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USING EVICTION TO COMBAT HOUSING-RELATED CRIME AND ANTI-SOCIAL BEHAVIOUR IN SOUTH AFRICA AND THE NETHERLANDS

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This article focuses on eviction used by local authorities to combat crime and anti-social behaviour in the Netherlands and South Africa. It further analyses how these practices relate to the right of respect for the home of the evictees, as laid down in treaties and national legislation. The results of a functional comparative analysis indicate that both countries use eviction to address crime, and primarily apply this instrument to address drug-related crime. The analysis identifies three ways of using criminal activities as grounds for eviction. First, authorities refer to crime committed by the evictees themselves as a reason for the eviction. Secondly, they refer to crime committed by third parties as a reason to evict residents. Thirdly, criminal activity is used as a justification for mass evictions of residents. In both countries eviction is qualified as a serious interference with the right to respect for the home. The article concludes, however, that the use of eviction in cases regarding crime does not automatically result in a violation of this right. Local authorities and courts in both countries seem to have accepted the growing role of evictions to combat crime and anti-social behaviour.

I INTRODUCTION

In recent years, there has been an increasing interest in the use of eviction to combat housing-related crime and anti-social behaviour.¹ Eviction is used to address criminal and anti-social behaviour in numerous countries on different continents.² For example, the mayor of Cape Town recently launched a substance-abuse awareness campaign to prevent drugs from destroying

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¹ John Flint *Housing, Urban Governance and Anti-Social Behaviour* (2006) 17; Caroline Hunter, Judy Nixon & Michele Slatter 'Neighbours behaving badly: Anti-social behaviour, property rights and exclusion in England and Australia' (2005) 5 *Macquarie LJ* 149; Lahny R Silva 'Criminal histories in public housing' (2015) 5 *Wisconsin LR* 375.

² Caroline Hunter & Judy Nixon 'Taking the blame and losing the home: Women and anti-social behaviour' (2001) 23 *Journal of Social Welfare and Family Law* 395; David P Varady & Harry Schulman 'Social disorders in the early stages of public housing decline: A Helsinki case study' (2007) 22 *Housing Studies* 313; John Flint & Hal Pawson 'Social landlords and the regulation of conduct in urban spaces in the United Kingdom' (2009) 9 *Criminology and Criminal Justice* 415; Yung Yua 'On the anti-social behaviour control in Hong Kong's public housing' (2011) 26 *Housing Studies* 701; Michel Vols, Vincent Tassenaar & Jan Jacobs 'Dutch courts and housing related anti-social behaviour. A first statistical analysis of legal protection against eviction' (2015) 7 *International Journal of Law in the Built Environment* 148.

livelihoods and contributing to crime and gangsterism. One of the main 'prevention strategies' of that campaign is to evict tenants from the municipality's rental stock due to illegal activities, such as drug abuse.³ In European countries, such as the Netherlands, local authorities also use eviction to combat crime and anti-social behaviour.⁴ For example, the mayor of Tilburg sees eviction as the most important instrument to address the increasing problem of drug-related crime in the city.⁵

In light of the above, the aim of this article is two-fold. First, the article aims to determine how eviction is used by local authorities to combat housing-related crime and anti-social behaviour in the Netherlands and South Africa. Secondly, the article intends to analyse the effect of the legal protections against the loss of a home, guaranteed by the respective countries, on these practices.

Housing-related crime refers to criminal activities that take place on or close to residential premises. Examples are drug dealing, the intimidation of neighbours, and gang-related activities in residential areas. The term 'anti-social behaviour', in this context, is a 'contested concept'.⁶ In this article we use the definition suggested by Burney, who describes anti-social behaviour as behaviour that 'unreasonably interferes with other people's rights to use and enjoyment of their home and community'.⁷ Such behaviour causes harassment, alarm or distress to individuals not of the same household as the perpetrator. Consequently, interventions from the relevant authorities are necessary.⁸

However, such interventions might prove to be difficult. Criminal prosecution and punishment may be inappropriate, either because the individual components of the behaviour are not prohibited by criminal law or, viewed in isolation, constitute relatively minor offences.⁹ Local authorities prefer to apply instruments based on administrative law, such as area exclusion orders,¹⁰ and private law, such as eviction orders,¹¹ because these instruments provide immediate solutions for the neighbourhood.¹²

The analysis is limited to the use of eviction by local authorities, as one such intervention. In this article we define eviction as the permanent or

³ City of Cape Town 'Mayor de Lille launches city's substance abuse awareness campaign' available at <http://www.capetown.gov.za>, accessed on 25 May 2016.

⁴ Michel Vols *Woonoverlast en het Recht op Privéleven* (2013) ch 7; Jan Luba 'Eviction by the magistrates: The new closure orders' (2009) 13 *Landlord & Tenant Review* 171.

⁵ Jan Tromp 'Als het maar de stad uit is' *De Volkskrant* 11 April 2015 at 43.

⁶ Andrew Millie *Anti-Social Behaviour* (2009) 2.

⁷ Elisabeth Burney *Making People Behave. Anti-Social Behaviour, Politics and Policy* 2 ed (2009) 8.

⁸ Millie op cit note 6 at 16–17.

⁹ *Ibid.* Cf Peter Ramsay 'What is anti-social behaviour?' 2004 *Criminal LR* 908–25.

¹⁰ An area exclusion order is a ban imposed on an individual prohibiting him or her from being in a specific area: Michel Vols & Dewi Duran 'Tackling anti-social behaviour and homelessness with exclusion orders in the Netherlands, Belgium, England and Wales' in Gijs Vonk & Albertjan Tollenaar (eds) *Homelessness and the Law. Constitution, Criminal Law and Human Rights* (2014) 61.

temporary removal, against their will, of individuals, families or communities from their homes.¹³ Of course, we acknowledge that local authorities and other parties, such as private individuals, companies and the police, may use instruments other than eviction to combat housing-related crime and anti-social behaviour. For example, community members may start neighbourhood mediation projects,¹⁴ or neighbours may initiate proceedings based on nuisance law.¹⁵ Furthermore, gated communities and private security companies can play a role in preventing and addressing housing-related crime and anti-social behaviour.¹⁶ However, in this article we focus on the use of eviction, because it can have very harsh consequences for those evicted and can be characterised as very serious interference with someone's right to housing.¹⁷ It is, therefore, interesting to consider how eviction is used to combat crime and anti-social behaviour, and to evaluate its effect on the right to housing.

We conduct a functional comparative analysis. The functional comparative method is one of the 'best-known working tools in comparative law'.¹⁸ It emphasises that law is created for the purpose of solving human problems and requires a concrete social problem as a starting block for the research.¹⁹ Using this method, we describe, juxtapose and identify differences and similarities in the way eviction is used to address crime and anti-social behaviour in South Africa and the Netherlands.²⁰

The scope of this article is limited to Dutch and South African law for a number of reasons. For purposes of a comparative legal analysis the systems under comparison have to share 'common characteristics, which serve as the

¹¹ Michel Vols 'Neighbors from hell: Problem-solving and housing laws in the Netherlands' (2014) 7 *The Arizona Summit LR* 507 at 514–17.

¹² Municipality of Amsterdam *Actieplan De Treiteraankpak* (2013) 7–8. See also City of Cape Town 'City obtains eviction order against drug dealer/shebeen owner in Blackbird Avenue, Parkwood' available at <http://www.capetown.gov.za/en/MediaReleases/Pages/CityObtainsEvctnOndrAgnstDrgDealerInBlckbirdAvePWood.aspx>, accessed on 25 May 2016.

¹³ United Nations Human Settlements Programme *Enhancing Urban Safety and Security* (2007) 118.

¹⁴ Elze G Ufkes, Ellen Giebels, Sabine Otten & Karen I van der Zee 'The effectiveness of a mediation program in symmetrical versus asymmetrical neighbor-to-neighbor conflicts' (2012) 23 *International Journal of Conflict Management* 440.

¹⁵ A J van der Walt *The Law of Neighbours* (2010) 305–12.

¹⁶ See Till F Paasche 'The softer side of security: The role of social development in Cape Town's policing network' (2013) 45 *Geoforum* 259; Andy Clarno & Martin J Murray 'Policing in Johannesburg after apartheid' (2013) 39 *Social Dynamics* 210.

¹⁷ Lorna Fox *Conceptualising Home* (2007); Jessie Hohmann *The Right to Housing. Law, Concepts, Possibilities* (2014).

¹⁸ Esin Özücü 'Developing comparative law' in Esin Özücü & David Nelken (eds) *Comparative Law. A Handbook* (2007) 51.

¹⁹ *Ibid* at 51.

²⁰ *Ibid* at 49.

common denominator', the tertium comparationis.²¹ First, both South Africa and the Netherlands are faced with rapid urbanisation. In South Africa, nearly 65 per cent of the population lives in cities.²² This percentage is on the rise due to the attractions of urban life, such as the availability of jobs.²³ In the Netherlands, over 90 per cent of the population lives in cities, and this percentage is rising too.²⁴ Denser living conditions foster anti-social behaviour, which implies a threat to the quality of life of residents.²⁵ Secondly, both countries deal with the problem of housing-related crime and anti-social behaviour. How to secure the home and neighbourhood against crime is a 'major concern in South African daily life',²⁶ as well as in the Netherlands.²⁷ Thirdly, the right to respect for the home is protected in both the Netherlands and South Africa. Article 10 of the Dutch Constitution of 1983 ('the Dutch Constitution'), art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ('the European Convention') and s 26 of the Constitution of the Republic of South Africa, 1996 ('the South African Constitution') codify this right. Both the South African Constitution and the European Convention can be characterised as reactions to injustice, oppression and violations of human rights in the past (ie Second World War and apartheid) and share a commitment to democracy and the protection of human rights.²⁸

²¹ Esin Örüçü 'Methodology of comparative law' in Jan M Smits (ed) *Elgar Encyclopedia of Comparative Law* 2 ed (2012) 561.

²² Central Intelligence Agency *The World Fact Book* available at <https://www.cia.gov>, accessed on 25 May 2016.

²³ Ibid. See also Hanri Mostert 'Landlessness, housing and the rule of law' in Hanri Mostert & Marius J de Waal (eds) *Essays in Honour of C G van der Merwe* (2011) 84.

²⁴ CIA op cit note 22; see also Peter Ekamper 'De verstedelijking van Nederland' (2010) 26 *Demos* 15.

²⁵ Tim Heath 'Revitalizing cities: Attitudes toward city-center living in the United Kingdom' (2001) 20 *Journal of Planning Education and Research* 464; Dutch Statistics Agency 'Four times as much nuisance in the major cities than in rural areas' available at <http://www.cbs.nl>, accessed on 25 May 2016.

²⁶ Hanri Mostert 'Nuisance' in Daniel Visser & Elspeth Reid (eds) *Private Law and Human Rights* (2013) 274. See also Leslie Bank 'The rhythms of the yards: Urbanism, backyards and housing policy in South Africa' (2007) 25 *Journal of Contemporary African Studies* 205; Tom de Bruyn 'Policy, fear and systemic violence: A review of the Johannesburg context' (2012) 13 *Urban Forum* 80; Laura Drivdal & Mary Lawhon 'Plural regulation of shebeens (informal drinking places)' (2014) 96 *South African Geographical Journal* 97.

²⁷ Henk Jan Bierling, Annemiek Lucas & Pieter Tops *Aanpak Overlast en Verloederling in Nieuw Perspectief* (2013) 5; Jan Brouwer & Jon Schilder 'Woonoverlast en de persoonlijke levenssfeer: Naar een balans tussen bescherming en beperking' 2011 *NJCM-Bulletin* 307.

²⁸ Gerhard van der Schyff *Limitation of Rights. A Study of the European Convention and the South African Bill of Rights* (2005) 1–2; Sarah Fick & Michel Vols 'Best protection against eviction? A comparative analysis of protection against evictions in the European Convention on Human Rights and the South African Constitution' (2016) 3 *European Journal of Comparative Law and Governance* 40 at 44.

Of course, there are major differences between the countries that need to be taken into account. One of the key differences between the Netherlands and South Africa is the socio-economic challenge of poverty. A large percentage of the South African population lacks basic housing, because it is unaffordable for them.²⁹ Numerous people live in informal settlements, in which the living conditions are deplorable.³⁰ In the Netherlands the problem of homelessness is less serious, and living standards are higher.³¹ For example, nearly every home contains private access to an indoor flushing toilet.³²

Nonetheless, acknowledging the differences between these countries, we believe that a comparison between the Netherlands and South Africa, given the similarities, can be fruitful. Whilst the comparative analysis is centred on Dutch and South African law, it may also be relevant for other jurisdictions facing similar issues.

After this introduction, this article is divided into three parts. Part II analyses Dutch and European legislation, policy documents and case law. These texts are used to analyse how local authorities use eviction to address housing-related crime and anti-social behaviour in the Netherlands. Part III contains a similar analysis of South African law. In part IV a comparative legal analysis is conducted in order to discover similarities and differences between the two jurisdictions.

II EVICTION, CRIME AND ANTI-SOCIAL BEHAVIOUR IN THE NETHERLANDS

Before analysing the use of eviction to combat crime and anti-social behaviour by the Dutch local authorities, it is appropriate to provide a brief overview of the protection against eviction offered by the Dutch Constitution and the European Convention.³³ Both documents protect people against eviction. The European Convention is a treaty signed by the Netherlands, which codifies the right to respect for private life and the home.³⁴ The protection provided by this provision is tenure-neutral: it is applicable to owner-occupiers, tenants and unlawful occupiers.³⁵ Eviction is an example of an interference with the right to respect for private life and the

²⁹ Mostert op cit note 23 at 75, 85.

³⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 24.

³¹ Alice Pittini & Elsa Laino *Housing Europe Review* (2011) 64–5.

³² Organisation for Economic Cooperation and Development ‘Better life index: Netherlands’ available at <http://www.oecdbetterlifeindex.org/>, accessed on 25 May 2016.

³³ See Michel Vols, Marvin Kiehl & Julian Sidoli del Ceno ‘Human rights and protection against eviction in anti-social behaviour cases in the Netherlands and Germany’ (2015) 2 *European Journal of Comparative Law and Governance* 156 for a detailed analysis of the protection offered against eviction in the Netherlands.

³⁴ Article 8 of the European Convention.

³⁵ Antoine Buyse ‘Strings attached: The concept of “home” in the case law of the European Court of Human Rights’ (2006) 3 *European Human Rights LR* 294; Vols et al op cit note 33 at 163.

home. Under certain conditions, an interference with the right to respect for private life and the home can be justified. First, art 8(2) of the European Convention prescribes that the interference has to be in accordance with the law. Secondly, the interference should serve one of the legitimate goals set out in the provision, such as the prevention of crime or the protection of rights of others. Thirdly, the interference has to be necessary in a democratic society. This last condition requires a pressing social need for the interference.³⁶

In the case of *McCann v United Kingdom*, in applying the third condition (that the interference be necessary in a democratic society), the European Court of Human Rights found that the loss of one's home should be characterised as 'a most extreme form of interference with the right to respect for the home'.³⁷ It also stated that, in principle, any person at risk of losing her home should be able to request an independent tribunal to assess the proportionality and reasonableness of the interference.³⁸ Consequently, in the context of evictions, for an eviction to be necessary in a democratic society the purpose of the eviction needs to be proportional to the effect thereof, ie the loss of a home.³⁹

The right to respect for private life, as laid down in art 10 of the Dutch Constitution, has the same scope as the right in art 8 of the European Convention.⁴⁰ However, the Dutch Constitution adds an additional requirement to the list of conditions that need to be fulfilled to justify an interference with the right to respect for the home. The Dutch Constitution requires that a limitation of the right should have a legal basis in an Act of Parliament ('wet in formele zin').⁴¹ A local by-law is not a sufficient legal basis for an interference with the right to respect for private life and the home. Consequently, in their fight against housing-related crime, local authorities have to rely on legal instruments provided by the national Parliament.⁴²

The requirements that arise from art 8 of the European Convention and art 10 of the Dutch Constitution become apparent in a number of built-in safeguards against eviction in Dutch law. One such example is found in Dutch tenancy law, where a court is entitled to cancel a lease agreement and issue an eviction order if a tenant causes anti-social behaviour.⁴³ Despite this

³⁶ Vols et al op cit note 33 at 164.

³⁷ *McCann v United Kingdom* (2008) 47 EHRR 40 para 50.

³⁸ Ibid para 50.

³⁹ Fick & Vols op cit note 28 at 47.

⁴⁰ See Vols op cit note 4 at 20.

⁴¹ Ibid at 24.

⁴² See parts II(a) and (b) below. Tenants are evicted by housing associations in terms of art 7:213 and 7:231 of the Civil Code, while owners are evicted when mayors close buildings in terms of the Opium Act of 1928.

⁴³ Article 7:213 and 7:231 of the Civil Code. See also Piet Abas *Asser-Serie. Bijzondere Overeenkomsten. Huur* 9 ed (2007) 84–90.

power, the criterion of reasonableness applies.⁴⁴ A court may decide not to terminate the agreement if the behaviour does not justify the termination and its legal effects.⁴⁵ For example, if an eviction produces disproportional effects for the tenant's children, the court may refuse to grant an eviction order.⁴⁶ A second example of these safeguards is found in Dutch administrative law, where the principle of proportionality is also applicable. According to the General Administrative Law Act of 1992, a decision of a (local) administrative authority may not violate the proportionality principle.⁴⁷ As a result, any decision by a local authority to evict must comply with the proportionality principle.

In the remainder of this section we discuss two case studies in which eviction has been used to address crime and anti-social behaviour in the Netherlands. The first case study analyses the Amsterdam Treiteraangepak, in which the City of Amsterdam works together with housing associations to evict anti-social residents from their homes. The second case study analyses the use of eviction from private property by local authorities under the Opium Act of 1928 to combat drug-related criminal and anti-social behaviour.

(a) *The eviction of public tenants*⁴⁸

In 2013 the City of Amsterdam and local housing associations (semi-public landlords that provide social housing)⁴⁹ developed a new policy: the 'Treiteraangepak'.⁵⁰ The main objective of this policy is to work together to address activities by tenants of the local housing associations that can be characterised under the Dutch concept 'treiteren'. Although this concept does not refer to any specific Dutch legal concept and there is no English equivalent, 'treiteren' can be defined as a catch-all term that refers to behaviour which annoys, pesters or harasses other people. According to the definition used by the authorities in the Treiteraangepak, the word 'treiteren' refers to structural, intimidating behaviour in residential areas which intends to offend specific individuals or groups of persons.⁵¹ Treiteren is characterised as a combination of nuisance and criminal behaviour, such as vandalism and violence.⁵²

⁴⁴ Floris Bakels *Ontbinding van Overeenkomsten* 2 ed (2011) 82–3.

⁴⁵ Article 6:265 of the Civil Code; Hoge Raad 22/10/1999, NJ2000, 208.

⁴⁶ Rechtbank Noord-Nederland 26/4/2013, ECLI:NL:RBNNE:2013:BZ8814.

⁴⁷ Article 3:4 of the General Administrative Law Act of 1992 ('Algemene Wet Bestuursrecht').

⁴⁸ The term 'public tenants', as used in this article, refers to tenants who occupy state-owned or social housing.

⁴⁹ Housing associations are non-profit organisations that are statutorily obliged to provide affordable housing to the public. In 2012, Dutch housing associations owned 31 per cent of all the houses in the Netherlands: Dutch Statistics 'Woningvoorraad naar eigendom' available at www.statline.cbs.nl, accessed on 2 June 2015.

⁵⁰ Directly translated as the 'harassment approach'.

⁵¹ Municipality of Amsterdam op cit note 12 at 6.

⁵² Ibid at 6.

The authorities that participate in the Treiteraankpak adhere to certain basic rules in their approach towards treiteren. The first rule is that people involved in treiteren should either cease this behaviour or leave the neighbourhood.⁵³ The second rule is that it is unacceptable to expect the victims of crime and anti-social behaviour to move instead.⁵⁴ If a person annoys, pesters or harasses her neighbours or other community members, the authorities will ‘pull out all the stops’ to combat that problem behaviour.⁵⁵ They rely on the fact that lease agreements prohibit treiteren. The lease agreement of a lessee who is involved in this kind of behaviour can, therefore, be cancelled and the person evicted.⁵⁶

Where a person continuously annoys, pesters or harasses her neighbour or other community members, the municipality, according to the Treiteraankpak policy document, first issues a ‘yellow card’ as warning. This warning contains specific requirements such as an order to stop threatening his or her neighbour, with which the offender has to comply. If the offender is a tenant, the warning also states that the tenant’s anti-social behaviour qualifies as a breach of the lease agreement and that the housing association will initiate proceedings if the tenant continues with the anti-social behaviour. If the person disregards the warning and, for example, continues to threaten her neighbour, the municipality issues a ‘red card’.⁵⁷

The meaning of this ‘red card’ depends on the type of tenure of the offender. If the offender is an owner-occupier or a private tenant, the housing associations are not involved in addressing the problem behaviour. The municipality will apply its own powers based on administrative law, such as area exclusion orders,⁵⁸ but cannot evict the offender as easily.⁵⁹ If the offender rents a home from a housing association, a ‘red card’ means that the mayor of Amsterdam requests the housing association to approach the court. The housing association then initiates proceedings and requests the court to cancel the lease agreement and to issue an eviction order.⁶⁰

The municipality and the housing associations in Amsterdam have built temporary and demountable housing units (‘portakabins’)⁶¹ to rehouse anti-social persons who are evicted.⁶² These portakabins are located on the

⁵³ Ibid at 9 and 14.

⁵⁴ Ibid.

⁵⁵ Ibid at 5.

⁵⁶ Most leases in the Netherlands contain a clause that prohibits anti-social or criminal behaviour. Besides that, art 7:213 of the Dutch Civil Code obliges tenants to behave ‘as a prudent tenant’. Therefore, being involved in treiteren will usually qualify as a breach of the lease agreement: Vols op cit note 11 at 514.

⁵⁷ Municipality of Amsterdam op cit note 12 at 14. The terms ‘yellow card’ and ‘red card’ are specifically used in the policy.

⁵⁸ Vols & Duran op cit note 10 at 62.

⁵⁹ Municipality of Amsterdam op cit note 12 at 14.

⁶⁰ Ibid.

⁶¹ A portakabin is a demountable building designed and built to be movable rather than permanently located.

⁶² Municipality of Amsterdam op cit note 12 at 16.

outskirts of Amsterdam, and have 24-hour surveillance. By offering the portakabins, the agencies aim to prevent homelessness of the evicted anti-social persons and, therefore, ensure a more proportional outcome. Another purpose of rehousing offenders in portakabins is to avoid simply relocating the problem to a different part of the city. By rehousing anti-social persons in the portakabins, the authorities can remove the problems from the residential areas and concentrate anti-social residents at a limited number of locations in Amsterdam. After a court has cancelled the lease agreement and issued an eviction order, the authorities will offer the evictees the opportunity to move to the portakabins. The evictees are not forced to live in the portakabins, but if they accept the agencies' offer, they must sign a new temporary lease agreement and pay a reasonable rent.⁶³ Although the evictees are allowed to refuse the portakabin and find another rental property, it will be hard for them to find alternative accommodation, since the housing agencies involved in the Treiteraapak own the vast majority of rental premises in Amsterdam.⁶⁴

From January 2013 to December 2015, the agencies involved in the Treiteraapak analysed approximately 300 of the most serious incidents of housing-related anti-social behaviour, such as noise nuisance and aggressive behaviour towards neighbours. In 74 cases, they decided that the behaviour could be characterised as definite instances of *treiteren* within the meaning of the Amsterdam Treiteraapak.⁶⁵ The results of the Treiteraapak are, however, not very impressive. In 38 cases the 'yellow card' issued by the authorities did not stop the anti-social behaviour, but the behaviour was not serious enough yet to issue a 'red card'. In 35 of the 73 cases the case was closed. The offenders changed their behaviour in only seventeen cases. In eight cases the offenders moved voluntarily and in another six cases the offenders were evicted against their will.⁶⁶ One of the offenders died of natural causes and another case was closed because the victim refused to accept any form of help. In two of the other cases the victims decided to move because of the anti-social behaviour.⁶⁷

Although the Treiteraapak in Amsterdam is supposed to be tenure-neutral,⁶⁸ an analysis of the approach shows that it is primarily used to address the problem of anti-social tenants who rent from housing associations. Nearly 75 per cent of all cases concerned offenders in rented premises that are owned by housing associations.⁶⁹ In so far as the seventeen owner-occupier cases that were analysed in the Treiteraapak are concerned, the municipality

⁶³ See Municipality of Amsterdam 'Containerwoningen in het kader van de treiteraapak' available at <https://www.amsterdam.nl>, accessed on 25 May 2016.

⁶⁴ See Dutch Statistics 'Eén op de drie woningen eigendom van woningcorporatie' available at <http://www.cbs.nl/>, accessed on 25 May 2016.

⁶⁵ Municipality of Amsterdam *Jaarrapportage Treiteraapak 2015* (2016) 4.

⁶⁶ *Ibid.* at 5.

⁶⁷ *Ibid.*

⁶⁸ Municipality of Amsterdam *op cit* note 12 at 14.

⁶⁹ Municipality of Amsterdam *Bijlage bij Jaarrapportage Treiteraapak 2015* (2016) 17.

argued that it was nearly impossible to address the problem behaviour through the Treiteraapak. Where the owner-occupier is the offender, the municipality does not have the same power to prevent the behaviour, since the Treiteraapak does not allow eviction at the request of the municipality itself. Rather, the success of the Treiteraapak depends on the co-operation of housing associations.⁷⁰ Consequently, the Treiteraapak is mainly used to address crime and anti-social behaviour caused by public tenants.⁷¹

The Treiteraapak has resulted in interesting case law. In 2013, the Dimitrov family (five adults and three young children) was given a 'yellow card' by the mayor of Amsterdam. According to the mayor, the family were involved in criminal and anti-social behaviour in their neighbourhood. They intimidated their neighbours and the housing association's staff. Furthermore, they had been involved in vandalism and noise nuisance for over ten years. Since the family ignored the yellow card, the mayor issued a 'red card'. Subsequently, the housing association requested the District Court Amsterdam to cancel the lease and grant an eviction order.⁷² The District Court found that the criminal and anti-social behaviour of the lessees resulted in a breach of their lease agreement that expressly obliged them not to behave anti-socially.⁷³ Furthermore, the District Court held that the municipality and the housing association had tried to solve the problem without eviction.⁷⁴ Lastly, the District Court found that the interests of the family and especially the young children should be taken into account in the decision whether or not to grant an eviction order. It concluded that it was proportional to grant an eviction order in this case, because the municipality had offered the family a portakabin. Consequently, the eviction did not have disproportional consequences.⁷⁵ After the court granted the eviction order, the family was evicted and rehoused in a portakabin at a remote location in the City of Amsterdam.⁷⁶

A few months later, the Dimitrov family was evicted from their portakabin as a result of non-payment of their rent. The District Court delivered a harsh judgment. It held that the breach of the lease agreement was serious enough for eviction and that only the family could be blamed for the eviction.⁷⁷ It found that the family was given a last chance that many people were not offered. According to the District Court, the family could only blame themselves for not seizing this opportunity.⁷⁸ The Dimitrov family did not

⁷⁰ Municipality of Amsterdam op cit note 65 at 8.

⁷¹ Municipality of Amsterdam op cit note 69 at 17.

⁷² Rechtbank Amsterdam 08-08-2013, ECLI:NL:RBAMS:2013:4935 para 1.

⁷³ Ibid para 20.

⁷⁴ Ibid.

⁷⁵ Ibid paras 21–2.

⁷⁶ Carla van der Wal 'Dit tuigdorps is een hel, ze noemen ons monsters' *Algemeen Dagblad* 12 May 2014 at 1.

⁷⁷ Rechtbank Amsterdam 30-05-2014, ECLI:NL:RBAMS:2014:3094 para 4.10.

⁷⁸ Ibid para 4.10.

argue that the eviction was disproportional to their right to housing and, consequently, the District Court did not assess whether this was the case.⁷⁹

In response, the Dimitrov family challenged the decision of the District Court to grant the initial eviction order. This challenge was unsuccessful. The Court of Appeal of Amsterdam held that the lessees were involved in serious anti-social behaviour that qualified as a breach of the lease.⁸⁰ The Court of Appeal found that the family's initial eviction was proportional and not contrary to their fundamental rights, because the family's misconduct constituted a severe breach of the lease and at the time of the eviction the family was rehoused in a portakabin.⁸¹ Although the Court of Appeal stipulated that the family's eviction from the portakabin was regrettable, it held that this eviction was the family's own fault because they had refused to pay the rent for the portakabin.⁸²

The Dimitrov case is only one example of eviction being used by a local authority to combat housing-related anti-social behaviour. The use of eviction to address unruly tenants is not uncommon in the Netherlands, and is not limited to Amsterdam.⁸³ In the whole of the Netherlands, the housing associations, in close collaboration with municipalities, initiate eviction proceedings in approximately 1500 cases concerning breaches of leases as a result of crime and anti-social behaviour every year.⁸⁴ A statistical analysis of litigation concerning eviction because of crime and anti-social behaviour showed that in the majority of the cases Dutch courts did assess whether the eviction was proportional and reasonable. However, in the vast majority of the cases the courts held that the eviction was proportional and reasonable, because of the seriousness of the breach of the lease.⁸⁵

Furthermore, the number of municipalities that use portakabins to rehouse criminal and anti-social residents is growing.⁸⁶ For example, the municipal council of Rotterdam has recently adopted a plan to build ten portakabins at the outskirts of the city.⁸⁷ According to alderman Eerdmans,⁸⁸ the area where the portakabins are built can be characterised as a slum village

⁷⁹ Dutch law does not oblige courts to assess whether an eviction complies with requirements which arise from human rights. Only if a tenant advances a defence that, for example, the eviction is disproportionate or unreasonable and an eviction would violate her human rights, does the court need to assess the proportionality and reasonableness of the eviction: Fick & Vols op cit note 28 at 62–3.

⁸⁰ Gerechtshof Amsterdam 15–07–2014, ECLI:NL:GHAMS:2014:2606 para 3.15.

⁸¹ Ibid para 3.20.

⁸² Ibid para 3.21.

⁸³ Vols op cit note 11 at 515–16.

⁸⁴ Aedes 'Huisuitzettingen 2008–2014' available at <http://www.aedes.nl>, accessed on 25 May 2016.

⁸⁵ Vols et al op cit note 2 at 154–6.

⁸⁶ RTL Nieuws 'Zeker twintig gemeenten steken geld in wooncontainers' available at <http://www.rtlnieuws.nl/>, accessed on 25 May 2016.

⁸⁷ Municipality of Rotterdam *Actieplan Woonoverlast 2015–2019* (2015) 23–4.

⁸⁸ An 'alderman' is a member of the executive municipal council.

(‘asodorp’) and can be used to accommodate people who are too mentally sound for the psychiatric clinic and not criminal enough to be sent to prison, but too dangerous to live in an ordinary neighbourhood.⁸⁹ Academics, journalists and civilians have criticised the Rotterdam portakabin project and have argued that the rehousing of people at the outskirts of the city only displaces problems, creates hotspots for criminality, and stigmatises the people living in the portakabins.⁹⁰ Nonetheless, the municipal council of Rotterdam has approved the alderman’s plan, and it is expected that the first portakabins will be used in 2017.⁹¹

As stated above, the Treiteraapak, and similar initiatives in other municipalities, are predominantly used to address housing-related crime and anti-social behaviour by public tenants, and not to fight problem behaviour by owner-occupiers and private tenants.⁹² Nonetheless, Dutch municipalities have other ways to use eviction in addressing the criminal and anti-social behaviour of owner-occupiers and private tenants. In the next section we analyse these methods.

(b) *Eviction from private property*

During the last two decades Dutch local authorities have intensified their fight against drug-related crime and anti-social behaviour in residential areas.⁹³ According to them, this type of crime affects the quality of life in communities.⁹⁴ In 2007, the national legislator granted mayors a new power to combat drug-related crime committed in homes. The Opium Act empowers the mayor to take administrative enforcement action (‘last onder bestuursdwang’) if illegal drugs are sold, delivered or provided to people in a home, or if drugs are present in a home for one of these purposes.⁹⁵ This means that the mayor is allowed to close down the premises temporarily, usually for three to twelve months. The municipality will board up the building. The application of the power is tenure-neutral. The mayor is entitled to close down owner-occupied premises, as well as rented premises.

⁸⁹ Marjolein Kooyman ‘“Containerdorp” voor rabiate aso’s in Rotterdam’ *Algemeen Dagblad* 9 May 2014 at 1.

⁹⁰ Michel Vols ‘Zijn asodorpen de oplossing voor overlast’ available at <http://www.openbareorderecht.nl/>, accessed on 25 May 2016; RTL Nieuws op cit note 86; RTV Rijnmond ‘Onrust in Schiebroek over komst asowoningen’ available at <http://www.rijnmond.nl/>, accessed on 25 May 2016.

⁹¹ Municipality of Rotterdam ‘Skaeve huse’ available at <http://www.rotterdam.nl/skaevhuse>, accessed on 25 May 2016.

⁹² Municipality of Amsterdam op cit note 65 at 8; Municipality of Amsterdam op cit note 69 at 24.

⁹³ See Henk-Martijn Breunese, Jan Brouwer & Jon Schilder *Wapenen tegen Drugs-overlast* (1996) 10; Marc Schuilenberg & Wytse van der Wagen ‘Samenwerking in de criminaliteitsbestrijding. Kwalitatief onderzoek naar de integrale aanpak van illegale hennepteelt’ (2011) 5 *Tijdschrift voor Veiligheid* 10.

⁹⁴ Pieter Tops & Edward van der Torre *Wijkenaanpak en Ondermijnende Criminaliteit* (2014) 12–15.

⁹⁵ Article 13b of the Opium Act.

It is an offence to enter and stay in such a closed-down building, but the former occupiers are entitled to return after the premises are reopened.⁹⁶ The effect of closing down a building is, therefore, that the occupiers are, at least temporarily, evicted. The mayor is not required to provide alternative accommodation for the residents who lose their homes because of the closure order.⁹⁷

Mayors have closed down hundreds of homes because of drug-related crimes since 2007.⁹⁸ The residents of these premises are entitled to appeal against the decision of the mayor to close down their homes.⁹⁹ In a relatively small number of cases District Courts have concluded that the closure order did not comply with the statutory requirements, such as the principle of proportionality.¹⁰⁰ One such judgment was handed down by the District Court Roermond.¹⁰¹ In this case, the mayor of Venlo closed down the owner-occupied home of a couple with two young children for three months, after the police found that the couple was cultivating cannabis in the home.¹⁰² The District Court assessed whether the closure order complied with the requirements that arise from art 8 of the European Convention and held that it did not. According to the court, the closure order violated the principle of proportionality for multiple reasons. One, the cannabis farm was very small. Two, it did not cause a fire hazard or nuisance. Three, the closure of the home would result in homelessness of the young children. Four, there was a risk that the couple would lose their jobs if they had to move. Five, moving would negatively affect the relationship of the couple. Consequently, the District Court revoked the closure order and issued a warning notice to the couple instead.¹⁰³

Nonetheless, an analysis of case law shows that the highest administrative court in the Netherlands, the Administrative Jurisdiction Division of the Council of State ('the Council of State'), supports stricter enforcement of the Opium Act.¹⁰⁴ This strict approach can be illustrated by three recent cases. In the first case, *Mayor of Purmerend v A & B*,¹⁰⁵ the Council of State ruled that the presence of a commercial quantity of drugs is, in principle, sufficient to justify the decision to issue a closure order.¹⁰⁶ In such cases the burden of

⁹⁶ Vols op cit note 4 at 86.

⁹⁷ Ibid at 84–5. Cf Rechtbank Rotterdam 15–06–1999, *Kort Geding* (1998) 186.

⁹⁸ Michel Vols & Michelle Bruijn 'De strijd van de burgemeester tegen drugs-criminaliteit. Een eerste statistische analyse van de toepassing van artikel 13b Opiumwet' 2015 *Netherlands Administrative Law Library* 1 at 3.

⁹⁹ Articles 6:4 and 8:1 of the General Administrative Law Act of 1992.

¹⁰⁰ Vols op cit note 4 at 82.

¹⁰¹ Rechtbank Roermond 29–02–2012, ECLI:RBROE:2012:BV7734.

¹⁰² Ibid para 1. The couple had 80 to 90 cannabis plants in their home.

¹⁰³ Rechtbank Roermond 29–02–2012, ECLI:RBROE:2012:BV7734 para 10.

¹⁰⁴ Vols & Bruijn op cit note 98 at 18.

¹⁰⁵ Afdeling Bestuursrechtspraak Raad van State 11–12–2013, ECLI:NL:RVS:2013:2362.

¹⁰⁶ A commercial quantity of drugs consists of more drugs than are need for personal use (eg one pill, pellet, five ml GHB or five cannabis plants): Dutch Public Prosecu-

proof is shifted. It is up to the interested party to prove that the drugs were not present in the home for commercial purposes.¹⁰⁷

In the second case, *Mayor of Emmen v A*,¹⁰⁸ the Council of State set aside a judgment of the District Court North Netherlands. In the quashed judgment the District Court had held that a mayor's policy was unlawful because it relied too much on closing premises, instead of on other, less intrusive, measures, such as issuing warning notices. Although the Council of State found that the mayor should always assess whether less intrusive instruments can be used, it did not rule that it is required to issue a warning notice in every case. It considered the strict policy rules of the mayor to be lawful.¹⁰⁹

In the third case, *Mayor of Maastricht v A, B & C*,¹¹⁰ the Council of State ruled that the decision of the mayor of Maastricht to close down three houseboats did not violate art 8 of the European Convention. The mayor closed down the boats after approximately four kilograms of cannabis and a hundred cannabis plants were found in the boats. The Council of State acknowledged that the closure of a home would have far-reaching consequences for the residents. However, it held that issuing a closure order in this case complied with the limitations stipulated in art 8(2) of the European Convention. The closure order had a statutory basis and was necessary to prevent crime and to protect the rights of others. It concluded that, given the large number of drugs and cannabis plants that were found, a prior warning notice was not necessary.¹¹¹

After a mayor closes down premises, local authorities have a number of powers to further regulate the use of the closed building. In practice, the authorities only use these powers if they close down the building for a considerable period of time, for example longer than six months. First, the Woningwet of 1991 ('the Housing Act') entitles the board of mayor and aldermen to issue a management order.¹¹² In terms of such an order, the owner of premises is required to transfer the management of the property to the municipality or to, for example, a housing association or property agent. The new manager of the property is entitled to decide who may occupy the property after it is reopened and is also responsible for maintenance of the property.¹¹³ The owner of the building is statutorily required to pay a management fee to the organisation to which the management has been

tion Service 'Aanwijzing Opiumwet (2015A003)' available at <https://www.om.nl/>, accessed on 25 May 2016.

¹⁰⁷ Afdeling Bestuursrechtspraak Raad van State 11–12–2013, ECLI:NL:RVS:2013:2362 para 4.1.

¹⁰⁸ Afdeling Bestuursrechtspraak Raad van State 21–01–2015, ECLI:NL:RVS:2015:130.

¹⁰⁹ Ibid para 4.3.

¹¹⁰ Afdeling Bestuursrechtspraak Raad van State 25–02–2015, ECLI:NL:RVS:2015:580.

¹¹¹ Ibid para 4.2.

¹¹² Article 13b of the Housing Act.

¹¹³ Ibid.

transferred.¹¹⁴ The management is only transferred back to the owner if the board is satisfied that the premises will not be used for drug dealing and that all management fees have been paid. A second power available to local authorities further to regulate the use of the closed building stems from the Expropriation Act of 1851. In terms of this Act, the municipal council can expropriate a building if the issuing of closure and management orders did not result in a stable situation without any further violation of the Opium Act.¹¹⁵

This part has shown that Dutch local authorities use eviction to combat housing-related crime and anti-social behaviour. In the case of public tenants, they collaborate with housing associations and use tenancy law to combat the crime and behaviour. Authorities request the court to cancel the lease agreement and evict unruly tenants. Where a private tenant or owner-occupier engages in drug-related criminal or anti-social behaviour, the authority is entitled to close down the building, effectively evicting the occupiers. The analysis found that in both types of cases, the evictees are allowed to challenge the eviction before a court. They can argue that the eviction does not comply with the principle of proportionality that arises from their right to respect for the home.¹¹⁶ However, the part above has shown that in both types of cases this defence strategy is not very successful. In the vast majority of cases, courts dismissed the evictee's proportionality defence.¹¹⁷

III EVICTION, CRIME AND ANTI-SOCIAL BEHAVIOUR IN SOUTH AFRICA

Before analysing the use of eviction to combat crime and anti-social behaviour by South African local authorities, we provide a brief overview of the constitutional protection against eviction in South Africa. It is beyond the scope of this article to provide a detailed analysis of all eviction protection legislation, policies and case law. Moreover, there is already a (growing) body of academic scholarship concerning the constitutional protection against eviction in South Africa.¹¹⁸

¹¹⁴ Article 14 of the Housing Act.

¹¹⁵ Article 77(7) of the Expropriation Act of 1851.

¹¹⁶ Article 8 of the European Convention.

¹¹⁷ See also Vols et al op cit note 2.

¹¹⁸ AJ van der Walt *Property and Constitution* (2012) 1–184; AJ van der Walt 'Common law, expropriation and human rights in the intersection between expropriation and eviction law' in Lorna Fox & James A Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (2010) 55; Mostert op cit note 23; Lilian Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 *Human Rights LR* 105; Sue-Mari Maass & AJ van der Walt 'The case in favour of substantive tenure reform in the landlord-tenant framework: The *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*; *City of Johannesburg Metropolitan Municipality v Blue Moonlight*: Notes' (2011) 128 *SALJ* 436; Jeannie van Wyk 'The role of local government in evictions'

During the apartheid era, eviction was used to implement apartheid policies and legislation.¹¹⁹ One of the main objectives of the apartheid regime was racial segregation. To achieve racial segregation it was necessary to displace groups of (black) people.¹²⁰ Consequently, the apartheid legal system provided weak tenure for black people, by allowing quick and easy evictions and removals by the apartheid government.¹²¹ These forced removals were a clear violation of the basic human rights of the evictees, such as their rights to equality and human dignity.¹²² Therefore, the South African Constitution has the objective to overcome the abuses of the past and to ensure that evictions take place in ‘a manner consistent with the values of the new constitutional dispensation’.¹²³

Section 26(1) of the South African Constitution entrenches the right of access to adequate housing. In relation to this, s 26(2) provides that ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’. Read together, these sections place a housing duty on the state. However, the sections do not impose a positive obligation for the state to provide all homeless people with *immediate* access to housing.¹²⁴

Section 26(3) of the South African Constitution provides that ‘no one may be evicted from her home nor may his or her home be demolished, without an order of court made after considering all the relevant circumstances’. According to this section, ‘no legislation may permit arbitrary evictions’. In the well-known case of *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court found that especially for poor people a home is often the only space that offers some privacy and security.¹²⁵ The court held that

(2011) 14 *PELJ* 50; Sandra Liebenberg ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of “meaningful engagement”’ (2012) 12 *AHRLJ* 1; Janke Strijdom & Sue-Mari Viljoen ‘Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved’ (2014) 17 *PELJ* 1207; Lilian Chenwi ‘Implementation of housing rights in South Africa: Approaches and strategies’ (2015) 24 *Journal of Law and Social Policy* 68; Reghard Brits ‘Protection for homes during mortgage enforcement: Human-rights approaches in South African and English law’ (2015) 132 *SALJ* 566; Fick & Vols op cit note 28.

¹¹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8–10; Stuart Wilson ‘Planning for inclusion in South Africa: The state’s duty to prevent homelessness and the potential of “meaningful engagement”’ (2011) 22 *Urban Forum* 265; Fick & Vols op cit note 28.

¹²⁰ AJ van der Walt *Property in the Margins* (2009) 62–86.

¹²¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 6; Mostert op cit note 23 at 80; Maass & Van der Walt op cit note 118 at 445.

¹²² Van der Walt op cit note 120 at 62–8.

¹²³ *Port Elizabeth* supra note 119 para 11.

¹²⁴ *Grootboom* supra note 121 paras 34–46. This is because the duty on the state is internally limited in s 26(2) of the Constitution, in that the right need only be realised progressively, within the state’s available resources.

¹²⁵ *Port Elizabeth* supra note 119 para 17.

unlawful occupiers should be treated with human dignity and not be dismissed as 'obnoxious social nuisances'.¹²⁶

In response to s 26(3) of the South African Constitution, the legislature adopted the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). The main objectives of PIE are to prevent illegal evictions and to replace the former depersonalised processes with more humane and fair procedures.¹²⁷ Although not all evictions involve applications in terms of PIE, courts, nevertheless, rely on jurisprudence based on PIE to interpret and apply s 26 of the Constitution.¹²⁸

Section 4 of PIE is concerned with eviction proceedings brought by property owners,¹²⁹ while s 6 of PIE deals with evictions sought by the state,¹³⁰ including local authorities. An eviction sought in terms of s 6 must either be in the public interest or be due to the fact that the evictees did not obtain the requisite municipal consent for their occupation.¹³¹ Although the sections are different, both require the court to consider all relevant circumstances and to assess whether it is just and equitable to grant an eviction order.¹³²

Section 6(3) of PIE contains a non-exhaustive list of factors that need to be considered by a court in deciding whether an eviction, sought by the state, would be just and equitable.¹³³ First, it should consider 'the circumstances under which the unlawful occupier occupied the land and erected the building or structure'. Secondly, it should assess 'the period the unlawful occupier and her family have resided on the land in question'. Thirdly, the court has to take into account 'the availability to the unlawful occupier of suitable alternative accommodation or land'.¹³⁴

With regard to this last requirement, the Constitutional Court has found that there is no 'unqualified duty' on the state to ensure that alternative accommodation is available before it seeks an eviction order.¹³⁵ However, courts should generally be 'reluctant' to order the eviction of 'relatively settled occupiers' without the availability of at least temporary housing.¹³⁶

In the remainder of this section we discuss two case studies in which eviction was used to address crime and anti-social behaviour in South Africa.

¹²⁶ Ibid para 41.

¹²⁷ Ibid para 13.

¹²⁸ See, for example, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 12 (discussed in part III(b) below). This case did not involve an eviction in terms of PIE but still referred to jurisprudence based on PIE.

¹²⁹ Or persons in charge of the property: s 4(1) of PIE.

¹³⁰ Section 6(1) of PIE.

¹³¹ Section 6(1)(a) and (b) of PIE.

¹³² *Port Elizabeth* supra note 119 para 24. Note that although evictions by the state are governed by s 6 of PIE, s 4 also applies to such evictions. See s 6(6) of PIE.

¹³³ Ibid para 30.

¹³⁴ Ibid para 25.

¹³⁵ Ibid para 28.

¹³⁶ Ibid. See also *Residents of Joe Slovo Community* supra note 30 para 7.

The first case study analyses the City of Cape Town's use of s 4 of PIE to evict tenants from its rental housing stock. The second case study analyses the use of eviction to combat the drug-related criminal and anti-social behaviour of persons occupying private property by the City of Johannesburg.

(a) *The eviction of public tenants*

As stated in part I above, the City of Cape Town started an anti-drug campaign in 2007, and has since used eviction to address housing-related crime and anti-social behaviour by council housing tenants. Immediately after Helen Zille was elected mayor, she lifted the moratorium on all evictions from council properties (premises owned by the municipality) because it prevented the eviction of drug dealers.¹³⁷ She aimed to evict every single drug dealer from council housing in terms of s 4 of PIE, thus relying on the local authority's ownership of the property.¹³⁸ This is similar to the City of Amsterdam's use of the Treiteraapak, where the local authority relies on its partnership with the housing associations that own the rental premises.

In that same year, the Wynberg Magistrate's Court ruled in favour of the City of Cape Town and ordered tenants to be evicted from a council property in Parkwood.¹³⁹ The tenants caused a noise nuisance, were rowdy, used the property as a shebeen,¹⁴⁰ had drugs on the property, and allowed children to sell alcohol. This breached the lease agreement, which prohibits anti-social behaviour,¹⁴¹ as well as the unlawful selling of drugs or liquor.¹⁴² Their behaviour was anti-social, since it threatened the peace and the safety of other lessees.¹⁴³ Interestingly, similar to the Dutch Treiteraapak, the ground for the eviction was not that the behaviour of the tenants was criminal, but that it breached a term of the lease agreement. The court found that the city complied with all the procedural requirements of PIE. Moreover, it found that the city did not have an obligation to provide the

¹³⁷ Chris van Gass 'Zille takes civil route against drug lords' available at www.bdlive.co.za, accessed on 25 May 2016. The moratorium on evictions was established by the African National Congress to prevent homelessness. See Marianne Merten 'New plans for Cape Town' available at <http://mg.co.za/>, accessed on 25 May 2016.

¹³⁸ *City of Cape Town v Daniels* [2011] ZAWCHC 340 para 1; Van Gass *ibid*.

¹³⁹ Since this is a magistrate's court decision it is unreported. Hence, we had to rely on a media statement by the city. See *City of Cape Town op cit* note 12.

¹⁴⁰ A shebeen is a 'private home where alcoholic beverages are served for consumption or to be taken away, and can be licensed or unlicensed': Neo K Morojelea, Millicent A Kachieng'ab, Evodia Mokokoc, Matsobane A Nkoko, Charles D H Parry, Annette M Nkowanee, Kgaogelo M Moshiaa & Shekhar Saxenae 'Alcohol use and sexual behaviour among risky drinkers and bar and shebeen patrons in Gauteng province, South Africa' (2006) 62 *Social Science & Medicine* 217 at 219.

¹⁴¹ Clause 23 provides *inter alia* that the lessee 'shall abstain from any conduct which may materially interfere with the ordinary comfort, convenience, peace or quiet, or adversely affect the safety or health of any other Lessee'. This clause is quoted in *Malan v City of Cape Town* 2014 (6) SA 315 (CC) para 41.

¹⁴² The specific clause in the city's lease agreement that prohibits these actions is discussed in *Malan* *ibid* paras 39 and 41.

¹⁴³ *City of Cape Town op cit* note 12.

evictees with alternative accommodation under these circumstances, since others, who behaved less objectionably, were lawfully waiting for housing.¹⁴⁴ This differs from the Dutch Treiteraapak, where alternative accommodation is provided.

After the judgment, the mayor announced that another fifty cases were pending.¹⁴⁵ Three years later, the mayor issued another media release, stating that the city was making headway in the eviction of problem tenants from council housing.¹⁴⁶ The city had successfully evicted five tenants who conducted illegal business from council housing and was preparing another thirty-four eviction applications.¹⁴⁷ The following year, the city stated that it aimed to evict occupiers from at least 176 council houses, since the properties were being used for drug dealing. It had already handed 60 cases to its attorney to initiate eviction proceedings.¹⁴⁸

In 2011, the City of Cape Town requested the high court to grant an order to evict a lessee and other occupants of premises within the city's rental stock. The city argued that the occupants were dealing drugs from the property and that the city had, therefore, cancelled the lease agreement. Schippers AJ found that the respondents were, subsequent to the cancellation of the lease agreement, unlawful occupiers within the meaning of PIE.¹⁴⁹ Moreover, he found that it was just and equitable to grant an eviction order in this case. He made it very clear that drug dealing cannot be allowed and will result in eviction:

'It is notorious that drug addiction and in particular, addiction to tik, is a scourge in the Western Cape. It must be rooted out. It destroys its users and wreaks havoc in their families and society at large. ... Therefore the message that must be sent to drug dealers who are tenants in council houses must be clear and unequivocal: you will be evicted.'¹⁵⁰

In that same year, the high court granted an eviction order after the city cancelled a lease agreement of an occupant of its rental stock. The cancellation was due to criminal activities and anti-social behaviour (among others 'murder, robbery, assault, rape, kidnapping, drug dealing, running a shebeen and possession of/dealing in illegal weapons') that took place on the premises.¹⁵¹ The high court found that the tenant had breached the lease

¹⁴⁴ Ibid.

¹⁴⁵ Chris van Gass 'Zille hails eviction ruling in drugs war' available at www.bdlive.co.za, accessed on 25 May 2016.

¹⁴⁶ City of Cape Town 'City gaining momentum in evicting problem tenants from its rental stock' available at <http://www.capetown.gov.za>, accessed on 25 May 2016.

¹⁴⁷ Ibid.

¹⁴⁸ Esther Lewis 'City cracks down on drugs dens' available at <http://www.iol.co.za/capeangus/city-cracks-down-on-drug-dens-1109554>, accessed on 25 May 2016. We are unable to cite the primary sources because decisions by the magistrate's court are not reported.

¹⁴⁹ *City of Cape Town v Daniels* supra note 138 para 19.

¹⁵⁰ Ibid para 21.

¹⁵¹ *City of Cape Town v Blankenberg* [2011] ZAWCHC 450 paras 6 and 53–9.

agreement and that the city was entitled to cancel the lease.¹⁵² The lessee did not have the right to occupy the premises anymore. The court granted the eviction order.¹⁵³ Although the evictees might not have been able to secure their own alternative accommodation, the high court concluded that the city was not required to provide the evictees with alternative accommodation in this case.¹⁵⁴

In 2014, the City of Cape Town announced that eviction of criminal elements and drug dealers from the city's rental housing units in gang-affected areas was part of the city's Gang Prevention Strategy.¹⁵⁵ One of the targets of this strategy was Shawn Malan, the leader of the Ugly Americans gang and his 74-year-old mother, Johanna Malan. Ms Malan had been renting a council house from the City of Cape Town since 1979. In October 2008, the city cancelled her lease agreement and demanded that she vacate the property before the end of the year. The reason for the cancellation was a breach of the lease agreement.¹⁵⁶ The South African Police Services reported that they had confiscated drugs, liquor, ammunition and illegal firearms from the property and had arrested (among others) Ms Malan's son and daughter for illegal activities conducted on the property.¹⁵⁷ Ms Malan, however, disputed the validity of the cancellation of the lease agreement and refused to vacate her home.¹⁵⁸

In response, the city approached the high court, seeking an eviction order against Ms Malan and those occupying the premises with her, while simultaneously tendering alternative accommodation for Ms Malan at an

¹⁵² Ibid para 60.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ City of Cape Town 'Economic advances key in the fight against Hanover Park gangsterism' available at <http://www.capetown.gov.za>, accessed on 25 May 2016.

¹⁵⁶ Ms Malan was in arrears with her rental payments. In addition, according to the City of Cape Town, Ms Malan breached clauses 23 and 24 of the lease. Clause 24 provides: 'In the event of the Lessee or any other person, whether residing upon the premises or not, being convicted of unlawfully selling, supplying or possessing intoxicating liquor as defined in the Liquor Act 30 of 1928, or Bantu beer as defined in the Bantu Beer Act 63 of 1962, or dagga or any other habit-forming drug upon the premises or in the event of the Lessee being convicted of any offence under the Arms and Ammunition Act 28 of 1937, the Tear Gas Act 16 of 1964, or the Dangerous Weapons Act 71 of 1968, or of assault in any form or any other offence involving violence, the Lessee shall be deemed to have committed a breach of this lease and the provisions of Clauses 28 to 31 shall apply'. Clause 23 of the lease agreement provides: 'The Lessee and all persons, whether residing upon the premises or present upon the premises by the invitation or permission of the Lessee for whose conduct the Lessee is hereby made responsible, shall at all times conduct themselves in a decent, quiet and orderly manner and shall abstain from any conduct which may materially interfere with the ordinary comfort, convenience, peace or quiet, or adversely affect the safety or health of any other Lessee; provided that the Lessor shall in no case be responsible to any person for any breach of this Clause whether by the Lessee or by any other Lessee'. See *Malan* supra note 141 paras 7, 39, 41.

¹⁵⁷ *Malan* supra note 141 para 73.

¹⁵⁸ Ibid paras 6–8.

old-age home.¹⁵⁹ The high court found that Ms Malan had breached her lease agreement and that she should have noticed from the numerous police raids that illegal activities were taking place on the property. An eviction order was granted against Ms Malan and her family.¹⁶⁰

Ms Malan appealed the high court's eviction order to the Constitutional Court. The city stated in argument that it had adopted a 'zero-tolerance approach' to drug dealing from any of its rental premises. According to the city, it was constitutionally obliged to provide crime-free housing to the poor.¹⁶¹

The Constitutional Court concluded that Ms Malan's appeal should be dismissed.¹⁶² The court found that in this case the wide-ranging illegal activities were compelling grounds for cancellation of the lease agreement and the eviction. Not only did the activities amount to a breach of the lease agreement, but combatting crime also constituted a pressing public reason for eviction. Clause 24 of the lease agreement prohibited the use of the property for illegal purposes. The court found that clause 24 ensured secure and dignified living conditions for all tenants.¹⁶³ Furthermore, it was legitimate for the state to enforce such a clause, provided that the clause made clear what conduct was prohibited; the tenant had the means to control the prohibited conduct; and the tenant had an opportunity to rectify the breach before cancellation.¹⁶⁴ In the case of Ms Malan these conditions were fulfilled, and the city was allowed to cancel the agreement.¹⁶⁵

Thereafter, the court assessed whether the eviction would be just and equitable, considering all the relevant circumstances. On the one hand, the City of Cape Town faced challenges concerning housing (eg the scarcity of housing stock) and crime.¹⁶⁶ On the other hand, Ms Malan was an elderly lady who faced losing her home.¹⁶⁷ A central issue in the balancing of interest, however, was the fact that the city had offered to make alternative accommodation at an old-age home available to Ms Malan. Consequently, the court found that the eviction complied with the Constitution.¹⁶⁸

After the court delivered its judgment, the city issued a media release in which it welcomed the court's decision.¹⁶⁹ According to the city, the decision promoted the safety of communities, as well as the city's zero tolerance approach to criminal activities in council housing.¹⁷⁰ The city

¹⁵⁹ Ibid para 15.

¹⁶⁰ Ibid paras 9–15.

¹⁶¹ Ibid para 58.

¹⁶² Ibid para 87.

¹⁶³ Ibid para 78.

¹⁶⁴ Ibid para 79.

¹⁶⁵ Ibid paras 80–1.

¹⁶⁶ Ibid para 84.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid paras 80–1 and 85.

¹⁶⁹ City of Cape Town 'City's actions to make communities safer confirmed by Concourt ruling' available at <https://www.capetown.gov.za/en/MediaReleases/Pages/CityactionsmakecommunitiessaferconfirmedConcourtruling.aspx>, accessed on 25 May 2016.

¹⁷⁰ Ibid.

mentioned that another fourteen test cases were pending and stated that it had to do everything in its power to protect the many law-abiding residents, vulnerable children and elderly people in the community.¹⁷¹

In sum: the City of Cape Town has intensified its fight against housing-related crime and anti-social behaviour by using the instrument of eviction. It has successfully defended this policy in court; the Constitutional Court has ruled that the eviction of a tenant due to criminal activity complies with the South African Constitution.

(b) Eviction from private property

Unlike Dutch local authorities, South African local authorities do not have powers to close down buildings linked to criminal or anti-social behaviour. While such building closures are possible in South Africa in terms of the Prevention of Organised Crime Act 12 of 1998 ('POCA'),¹⁷² the power to seek such building closures does not lie with local authority, but with the National Director of Public Prosecutions.¹⁷³ Building closures are achieved by applying to the high court for what is called a 'preservation of property order'.¹⁷⁴ Such an order expires after 90 days.¹⁷⁵ The proceedings, in terms of POCA, are civil in nature and the enquiry is whether reasonable grounds exist to believe that the property is instrumental to offences, including the illegal selling of alcohol; no criminal conviction is required.¹⁷⁶

The power of local authorities to evict persons who are not occupying municipal property or whose occupation does not require municipal consent is quite limited.¹⁷⁷ A local authority must prove that the eviction either

¹⁷¹ Ibid.

¹⁷² Section 38 of POCA.

¹⁷³ The National Director of Public Prosecutions is the head of the prosecuting authority and 'has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings': s 179 of the Constitution.

¹⁷⁴ Applications are made ex parte: s 38(1) of POCA. It has been argued that civil law is applied because criminal law often fails to solve the problem: *Van den Burg v National Director of Public Prosecutions* 2012 (2) SACR 331 (CC) para 53. Furthermore, civil forfeiture of the property can subsequently be ordered if it is proved that the property was instrumental in the commission of organised crime: s 48 of POCA. The effect of such an order is that the state acquires ownership of the property. This is similar to the Dutch situation, where the authorities can expropriate the property if the closing down of the building does not put an end to the criminal activity.

¹⁷⁵ Section 40 of POCA. Also, as with the Dutch building closures, a person can be appointed to manage the property for the duration of the preservation: s 42 of POCA.

¹⁷⁶ Sections 37 and 38(2)(a) of POCA. The property could also be deemed the proceeds of unlawful activities. That the illegal selling of alcohol falls under this section is clear from case law: see, for example, *Van den Burg* supra note 174 para 6. See also Moira Fourie *The Constitutionality of Forfeiture of Property* (unpublished LLM thesis, North-West University, 2008) 2.

¹⁷⁷ If municipal consent is required, the municipality can seek an eviction in terms of s 6(1)(a) of PIE.

promotes the safety of the occupiers, or that the occupation is unlawful and that the eviction is in the public interest.¹⁷⁸ In theory, proving that an eviction due to criminal or anti-social behaviour would be in the public interest and, therefore, justified under s 6 of PIE, should be uncomplicated. Unfortunately, this power of local government is limited to unlawful occupiers. Furthermore, even in the case of unlawful occupiers local authorities have avoided this tactic, opting instead to use the alleged anti-social or criminal behaviour as a secondary ground for eviction. For example, they have employed the public interest requirement in terms of s 6 to argue that, due to safety concerns, it would be in the public interest to evict the unlawful occupiers. Alternatively, they have employed their powers under legislation, such as the National Building Regulations and Building Standards Act 103 of 1977 ('NBRBSA') to order the occupiers to vacate the premises due to safety concerns.¹⁷⁹ The behaviour of the occupiers, or the surrounding neighbourhood's displeasure with the behaviour, is simply referred to as additional persuasion,¹⁸⁰ as will be seen in the case study discussed below.

The reason for not relying on the behaviour of the unlawful occupiers directly could be that a court might be less likely to grant such an eviction order without a criminal conviction or proof of anti-social behaviour. When trying to evict large groups, it would be nearly impossible to prove the criminal or anti-social behaviour of each individual occupier.

In the early 1990s the inner city of Johannesburg experienced a rapid population increase and, hence, a growing demand for accommodation. This was due to the end of apartheid and the collapse of influx control. In response, landlords increased the rent of premises in the inner city.¹⁸¹ Consequently, tenants had to sublet their homes and many blocks of flats were overcrowded.¹⁸² This resulted in an increased demand for water and electricity and caused problems with elevators and sewerage systems. Buildings fell into disrepair and ceased to comply with building regulations.¹⁸³ Tenants were unable to pay their rent and landlords failed to pay the municipal bills for rates and services.¹⁸⁴

¹⁷⁸ See s 12(4) of the National Building Regulations and Building Standards Act 103 of 1977; s 55(2) of the Disaster Management Act 57 of 2002; s 6(1)(b) and (2) of PIE.

¹⁷⁹ Either directly in terms of s 12(4)(b) (*Olivia Road* supra note 128), or by ordering the owner to effect the eviction in terms of s 12(4)(a) (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* (SCA) 2012 (6) SA 294 (SCA)).

¹⁸⁰ In *Port Elizabeth* supra note 119, for example, 1600 neighbours signed a petition for the eviction of the unlawful occupiers: para 1.

¹⁸¹ COHRE *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 15–17.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Tanya Zack, Andreas Bertoldi, Sarah Charlton, Michael Kihato & Melinda Silverman *Draft Strategy for Addressing Blighted Medium and High Density Residential Bad Buildings in Johannesburg: Working Document for Discussion* (2009) 11.

Subsequently, the Johannesburg municipality effected water and electricity disconnections.¹⁸⁵ Several owners ceased to exercise control over their properties and the residential environments of the inner city of Johannesburg declined.¹⁸⁶ Moreover, slum lords (rogue landlords) entered the area and took over buildings. In some cases, criminals ‘hijacked’ the buildings and coerced tenants to pay rent and protection money to them.¹⁸⁷ In sum: the state was gradually losing control of the inner city of Johannesburg.¹⁸⁸

To address the problems, the City of Johannesburg adopted the Inner City Regeneration Strategy (‘ICRS’), which had the objective of fighting crime and grime in Johannesburg’s inner city. The ICRS had to combat ‘sinkholes’: areas of accelerated or chronic urban decay, poor infrastructure, high crime and hijacked ‘bad’ buildings.¹⁸⁹ Part of the ICRS was the Bad Buildings Programme (‘BBP’).

The BBP aimed to close down bad buildings, evict the occupiers and transfer the property to approved private property developers that would upgrade the buildings.¹⁹⁰ The main reason provided was to address the problem of badly maintained buildings and unsafe living conditions. In addition the BBP addressed inner-city crime and anti-social behaviour. The City of Johannesburg classified the bad buildings as criminal sanctuaries which corrupt the surrounding neighbourhood.¹⁹¹ The buildings were linked to criminal activities, such as prostitution, theft and drug dealing.¹⁹² Even the police were reluctant to enter these buildings.¹⁹³

However, the researchers of the Centre on Housing Rights and Evictions (‘COHRE’) found that while these buildings were used for criminal activity,

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Jo Beal, Owen Crankshaw & Susan Parnell *Uniting a Divided City: Governance and Social Exclusion in Johannesburg* (2003) 109. See also Margot Rubin ‘Johannesburg’s bad buildings programme’ in Christoph Haferburg & Marie Huchzermeyer *Urban Governance in Post-apartheid Cities* (2014) 214–16; Strijdom & Viljoen op cit note 118 at 1210; Stuart Wilson ‘Litigating housing rights in Johannesburg’s inner city: 2004–2008’ (2011) 27 *SAJHR* 127 at 132–3.

¹⁸⁹ COHRE op cit note 181; Wilson op cit note 188 at 134; Rubin op cit note 181 at 214–17.

¹⁹⁰ Wilson op cit note 188 at 134; Jacob Rasmussen ‘Struggling for the city. Evictions in inner-city Johannesburg’ in Steffen Jensen, Lars Buur & Finn Stepputat (eds) *The Security-Development Nexus* (2007) 174–90.

¹⁹¹ COHRE op cit note 181 at 42, 46, 60; Zack et al op cit note 184 at 12.

¹⁹² Thomas Thale ‘Jo’burg moves in on derelict buildings’ available at <http://www.goafrika.co.za/joburg>, accessed on 25 May 2016. See also COHRE op cit note 181 at 42, 46 and 60; Zack et al op cit note 184 at 38; Lucille Davie ‘Squatters evicted from vandalised Hillbrow building’ available at <http://www.goafrika.co.za/joburg/>, accessed on 25 May 2016; Bongani Majola ‘Strike teams targets inner city ills’ available at <http://www.johannesburg.gov.za/>, accessed on 25 May 2016. See also City of Johannesburg *Johannesburg Inner City. Common Vision, Shared Success. End of Term Report 2006–2011* (2011) 41 and 44; Wilson op cit note 188 at 135.

¹⁹³ Zack et al op cit note 184 at 38.

most occupiers were ordinary people.¹⁹⁴ They were not criminals and did not participate in anti-social behaviour. Instead they were responsible members of society and had low-paying, often informal, employment.¹⁹⁵ In response to the conclusions of the COHRE researchers, the City of Johannesburg admitted that many bad buildings did not harbour criminal activity.¹⁹⁶ However, it maintained that the police had uncovered 'illegal firearms, drugs, stolen goods and wanted criminals' there and that the buildings provided an environment conducive to criminality.¹⁹⁷

To close down the bad buildings, the city applied its powers laid down in the NBRBSA.¹⁹⁸ As noted above, the dilapidated buildings did not comply with the city's building regulations. The city would first issue a notice in terms of s 12(4)(b) of the NBRBSA. In the notice, the specific bad building would be declared unfit for occupation and all the residents would be ordered to vacate the building within one week.¹⁹⁹ Thereafter, the city would lodge an application with the high court for an interdict ordering the residents to vacate the building.²⁰⁰ Between 2002 and 2006, the city issued notices to occupiers of 122 bad buildings in Johannesburg's inner city and evicted an estimated 10 000 people.²⁰¹

The reason given for the evictions was that they were necessary to ensure the health and safety of the occupiers. The buildings were in disrepair and could not be occupied. However, some residents of bad buildings challenged the application for an eviction order. According to them, the motive of the BBP was not to ensure their health and safety, but to put an end to the criminal activity and anti-social behaviour that the buildings allegedly fostered.²⁰²

In 2007, the BBP resulted in a Constitutional Court case: *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* ('*Olivia Road*').²⁰³ The occupiers of two inner city buildings challenged the decision that had authorised their eviction. The Constitutional Court issued an interim order that required the City of Johannesburg and the applicants to engage with each other meaningfully in an effort to resolve the differences and difficulties.²⁰⁴ Consequently, the Constitutional Court established the requirement of meaningful engagement between the municipality and the occupiers, where the occupiers faced homelessness as a

¹⁹⁴ COHRE op cit note 181 at 42, 58–9.

¹⁹⁵ Ibid.

¹⁹⁶ Zack et al op cit note 184 at 11.

¹⁹⁷ Ibid at 73.

¹⁹⁸ Ibid at 60.

¹⁹⁹ Ibid at 60–1.

²⁰⁰ Ibid at 61.

²⁰¹ Wilson op cit note 188 at 137.

²⁰² Rubin op cit note 188 at 225.

²⁰³ Supra note 128.

²⁰⁴ The City of Johannesburg and the applicant entered into an agreement of settlement: paras 5–6. See also Wilson op cit note 119 at 265–82.

result of the eviction.²⁰⁵ The result of the *Olivia Road* judgment is that residents of bad buildings cannot be evicted without a rigorous and considered process of engagement.²⁰⁶ To avoid this additional requirement, the City of Johannesburg stopped seeking eviction orders itself and instead encouraged private owners of the bad buildings to do so.²⁰⁷ This strategy, however, did not work. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,²⁰⁸ the Constitutional Court held that regardless of who seeks an eviction, the municipality has a duty to include those facing homelessness within its emergency housing programme.²⁰⁹

Subsequently, the City of Johannesburg adopted a managed care policy to comply with its constitutional obligations. In terms of this programme, people facing homelessness as a result of eviction are relocated to shelters that have a 'managed care policy'.²¹⁰ Although the shelters aim to provide therapeutic support to the evictees, they have strict disciplinary codes. For example, random searches take place, the shelters do not give keys to residents, and in some locations residents are locked out of their shelters during the day.²¹¹ Residents are not allowed to be absent from the shelter for less than four days without informing the housing manager.²¹² If a resident violates the disciplinary code, she faces eviction from the shelter.²¹³ Wilson criticises the managed care policy. He argues that the policy stereotypes the evictees as 'free-floating hedonistic, anti-social troublemakers, who have no ability to generate or adhere to rules and practices necessary'.²¹⁴ In essence, the evictees are seen as criminals.

From this case study it is evident that the City of Johannesburg tried to use eviction to address the problem of badly maintained buildings and unsafe living conditions and, by doing so, to address inner-city crime at the same time. The tackling of housing-related crime was not the main objective of the BBP, but an additional legitimisation of the programme: the reduction of

²⁰⁵ *Olivia Road* supra note 128 para 18. See also Liebenberg op cit note 118 at 1–12; Lilian Chenwi & Kate Tissington *Engaging Meaningfully with Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010); Gustav Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stellenbosch LR* 742–58; Wilson op cit note 119 at 265–82.

²⁰⁶ Wilson op cit note 188 at 149; Brian Ray 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the right to adequate housing through "engagement"' (2008) 8 *Human Rights LR* 703.

²⁰⁷ An example of such a case is *City of Johannesburg v Changing Tides 74 (Pty) Ltd* (SCA) 2012 (6) SA 294 (SCA). See also Stuart Wilson 'Curing the poor: State housing policy in Johannesburg after *Blue Moonlight*' (2014) 5 *Constitutional Court Review* 279 at 282.

²⁰⁸ 2012 (2) SA 104 (CC).

²⁰⁹ Ibid paras 95–7.

²¹⁰ Wilson op cit note 119 at 289–90.

²¹¹ Ibid.

²¹² Ibid at 290.

²¹³ Ibid.

²¹⁴ Ibid at 287.

crime by the eviction was a positive side effect. Nonetheless, the BBP had negative side effects: (innocent) people were left homeless. The question has been raised whether combating crime should outweigh homelessness. After several judgments of the Constitutional Court the BBP became ineffective in addressing crime by eviction.

(c) *Concluding remarks*

This part has shown that South African authorities use eviction to combat housing-related crime and anti-social behaviour. In the case of public tenants, they rely on their ownership of the properties to cancel the lease agreements. Where a private tenant or owner engages in drug-related criminal or anti-social behaviour, unlike in the Netherlands, only the National Director of Public Prosecutions is entitled to close down buildings. Local authorities generally do not use their power to apply for evictions that are in the public interest for purposes of evicting unlawful occupiers of private property who participate in criminal or anti-social behaviour. Despite attempts to use criminal and anti-social behaviour as a secondary ground in mass evictions, this approach has not been very successful and has been highly criticised.

Furthermore, the analysis found that in both types of cases, evictions of public tenants and evictions from private property, the evictions must be court-ordered. A court may only grant the order if it has considered all the relevant circumstances and is satisfied that the eviction will be just and equitable. Courts generally take this duty very seriously, and are reluctant to grant an eviction where alternative accommodation is not available to the evictees. In the case of eviction of persons who participate in criminal and anti-social behaviour, courts have been less sympathetic and are more likely to grant an eviction even in the absence of alternative accommodation.

IV COMPARATIVE ANALYSIS

In this final part of the article we conduct a functional comparative analysis by describing, juxtaposing and identifying the similarities and differences between the ways in which South African and Dutch local authorities use eviction to combat housing-related crime and anti-social behaviour. The most obvious similarity between South Africa and the Netherlands is that both countries use eviction to address this kind of behaviour. In both countries the main approach can be characterised as 'getting tough' and eviction-orientated towards housing-related incivilities.²¹⁵ Furthermore, the analysis shows that both countries primarily apply the instrument of eviction to combat drug-related crime and anti-social behaviour that is committed in residential areas.

²¹⁵ See Howard Safir *Security. An Inside Look at the Tactics of the NYPD* (2003) 13–21; Gail Super *Governing Through Crime in South Africa* (2013) 11, 57–9; Vols op cit note 4 at 205–6.

What is also clear is that authorities are surprisingly open about the reason why they use eviction to combat crime and anti-social behaviour. In both countries, the authorities state that traditional criminal law is unable to address the (low-level) crime and other anti-social behaviour. There is an enforcement deficit in criminal law.²¹⁶ The police and public prosecution services often do not have sufficient resources and time to act against crime and initiate criminal proceedings. Furthermore, it is often easier to combat crime with administrative or private-law instruments than with criminal law. The latter has additional procedural requirements which stem from, for example, the South African Constitution and art 6 of the European Convention.²¹⁷ So, while applying private/administrative law, the authorities aim to circumvent strict criminal-law safeguards and hope to make a less time-consuming approach towards crime possible.²¹⁸

However, our analysis shows that other legal safeguards operate in private, civil and administrative law. Procedural and substantive protection against eviction that arises from the European Convention and the South African Constitution inhibits the swift dealing with crime. Nonetheless, it is clear that these safeguards provide less protection than the safeguards in criminal law.²¹⁹ For example, in both Dutch and South African administrative and private law the burden of proof is less strict than the one in criminal law.²²⁰ Furthermore, courts are less likely to find that these safeguards should prevent an eviction where the evictee participated in criminal or anti-social behaviour.

As we explained in the introduction to this article, the aim of this article has been two-fold. First, the article aimed to determine how eviction is used by local authorities to combat housing-related crime and anti-social behaviour in the Netherlands and South Africa. Secondly, the article intended to analyse the effect of the legal protections against the loss of a home, guaranteed by the respective countries, on these practices. In what follows below, the manner in which eviction is used by the local authorities of the two countries to combat housing-related crime and anti-social behaviour is compared. Thereafter, the effect of the countries' legal protections against the loss of a home on the eviction by local authorities on the basis of crime and anti-social behaviour is analysed.

(a) *The use of eviction to combat crime and anti-social behaviour*

The two countries use similar instruments to evict as a result of crime and anti-social behaviour. First, both countries evict public tenants who behave

²¹⁶ Roger Matthews *Realist Criminology* (2014) 148.

²¹⁷ Article 6 of the European Convention codifies the right to a fair trial.

²¹⁸ Rasmussen op cit note 190 at 179.

²¹⁹ Vols op cit note 4 at 201.

²²⁰ See Herman E Bröring & Gerdy G T J M Jurgens 'De bestuurlijke boete is zo gek nog niet! Bepiegelingen over buitengerechtelijke beboeting in het bestuursrecht en het strafrecht naar aanleiding van de wet O.M.-afdoening' (2006) 10 *Nederlands Tijdschrift voor Bestuursrecht* para 2.3; Duard Kleyn & Frans Viljoen *Beginner's Guide for Law Students* 4 ed (2010) 170.

in a criminal or anti-social manner. When a property is occupied by public tenants it is often possible for local authorities to control the content of the lease agreements of the tenants. They are able to prohibit criminal and anti-social behaviour within the lease agreements. This is possible either because the local authority is the owner of the property or has partnered with the owner of the property. When a tenant participates in the prohibited behaviour, her actions amount to a breach of contract and she can lawfully be evicted.

Secondly, both countries close down premises occupied by private tenants or owners who participate in criminal or anti-social behaviour. The effect of a building closure is that the occupiers must vacate the premises, which arguably amounts to an eviction. In South Africa, however, the power to close down a building is not available to the local authority, but is limited to the National Director of Public Prosecutions. This might be due to an attempt to prevent inconsistent application of the power by different local authorities. By limiting the power to the National Director, occupiers are ensured equal treatment. It can be argued, however, that this power should be made available to local authorities. This would allow local authorities to prevent occupation by persons who behave criminally and anti-socially, ensuring transparency and preventing allegations that local authorities are using other grounds, such as safety, to hide their true intentions. Local authorities are also in a good position to lead evidence regarding the alleged criminal and anti-social behaviour.

Alternatively, it could be argued that the South African local authorities should use their power in terms of s 6(1)(b) of PIE to evict unlawful occupiers who behave in a criminal or anti-social manner on the grounds that such evictions would be in the public interest to rid the neighbourhood of such persons. However, this power of the local authority is extremely limited, since it is only applicable to unlawful occupiers.

The two countries have also reacted similarly in respect of whether or not the evictee, herself, participated in the criminal or anti-social behaviour. First, in both countries the local authorities refer to crime committed by the evictees themselves as a reason for the eviction. This is, for example, the case in Netherlands where drug dealing owner-occupiers are evicted because of their own criminal behaviour.²²¹ This is also the case in the eviction programme of the City of Cape Town.²²²

Secondly, local authorities refer to crime and other anti-social behaviour committed by third parties such as family members, friends or other visitors as a reason to evict the residents from their (rental) property. This was the approach used in the Dutch case of the Dimitrov family. The mother was evicted because of her own actions, as well as the anti-social behaviour of her family.²²³ Similarly, in South Africa, Ms Malan was evicted, not because of

²²¹ Article 13b of the Opium Act.

²²² For example *Daniels* supra note 138 para 6.

²²³ *Rechtbank Amsterdam* supra note 72 para 1.

crimes committed by her, but because of crimes committed by her children.²²⁴ Furthermore, in *Olivia Road*, the criminal or anti-social behaviour of individuals within a large group was used as an (additional) justification for the eviction of the whole group of people who shared the building. Authorities did not link specific criminal behaviour to specific residents, but referred to crime and criminal occupiers in general. The reference to the criminal behaviour of the occupiers as an additional ground for eviction in this case was heavily criticised.

Given this criticism, as well as requirements stipulated by the South African Constitutional Court in the *Malan* case, we doubt whether crime and anti-social activities within a large group can be accepted as the sole ground for eviction under South African law. In the *Malan* case, the Constitutional Court held that a tenant can only be evicted if it is clear what behaviour is prohibited, the tenant has the means to control the prohibited conduct, and the tenant has an opportunity to rectify the breach before cancellation.²²⁵ It is impossible for an individual occupier to control and rectify the criminal activities of a large group. Similarly, Dutch municipalities or housing associations will probably not be very successful in using the combatting of crime as a justification for mass evictions. Dutch courts have shown that they are only willing to allow the eviction of people due to their own criminal or anti-social behaviour or the behaviour of third parties over whom they have some form of control.²²⁶ Moreover, Dutch courts would probably find that the eviction does not comply with the proportionality principle that arises from art 8 of the European Convention.²²⁷

In conclusion, it is clear that local authorities in both South Africa and the Netherlands use crime and anti-social behaviour as a ground to evict public tenants.²²⁸ The power to close down buildings and in this way to evict private tenants and owners is limited to Dutch local authorities. We argue that the similar power that vests in the National Director of Public Prosecutions in South Africa could be extended to local authorities. Although limiting the power to the National Director might promote equal treatment, local authorities are arguably in a better position to lead evidence regarding the alleged criminal behaviour of the occupiers within their jurisdiction.

Furthermore, although a very limited tool, South African local authorities should use their powers in terms of s 6(1)(b) of PIE to evict unlawful occupiers engaging in criminal and anti-social behaviour on the ground that it is in the public interest. However, such applications should be limited to matters where the evictee, herself, engaged in the problem behaviour or

²²⁴ *Malan* supra note 141 para 73.

²²⁵ *Ibid* para 79.

²²⁶ *Rechtbank Amsterdam* supra note 72 para 1.

²²⁷ See also the judgment of the European Court of Human Rights in *Yordanova v Bulgaria* (2012) 25446/06 para 141.

²²⁸ Either directly or indirectly through housing associations.

where she had some control over the problem behaviour of third parties. It should not be used for mass evictions, where innocent persons, who are unable to control or prevent the behaviour of those acting criminally or anti-socially, might be evicted.

(b) The effect of the right to a home on eviction due to crime and anti-social behaviour

In both South Africa and the Netherlands, people are legally protected against eviction, irrespective of their title to reside on the land. Under South African and Dutch law, the loss of one's home is seen as a most serious limitation of someone's right to respect for private life and the home. In both countries people have the right to have a court decide whether the eviction is just and proportional.²²⁹ The one substantial difference is that, unlike in South Africa, in the Netherlands evictions without a court order are not prohibited. As a result, the proportionality of the eviction will only be analysed if the defence is raised.

Despite the largely similar entrenchment of the right to a home, the respective countries' approaches to eviction and application of the right to a home differ quite significantly. This can be ascribed to the different historical backgrounds, as well as the different socio-economic realities of the two countries. The fact that South Africa's history includes serious violations of the right to a home due to evictions, and that millions are homeless and live in poverty, has resulted in a political sensitivity toward the instrument of eviction that is absent in the Netherlands.

In the Netherlands, using eviction to combat anti-social behaviour and crime does not result in hefty political and social debate. For example, there was no real political opposition to the introduction of art 13b of the Opium Act, which entitles Dutch mayors to close down a home in the case of drug dealing. In Parliament, both left-wing and right-wing parties supported the Bill and suggestions by the Council of State to ensure that the proportionality principle be respected were basically ignored.²³⁰ The Treiteraangepak in Amsterdam and the portakabin project in Rotterdam did not encounter political resistance either. Although some academics and journalists criticised the eviction-orientated policy,²³¹ the predominantly left-wing municipal councils in Rotterdam and Amsterdam still support the approach.²³²

The image of eviction in South Africa differs greatly from that of eviction in the Netherlands. As stated above, the historical and socio-economic background of South Africa has resulted in political sensitivity toward eviction. It was used as one of the main instruments to implement apartheid

²²⁹ Sections 4 and 6 of PIE both require that an eviction order be just and equitable, whereas art 8 of the European Convention requires proportionality. The measures of just and equitable evictions and proportional evictions are similar in that they require a balance of the interests of the parties involved.

²³⁰ Vols op cit note 4 at 80.

²³¹ Vols op cit note 11 at 509.

²³² Municipality of Amsterdam op cit note 12; Municipality of Amsterdam op cit note 65; Municipality of Rotterdam op cit note 91.

policy. Consequently, the use of eviction is assessed very critically. Nonetheless, some political parties are in favour of a moratorium on all evictions,²³³ while other parties support the use of eviction to address crime and anti-social behaviour.²³⁴ While doing so, they use sweeping political statements to justify the choice of eviction, such as their 'zero tolerance approach to illegal activities, and in particular drugs-related activities'.²³⁵ The use of these kinds of statements shows some resemblance with the Dutch situation. An alderman of the Municipality of Rotterdam, for example, issued a provocative media statement that characterised the evictees as too smart for the psychiatric clinic, not criminal enough to be sent to prison, but too dangerous to live in an ordinary neighbourhood.²³⁶

The political sensitivity toward eviction also seems to impact on the South African courts' attitude toward evictions. In one way the attitudes of the different courts are rather similar. The South African Constitutional Court, the European Court of Human Rights and the Dutch Supreme Court all characterise eviction as the most serious interference with a person's right to respect for her home.²³⁷ However, due to the political sensitivity, the South African Constitutional Court is generally more sensitive and compassionate than the European and Dutch courts. In several cases, the Constitutional Court has emphasised the dreadful living conditions of large numbers of South Africans and their need for housing. Furthermore, it has emphasised the need for harmony and dialogue and has found that evictees should not be seen as 'obnoxious social nuisances'.²³⁸

Conversely, the European Court of Human Rights and the Dutch national courts seem less compassionate in their attitude toward eviction. Instead, the European and Dutch courts are far more legalistic and formalistic. They do not refer to harmony or the need for dialogue, but appear more detached in their assessment of whether the eviction is necessary in a democratic society and complies with the principles of proportionality and subsidiarity. Moreover, the European Court of Human Rights ruled that the possibility of putting forward a proportionality defence should not have 'serious consequences for the functioning of the domestic systems or for the domestic law of landlord and tenant'.²³⁹

These differing attitudes of the two countries' courts are also evident in their application of the right to a home, especially the proportionality principle. Under South African law, it is always required that a court assess whether the eviction is proportional. Courts are obliged to balance the interests of the parties involved in determining whether an eviction will be

²³³ For example the African National Congress.

²³⁴ For example the Democratic Alliance.

²³⁵ City of Cape Town *op cit* note 169.

²³⁶ Kooyman *op cit* note 89 at 1.

²³⁷ *McCann* *supra* note 37 para 50.

²³⁸ *Port Elizabeth* *supra* note 119 paras 37 and 41.

²³⁹ *Orlic v Kroatijë* Application No 48833/07, Merits, 21 June 2011 para 66; *Bjedov v Croatia* Application No 42150/09, Merits, 29 May 2012 para 67.

just and equitable.²⁴⁰ Under Dutch (and European Convention) law, courts have interpreted the right to a home to mean that the proportionality of the interference need only be assessed where an occupier raises the proportionality defence.²⁴¹ Furthermore, the European Court of Human Rights stated that 'it will be only in very exceptional cases that an applicant will succeed in raising an arguable case on Article 8 grounds which would require a court to examine the issue in detail'.²⁴²

Moreover, in the assessment of proportionality, South African courts must establish whether the municipality is able to provide alternative accommodation to the evictees, even in cases where a private landowner initiated the eviction proceedings. In general, South African courts are reluctant to grant an eviction order unless alternative accommodation is available. Under European and Dutch law, courts do not consider alternative accommodation to be a requirement for issuing an eviction order.²⁴³ Furthermore, Dutch courts have placed less importance on the availability of alternative accommodation. Only in a small number of Dutch cases has the municipality or landlord offered alternative accommodation.²⁴⁴ They were, however, not required to do so and this is not common practice.²⁴⁵

Nonetheless, we doubt whether this difference between the two countries regarding the availability of alternative accommodation exists as starkly in eviction cases related to housing-related crime and other anti-social behaviour. The high court in South Africa has held that, in these types of cases, the municipality is not required to offer alternative accommodation.²⁴⁶ In the *Malan* case, alternative accommodation was offered by the municipality, and the Constitutional Court considered this to be important in the assessment whether the eviction was just and equitable.²⁴⁷ However, the Constitutional Court did not hold that it was mandatory to offer alternative accommodation in all eviction cases regarding crime and anti-social behaviour. What might be of importance, regarding the emphasis placed on the availability of alternative accommodation, is whether the evictees committed the crimes or behaved anti-socially themselves. In the *Malan* case, for example, the tenant did not commit the crimes herself, which might explain why the Constitutional Court took the availability of alternative accommodation into account. Hence, we expect South African courts to place less emphasis on the

²⁴⁰ Sections 4 and 6 of PIE.

²⁴¹ Fick & Vols op cit note 28 at 63. See also Vols et al op cit note 33 at 166.

²⁴² *Pinnock & Walker v United Kingdom* Application No 31673/11, Merits, 24 September 2013 para 28.

²⁴³ Vols et al op cit note 33 at 177–80.

²⁴⁴ For example the case regarding the Dimitrov family: *Rechtbank Amsterdam* 08-08-2013, ECLI:NL:RBAMS:2013:4935 para 20.

²⁴⁵ Vols et al op cit note 2.

²⁴⁶ *Daniels* supra note 138 para 19; *Blankenberg* supra note 151 para 75.

²⁴⁷ *Malan* supra note 141 para 85.

availability of alternative accommodation in cases where the evictees were clearly involved in the criminal activity themselves.²⁴⁸

In conclusion, the protection of the right to a home in South Africa and the Netherlands is very similar. However, due to the violation of this right during apartheid, the approach and application of this right differ significantly. There is a political sensitivity toward eviction in South Africa that is absent in the Netherlands. This results in the courts being more compassionate towards evictees and reluctant to grant eviction orders where no alternative accommodation is available. However, this compassion has been less visible in evictions due to crime and anti-social behaviour, and we expect courts to have a similar attitude in future cases of this nature, especially where the evictee herself engaged in the problem behaviour.

V CONCLUDING REMARKS

Given these similarities and differences, one of the most significant inferences to be drawn from the comparative analysis of the legal systems is that in South Africa and the Netherlands eviction is categorised as a most serious interference with the evictees' rights to respect for the home. This, however, does not lead to the conclusion that the use of eviction in cases regarding crime and anti-social behaviour automatically results in a violation of the rights of the evictees. On the contrary, local authorities and courts in both the Netherlands and South Africa seem to have accepted the growing role of evictions based on private or administrative law to combat housing-related crime and other anti-social behaviour.

Of course, further research has to be conducted to deepen our understanding of the relationship between crime, anti-social behaviour, eviction and human rights. This article provides the first comparative analysis and can serve as a basis for future international doctrinal and interdisciplinary studies on the use of eviction in addressing crime and anti-social behaviour. A key issue that needs to be explored is the efficacy of eviction in tackling crime. Does eviction simply displace the problem, or does it provide a lasting solution for housing-related crime and anti-social behaviour?

²⁴⁸ See *Daniels* supra note 138.