section 26 (3) places a duty on a court to consider all the relevant circumstances.

At common law, only the existence and relative strengths of the parties' common law rights were relevant, and the onus to prove the existence of a common law right usually lay with the occupier. On its face, Section 26 (3) of the Constitution now accorded a court with an open discretion and required the court to consider what "circumstances" were relevant to the exercise of that discretion. On a plain reading of the section, a court has a wide discretion to measure the social impact of an eviction, and decide what is fair in the circumstances.

There was predictable resistance to this generous interpretation of the way in which section 26 (3) of the Constitution changed the relationship between owner and occupier. In *Brisley v Drotsky*[25] the Supreme Court of Appeal held that section 26 (3) of the Constitution requires a court to consider the only circumstances that "legally relevant"[26] to the exercise of its discretion. If the discretion to refuse an eviction order was not specifically conferred on a court by the common law or a statute, the Constitution itself does not authorise a court to decline to order an eviction to which a landowner would otherwise be legally entitled. Section 26 (3) did not allow a court to decide what was fair in the circumstances.

[25] 2002 (4) SA 1 (SCA).
[26] para 42.

But the decision in *Brisley*, while never formally over-ruled, has effectively been ignored by the Constitutional Court. Just two years later, a unanimous Constitutional Court held that section 26 (3) of "the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home . . . The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[27]

Ultimately, however, the debate about what the direct application of section 26 (3) of the Constitution might mean for unlawful occupiers has been rendered academic by the broad application that has been given to the PIE Act. The PIE Act, which came into effect in 1998, set two conditions for the eviction of unlawful occupiers. First, unlawful occupiers must be given "written and effective notice"[28] of any proceedings for their eviction. Failure to provide effective notice vitiates eviction proceedings.[29] Second, no unlawful occupier can be evicted unless it is "just and equitable" to do so.[30] In other words, unlawful occupiers stay where they are unless they are informed of proceedings for their eviction, and their eviction would be substantively fair.

[27] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 23.
[28] Section 4 (2) of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998.
[29] *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* [2001] 4 All SA 479 (A)
[30] Sections 4 (6), 4 (7) and 6 (1) of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998.

Early decisions grappling with what "justice and equity" meant as between owner and occupier, resorted to the common law. What was fair, so some of the earlier decisions held, was that the owner be restored to exclusive possession of his property.[31] But that attempt to cling on to the common law did not last long. In a series of decisions, starting with *Grootboom* in 2000, the Constitutional Court and the Supreme Court of Appeal, developed a careful, structured account of what justice and equity required both in relation to the scope and content of a court's enquiry, and the substantive result that had to be achieved in eviction proceedings.

The over-riding principle, now firmly established, is that evictions of unlawful occupiers should not lead to homelessness.[32] Where it appears that an eviction might lead to homelessness, a court is required to conduct the necessary enquiries to decide whether and to what extent homelessness would result from an eviction, and to seek input from the state, usually the local authority, on what steps are to be taken to ensure that the unlawful occupiers concerned will have access to alternative accommodation if they are evicted.[33] In rare cases, a court will refuse an eviction order outright.[34] More often, though, a court will make a structured eviction order, obliging the local authority to provide accommodation to the unlawful occupiers before the date on which the unlawful occupiers may be evicted, and specifying the nature and location of the alternative accommodation to which the unlawful occupiers are to be relocated.[35]

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[31] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA468 (W), para 8.2.
[32] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 28. *Occupiers, Shulana Court v Mark Lewis Steele* [2010] 4 All SA 54 (SCA), para 16. Mathale v Linda [2015] ZACC 38, para 50.
[33] *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA), para 40.
[34] Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 2014 (3) SA 23 (SCA); All Builders And Cleaning Services CC v Matlaila and Others [2015] ZAGPJHC 2.
[35] *Hlophe and Others v City of Johannesburg and Others* 2013 (4) SA 212 (GSJ).

The state's response to the new duties imposed on it has been sluggish.[36] Eviction applications have, in some cases, taken several years to finalise.[37] Depending on the size of the community involved, and the logistical difficulties with providing alternative accommodation, large communities can establish *de facto* rights of occupation in the years it takes to obtain an eviction order. In *Modderklip*, the unlawful occupiers were simply left where they were, the state bought the land they had occupied, and a low cost housing development was eventually constructed on it.[38] In the Ratanang informal settlement case,[39] the local authority entered into a court-sanctioned 36 month lease with the owner of the property on behalf of the occupiers – effectively, if only temporarily, giving legal recognition to the informal setters' rights of occupation. In the Joe Slovo Informal settlement case,[40] the conditions placed by the Constitutional Court on the state's right to evict and relocate the occupiers of the informal settlement proved so onerous that the eviction order could not be carried out, and was ultimately discharged.[41] The unlawful occupiers in that case are now negotiating the terms on which the Joe Slovo informal settlement will be upgraded *in situ*.

Even where the unlawful occupiers ultimately have to move, this has had significant knock-on effects for urban planning. A series of eviction cases in the Johannesburg inner city has resulted in the creation of a small, but growing, public housing stock created to accommodate unlawful occupiers evicted from

[36] *City of Johannesburg Metropolitan Municipality and others v Hlophe and Others* 2015 (2) All SA 251 (SCA)
[37] Ibid.
[38] Kate Tissington "Demolishing Development at Gabon Informal Settlement: Public Interest Litigation Beyond Modderklip?" *South African Journal on Human Rights* vol. 27 (2011) pp. 192-205.
[39] De Clerq and Others v Occupiers of Plot 38 Meringspark, Klerksdorp and Others. Case pending at the time of writing. Papers available at: http://www.seri-sa.org/index.php/19-litigation/case-entries/188-de-clerq-and-others-v-the-occupiers-of-plot-38-meringspark-klerksdorp-and-others-ratanang. Last visited 4 March 2016.
[40] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).
[41] *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC).

buildings in the course of inner city regeneration initiatives.[42] The terms on which that accommodation is provided have opened up a new front in unlawful occupiers' struggles to retain access to the city. The courts have directed local authorities to provide accommodation within a reasonable distance of the land from which unlawful occupiers have been removed.[43] They have also directed that family accommodation be provided, and struck down restrictive rules and conditions placed on residence in the housing stock the state provides.[44]

Restrictions have also been placed on the legal steps private owners and the state can take to prevent the urban poor from moving onto vacant land. The courts have rejected attempts to obtain land occupation interdicts which permit eviction without a court order where unlawful occupiers have moved onto land for a relatively short period – often because they have been evicted from elsewhere.[45] The Constitutional Court, in particular, has disapproved of coercive responses to new land occupations, emphasising the need to engage with homeless people moving on to land for the first time, and to deal with their needs on a case by case basis.[46]

In practice, this new scheme for the adjudication of eviction cases, the execution of eviction orders and the management of unlawful land occupation has opened up a fairly wide space within which unlawful occupiers can shape the terms of their access to land. The Apartheid legal regime, buttressed by the overwhelming power that common law eviction proceedings assigned to landowners, produced a vast number of eviction orders, which were granted and executed irrespective of the social consequences of making large numbers

[42] Stuart Wilson "Litigating Housing Rights in Johannesburg's Inner City: 2004-2008", South African Journal on Human Rights on Public Interest Litigation vol. 27 (2001) pp. 127-151.
[43] *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC), para 104.
[44] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ)
[45] *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 (CC)
[46] *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC), para 87.

of very poor people suddenly homeless. The post-Apartheid constitutional and statutory scheme for the management of eviction proceedings has instead sought to create a space in which the competing social claims of landowners and unlawful occupiers can be balanced and reconciled, and in which poor people can negotiate the terms of their residence in urban areas. This has led to resettlement of significant tracts of urban land by poor people, and changes in government policy and practice, increasing the availability of public rental housing stock, and the frequency with which informal settlement upgrades take place.

Mention Kirbily

Deal Briefly with debtor/creditor law (sebola) and Landlord and tenant law (Maphango)

Changes in property law adjust the boundaries of human agency. They therefore, albeit indirectly, lead to social change, whether or not anyone immediately changes his or her behaviour. It is enough that spaces of possible action are opened up or closed down. Over time, new spaces will be occupied and acted in, and old spaces will be abandoned, either as a result of coercion, or voluntarily because of agent-centred adjustments to the bounds of permissible action.

Property law is one of the most important sources from which spaces of social action are constructed and reshaped. It sets the terms on which people may access and exploit material goods. Through reforms to property law, South Africa is embarked on a fundamental re-imagining of those terms. Unlawful occupiers of land have gained temporary, limited and circumscribed rights to remain where they have no common law entitlement to be. Tenants can insist

that their landlords act fairly, even where their leases contracts specify otherwise; and can hold out against a landlord who wants to repossess his property by arguing that the landlord has acted unfairly. Debtors who have failed to repay their debts can stave off debt recovery, restructure their obligations, and even prevent some forms of execution altogether, even though they have borrowed money that they have not given back.

These important amendments to South African property law are reshaping social and economic relationships across a wide range of geographical and social contexts. They are driving social change.