Law and the city: Keeping the poor on the margins

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OPSOMMING

Die Reg en die Stad: Om Armes op die Marge te Hou

In hierdie artikel ontleed ek die *Tswelopele* beslissing van die Hoogste Hof van Appèl en die *Schubart Park* beslissing van die Grondwetlike Hof ten einde sommige van die kompleksiteite van die verhouding tussen die reg en armoede te illustreer. Ek fokus spesifiek op die keuse van die twee howe om direk op die Grondwet te steun eerder as op toepaslike gemenereg en op die wyse waarop daar in die twee beslissings met die feite omgegaan is. Ek wys uit dat beide hierdie aspekte van die beslissings, ten spyte van die positiewe praktiese uitkomste in die sake vir arm mense, die heersende ideologies-gelaaide siening van arm mense as anders, of abnormaal onderskraag en bevestig en so saamwerk in 'n ideologiese projek van depolitisering van armoede.

1 Introduction

A defining feature of Tshwane's cityscape is the extent to which poor people visibly live apart from the middle-class and more affluent residents of the city. Most poor (black) people in the city still live in the townships such as Atteridgeville, Mamelodi, Soshanguve and Hammanskraal to which they were officially relegated during apartheid, and in the large informal settlements that have over years developed there – in a ring around the city proper. But this visible apartheid of the poor is also a feature of the "new", post-apartheid Tshwane. The inner city and some of the surrounding suburbs such as Sunnyside have visibly become "poor" (mostly black) neighbourhoods, assiduously avoided by mainstream residents of Tshwane. Even there where poor people have managed to insert themselves into the general spaces of the rich – such as the new "estate" housing developments on previously open land to the east of the city where informal settlements have sprung up on tracts of land left open in between new developments (or had been there all along) or where poor people live in business or government precincts within the inner city – their separateness is graphically enforced through the enormous security walls and fences erected around the estates and in some cases the building of walls around the informal settlements themselves as well as constant attempts by the City and/or residents of the estates to remove them.[1]

The law is of course intimately involved in the separateness of poor people, most obviously when attempts are made to enforce this separateness through evictions of poor people. In this short article I focus on two such instances of the involvement of the law: I analyse two

ostensibly pro-poor eviction judgments that played out in the city of Tshwane – the cases of *Tswelopele Non-Profit Organisation*[2] and *Schubart Park*[3] – and illustrate how our Supreme Court of Appeal and Constitutional Court in the manner in which they reached their pro-poor outcomes in these judgments – in the geography or architecture of their judgments - unintentionally mirrored and so confirmed the geographical separateness of poor people in Tshwane.

I start, in part 2 below, by describing the two cases and their resolution in court. I then, in part 3, point out how the disputes underlying the two cases are examples of an enactment of the separateness of the poor. In part 4, I describe two ways in which the separateness of the poor was unintentionally mirrored in the two cases by our courts: through the choice of which body of law to apply to resolve the cases and through the use of settled approaches to dealing with evidence. I conclude, in part 5, with some tentative points about why this mirroring matters and is problematic.

2 The Cases

The Supreme Court of Appeal decision in *Tswelopele* dealt with a community of poor people who built and lived in their shacks next to a prominent upmarket housing estate in the suburb of Garsfontein in Tshwane. During the day, many of these people worked in the housing estate as gardeners and domestics; at night they returned to their shacks to sleep next to it. In collusion with members of the property owners association of the housing estate (who were concerned about the effect of having a "squatter camp" right next door on their property values and safety) officials of the City, the Metro Police, the police, the Department of Home Affairs and members of the local community policing forum in the early hours of the morning and without any recourse to law – *illegally*, therefore[4] – forcibly evicted the community from their shacks, demolishing and burning the shacks and all the possessions in them in the process. With the aid of a faith-based NGO the community turned to the law for protection, applying to court to be returned to the piece of land they had been ejected from and to have their shacks re-erected and their possessions restored to them by and at the expense of the City. They failed in their application in the High Court in Tshwane, but

1 For a scientific overview of the extent to which poverty is localised in Tshwane, see in general Cameron & Krynauw "City of Tshwane: Development challenges" (2001) available at http://www.repository.up.ac.za/bitstream/handle/2263/8190/5b3.pdf?sequence = 1 (accessed 2014-10-14).

2 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

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

4 That is, not only unlawfully but illegally – the eviction was in clear contravention of section 8(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

obtained leave to appeal to the Supreme Court of Appeal in Bloemfontein. Two weeks after the first judgment in the High Court a number of the erstwhile residents returned to the land they had been evicted from, but they were again forcibly and illegally removed. This prompted a second turn to the High Court in Tshwane, where this time around a small group of the residents obtained an order that they be housed temporarily in the Garsfontein Police Station, until place was found for them in a City-run housing shelter and that they be assisted once there to apply for and receive a place on the housing list of the City. In this way five members of the original group of around 30 people eventually obtained a place on the housing list. In the meantime the community prosecuted their appeal to the Supreme Court of Appeal, still with the aim of being restored in possession of the land they had been evicted from and their homes on it. In the Supreme Court of Appeal they succeeded, obtaining an order that they be allowed to return to the land they were evicted from and that the City provide them with temporary habitable shelter to enable them to do so. The majority of the community was in fact returned to the land in question, with their shacks and possessions restored. Today the so-called "squatter camp" is on course to being developed as a low-cost housing project, still right next to the upmarket housing estate, with the assistance of the City.[5]

In turn, *Schubart Park* dealt with a City-owned apartment complex in downtown Pretoria, in which a large number of poor people lived. The complex, consisting of four buildings had over the years fallen into disrepair, prompting the City over time to make various attempts to evict the poor people living there. This created a response from these people, who stoutly resisted any attempts to remove them, which response included sometimes violent protest. A long and complicated history culminated one fateful day, after the water supply to some of the buildings had been cut off, in a spontaneous protest by some of the residents of one of the buildings, with stones being thrown and an old car wreck being set alight. This invited a response from the police who cordoned off the building in question, prevented those residents who had been at work and elsewhere from going back to their flats, and forced the vacation of the building through a room to room search – in effect, a complete eviction under the guise of police action, again wholly illegal, which resulted in almost 3000 people being out on the street, with nowhere else to go.

The residents again turned to the law, challenged their eviction first unsuccessfully in the Pretoria High Court,[6] unsuccessfully sought an

5 I draw for this description on the descriptions of the matter in Lawyers for Human Rights *LHR Casebook: Lawyers for Human Rights and Public Interest Litigation in South Africa* (2009) available at http://www.lhr.org.za/sites/lhr.org.za/files/LHR_case_book.pdf at 15 & 16.

6 The High Court in Pretoria was approached thrice in succession, but the residents were unable to obtain from the High Court an order requiring their return to the building, obtaining instead only an order that the City make good on a tender it had made to provide temporary habitable shelter

appeal to the Supreme Court of Appeal,[7] and then finally prevailed on appeal in the Constitutional Court. There they obtained an order that their eviction was unlawful and that the City should, through a process of "engagement" with them, either refurbish the buildings if that were feasible and allow them to return or provide suitable alternative accommodation, whilst housing the residents in the interim.[8]

3 Separating the Poor

What is striking about both the cases is how the disputes underlying them are stories illustrating how official society regards and treats poor people as other, as an excess, an abnormality to be removed from "ordinary" society – in short, how they are examples of attempted enforcement of the separation of the poor.

Most obviously, both cases involved poor people staying inside the city, as part of the city. In *Schubart Park* the "occupiers" lived in the inner city, at the heart of officialdom: the building complex is two blocks away from the North Gauteng High Court, the Palace of Justice, two sets of chambers of the Pretoria Bar[9] and close to a number of Government Departments.[10] In *Tswelopele* they lived inside rich suburbia, surrounded by upmarket housing estates, shopping centres (and ironically right next to a church, to boot).

Both cases originated from the impulse of "normal"/"official" society to eject the poor people living inside of it or as part of it, to get rid of them, to enforce the rigid apartheid of the poor that still characterises Tshwane and South African cities more generally so strikingly – to remove them to where "they" belong, which is not inside of "us".

Perhaps less obviously, both cases also represent an apartheid or separation of story, of narration. *Schubart Park*, most clearly, entails an official story and an unofficial one. The years long dispute is characterised by attempts of the City to tell one story to the exclusion of another – that the buildings are unsafe, dangerous and cannot be lived in, that the people living there harbour criminals or are criminals themselves – to the exclusion of the story of the residents, that the buildings are their homes, where despite difficult circumstances including official neglect and hostility they managed to make a life for themselves, do not feel unsafe and feel at home. Similarly, in *Tswelopele* officialdom in the form of the City, the Metro Police and the SAPS initially

to those who qualify for it while the prospects of refurbishing the building was investigated; and that should it be found possible the residents would be allowed to return once the refurbishment was complete.

7 Leave to appeal on special petition was denied.

8 I rely for this description of the development and current state of the case on the various updates on the case provided at http://www.lhr.org.za/search/node/Schubart.

9 High Court Chambers and New Court Chambers.

10 Among others, rather ironically, the National Treasury.

hear only the story of the wealthy surrounding property owners that the settlement in their midst is a threat to their safety, a lawless presence threatening to erupt and overwhelm the stable, proper society around it; to the exclusion of the story of the residents who in fact were a highly organised, settled community, most of whom worked in the surrounding areas and needed to remain where they were to continue doing so.

4 Othering in the Courts

What should be clear from the description of the two cases above is that, in practical, "outcomes" terms, they are both eminently pro-poor decisions – simply put, the poor people who brought these cases to court "won". In *Tswelopele* the residents' eviction was declared unlawful and the City was ordered to allow the residents to return to the land they had been removed from and to rebuild their shacks that had been destroyed (returning them to their position of previous disadvantage, as counsel for the residents laconically remarked after the legal "victory"). As a precedent, the decision has subsequently also often been relied on to ameliorate the effects of illegal, destructive evictions. In *Schubart Park* the eviction was also declared unlawful and the residents also eventually obtained an order that has the potential of, at the very least, returning them to their homes or something similar to that.

However, despite these positive practical outcomes, the two decisions also stand to be criticised for the ways in which, through the application of seemingly innocuous and neutral processes and conceptual structures, they participate in the othering and separation of the poor – how despite their pro-poor outcomes therefore, they implicitly reflect the very apartheid of the poor that they were explicitly intended to counteract.

This happened in the two cases in at least two ways.

4 1 Choice of Law

The first of these two ways has to do with the body of law upon which the courts in the two cases chose to decide the cases. In both cases the residents sought to fight their eviction through reliance on a remedy provided by the common law – that is, the body of "ordinary" law that regulates the day to day interaction between you and I and everyone else, developed by our courts over a century and a half on the basis of mostly Roman Dutch Law. The particular remedy is the *mandament van spolie*.

The *mandament van spolie* allows a court, upon application, to grant an order that anyone unlawfully evicted from property they had occupied (spoliated) may claim simple restoration of possession (occupation) without more (without the establishment of any rights to the property),

pending further litigation to determine the parties' rights to the property.[11] Where an unlawful eviction had in fact taken place (as was evident in both cases) it is very difficult for the unlawful evictor to resist an application for a spoliation order in terms of the *mandament* precisely because the *mandament* is not determinative of any rights. The common law recognises only a limited number of defences against the *mandament*. The most prominent of these is the defence of impossibility – a spoliation order will not be granted where it is impossible, for whatever reason, to restore possession of the property in question.[12] This may be the case, for example where, as in *Tswelopele* the property restoration of which is sought no longer exists (has been destroyed) or, as was asserted in *Schubart Park*, where it would be dangerous to allow return to the property in question.

To resist this defence in *Tswelopele*, the residents argued that the common law should be "developed" (ie changed) by the Court to allow for a spoliation order also there where the property in question had been destroyed – that is, that the *mandament* be developed to allow, in their case, an order not only that they be allowed to return to the vacant land from which they had been removed, but that they also be restored in possession of their homes, meaning that the City would have to reconstruct their homes in some way. This the Court was asked to do not only in exercise of its "inherent" power to develop the common law to allow it to adapt to changing circumstances, but also because it is, in terms of section 39(2) of the Constitution duty-bound when developing the common law to do so in a manner that promotes the "spirit, purport and objects" of the Bill of Rights – in short, to read the Constitution into the common law.

Judge Cameron in the Supreme Court of Appeal, declined the invitation to do so and then to decide the case on the basis of the (newly developed) common law.[13] Instead he developed a special remedy directly on the basis of the housing rights in the constitution – a remedy in terms of which *exactly as would have been the case had the* mandament van spolie *been used*, the occupiers were allowed to move back onto the land from which they were unlawfully evicted and the City was ordered to rebuild their shacks for them, but without their obtaining any rights to the land other than their right not to be unlawfully evicted.[14] In sum: the Court granted them in substance exactly the same relief that they had claimed in terms of the ordinary, common law remedy of spoliation that is at all of our disposal should we be dispossessed of property unlawfully; but on the basis of a special body of law, the Constitution, reserved so it seems for the special/abnormal circumstances of the poor.

11 Van der Merwe, 'Possession' in Joubert, The Law of South Africa vol. 27 (first reissue 2002), parr 263-277.
12 See e.g. *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W).
13 Tswelopele par 24.
14 Par 28.

Cameron J's explanation of this choice is instructive. Running through his entire judgment on this point is the quite rigid assumption that the Constitution and the common law are two distinct sets of law, with two distinct sets of purposes and involving two distinct sets of interests and rights. This is indicated first by his view of what the relationship between the two bodies of law entails: He described it thus:

> "The Constitution preserves the common law, but requires the courts to synchronise it with the Bill of Rights. This entails that common law provisions at odds with the Constitution must either be developed or put at nought; but it does not mean that every common law mechanism, institution or doctrine needs constitutional overhaul; nor does it mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must necessarily be seized upon for its development".[15]

Obviously absent from this characterisation of the relationship is any indication that the ordinary law – the common law – must be progressively infused with the Constitution, with its underlying value system as in the past it has been accepted to be the case in terms of the so-called "one body of law"-principle.[16] The understanding is clear: the two bodies of law are separate, but with a hierarchy, so that where there is clear conflict between the common law and the Constitution, the former must be changed to remove that conflict, but no general "overhaul" is required.

From this point of departure, Cameron J's argument develops along the following lines: the eviction of the Tswelopele community was not an ordinary unlawful dispossession of property in which only the interest in bare possession of that property was at stake. Rather, the eviction occurred in such a way that not only the constitutional housing rights of the residents were breached, but also their rights to personal security, privacy and ultimately to dignity.[17] Where constitutional rights are breached a remedy for that breach is supposed not only to make good what was bad with respect to the particular people involved, but also to vindicate the constitutional rights in the abstract – that is, to remedy the injury done through the breach to *all of us*.[18] In his own words:

> "Essentially, the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity".[19]

15 Par 20.
16 See Van der Walt *Property and Constitution* (2012) 20.
17 Par 15.
18 Parr 26-27.
19 Par 27.

One would have to look far to find a clearer statement than the final sentence in this passage of the idea that, although related in a hierarchical fashion, the Constitution and the common law are distinct, the one catering for "special" rights and interests and the other for ordinary life.

Cameron J's decision not to develop the common law *mandament van spolie* but instead to craft a special constitutional remedy to deal with the perceived special nature of the case before him in *Tswelopele* is subsequently confirmed (and so set in stone) by the Constitutional Court in *Schubart Park*, when Judge Froneman confirmed that part of the High Court order in the case that rejected reliance on the *mandament* and, with reference to *Tswelopele,* explicitly held that it is inappropriate to develop the common law remedy of spoliation in cases such as these where constitutional housing rights are at stake.[20] After quoting extensively from Cameron J's judgment in *Tswelopele* (which he described as "upholding the distinction between the common law requirements for spoliation and that of constitutional relief under section 38 of the Constitution"),[21] he came to the conclusion that "it is conducive to clarity to retain the 'possessory focus' of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution".[22]

4 2 Conflicting Stories in Court

The second way in which our courts in these two cases confirm the rhetoric of the otherness of the poor, has to do with the manner in which the facts on which to decide cases is determined in cases such as these – the stories of the cases, so to speak.

When a group of poor people approach a court to remedy their unlawful eviction through the *mandament van spolie*, as happened in both these cases, they do so by way of an application. Application procedure in our courts (as distinct from so-called "trial" procedure) is a simplified procedure in terms of which cases are decided "on the papers" – on the basis that is, of evidence set out in sworn statements called affidavits – and on the basis of legal argument by counsel appearing for the two parties, rather than on the basis of evidence led at trial through testimony by witnesses. The way in which courts determine the facts on the basis of which a case must be decided on application, between the conflicting versions presented to it in the papers by the two parties, heavily favours the respondents. In terms of the so-called *Plascon Evans*-rule,[23] the court decides the case on the basis of those facts alleged by the respondent taken together with those facts alleged by the applicants that are accepted by the respondents, unless the respondents' version is patently

20 Par 28.
21 *Ibid*.
22 Par 29.
23 Named after the decision in which it was established, *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) ("*Plascon-Evans*").

absurd in some way.[24] In sum, the respondent's story is accepted unless there is some exceptional reason not to do so.

Applications on the basis of the *mandament van spolie* that involve unlawful eviction from housing, are most often also brought on an urgent basis – the remedy is by its nature urgent. Urgency makes impossible the limited ways in which in application proceedings it is possible to resolve factual disputes that arise despite the *Plascon Evans*-rule, those being referral to oral evidence or referral to trial. For both these options in an urgent application there simply usually is not time.

In cases such as *Tswelopele* and *Schubart Park* the applicants are poor people evicted from their homes and the respondents a state agency (in both these cases the City of Tshwane) – the *Plascon Evans*-rule in these cases means that the version of the facts presented by the City is accepted as against that presented by the poor people who bring the case to court, unless they are able to persuade the court that the City's version is patently absurd. This is of course difficult for precisely litigants such as the applicants in these cases to do, given their relative access to resources and in particular in the context of cases brought on an urgent basis, with hastily prepared papers, decided before a judge in chambers who has hardly had time to read through the papers.

The effect of this scheme can be quite drastic in the extent to which the story told by poor people of their own predicament is excluded, as is best illustrated by *Schubart Park*. In *Schubart Park* in the High Court when the application for a spoliation order was decided the crucial issue was whether the buildings from which the occupants had been excluded illegally were structurally sound and otherwise safe for human occupation. Because of the urgency of the matter the City was allowed to present oral expert evidence about this issue, the gist of which was that the building was clearly structurally unsound and for other reasons also unsafe for human habitation. These "facts" were the basis for their defence against the *mandament van spolie* of impossibility – it was impossible to restore occupation of the building as it would be too dangerous to allow the applicants back, however illegal the eviction might have been. The applicants of course vigorously disputed this version – on their version, the buildings were not near as degraded as alleged by the respondents, but were in fact perfectly safe for human habitation and in addition, to the extent that there was degradation to be concerned about, this was caused by the City's neglect of its responsibilities of upkeep as landlord.

Due to the operation of the *Plascon Evans* rule and the urgent circumstances in which the case was argued, the High Court simply accepted the oral evidence presented in this respect for the City – accepted the City's story, that is, to the exclusion of that of the residents.

24 *Plascon-Evans* 643E-653C. See also Theophilopoulos, Van Heerden & Boraine *Fundamental Principles of Civil Procedure* (2d ed 2012) 131.

This acceptance formed the basis for the High Court's dismissal of the spoliation application, as is evident from the following passage from the judgment:

> "It turns out … that on judging the evidence as a whole, and the weight thereof, all these experts agree that to allow this application and to send these people, including elderly people and children found abandoned in locked rooms by the police, and the Metro Police, back into this building in the shocking condition in which it is, would be playing with their lives and endangering their very existence. I am asked by these applicants to sanction such a state of affairs and I am not prepared to do so". [25]

This is exacerbated when the case reaches the Constitutional Court on appeal. A court on appeal usually does not question the findings of fact made by a lower court – it rather assesses the lower court's holdings on the law, on the basis of the facts as determined by the lower court. In addition, the Constitutional Court, at least at the time that *Schubart Park* was decided, decides on appeal only matters that raise constitutional issues – disputes of fact and the questioning on appeal of factual findings of the lower courts usually do not raise any constitutional issues.[26] This means that the Constitutional Court in particular as court of appeal usually decides cases on the basis of the facts as established by the lower court.

And this is exactly what happened in the Constitutional Court. The residents had applied to be allowed to introduce additional evidence before the Constitutional Court to challenge the finding of fact on the basis of which their spoliation application was dismissed in the High Court, but Froneman J dismissed their application in this respect.[27] This meant that Judge Froneman really considered only the facts as presented by the City – the story of the case as told by the residents now was not even considered and rejected. It simply was not present.

5 Conclusion

Why do these two oddities of approach matter? Most lawyers' response to the illustration above of the implicit mirroring by the two courts of the separateness of the poor in Tshwane would be that the manner in which the outcomes in the two cases was reached does not really matter – the poor people who brought the cases to court won and obtained the relief they were seeking.

By way of conclusion I would venture that it matters at least in two ways: because it implicitly confirms, and so reinforces, a set of problematic cultural assumptions about the poor on the basis of which mainstream society deny their responsibility for poverty and their capacity to do anything about it – reinforcing, that is, the

25 As quoted by Froneman J in *Schubart Park* at par 13.
26 *Schubart Park* par 31.
27 *Ibid*.

"depoliticisation" of poverty; and because it insulates from scrutiny and change the very part of our law that is most obviously complicit in creating and maintaining poverty, being the basic rules of transaction, property and liability embodied in the common law.

5 1 Reinforcing Demonisation of the Poor

To distinguish poor people from the rest of "us" – which distinction is so graphically depicted in the separateness of the poor in the cityscape of Tshwane – is not ideologically or politically neutral. While the simple act of describing the poor as an abstraction, a category separate from those of us who are not poor is linguistically and otherwise unavoidable – to speak about the world at all, "we must resort to categories and abstractions"[28] – and often necessary,[29] it is also the first step in an ideological process through which the poor are depicted as not only other than us, but inferior to us, blameworthy for that reason – more accurately, to blame for their own predicament – and so not our responsibility. In short, it is the first step in the ideological project of depoliticisation of poverty.[30]

We see this process of demonisation of the poor and depoliticisation of poverty in operation quite graphically in both *Schubart Park* and *Tswelopele*. In *Schubart Park* the City engages in an on-going and conscious effort to demonise the poor people living in the buildings. They are routinely and mostly falsely *en bloc* described as rent defaulters and defaulters on their electricity and water accounts to justify the state of disrepair into which the buildings had fallen (while it is in fact the neglect of the property owner, the City itself, that caused these problems, despite ongoing attempts by the residents to persuade it to act). At the time of the police action, this demonisation is at its clearest, when the police effecting the removal, to justify their conduct recount how they found pets and children in a state of neglect in some of the apartments, while it was in fact the police themselves who had prevented the residents of those flats to retrieve their pets and their children upon returning from work as they do every day. In *Tswelopele*, similarly the illegal eviction is justified by the surrounding property owners by describing the community as lawless, a threat to safety and health, when many members of the community are in fact employed to work in their homes, gardens and shops and there is no actual evidence of crime directed at the surrounding housing estates from within the community.[31]

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28 Ross "The rhetoric of poverty: Their immorality, our helplessness" (1990-1991) 79 *G LJ* 1499 1499.

29 *Ibid*.

30 *Idem* 1499-1508; Williams "Welfare and legal entitlements: The social roots of poverty" in Kairys (ed) *The politics of law: A progressive critique* (3rd ed 1998) 569 569-571.

31 This "demonisation" is at its most cynical when the City in the High Court application attempts to describe the eviction as simply a by-product of its efforts to remove "alien vegetation" from the land.

The decisions of the Constitutional Court and the Supreme Court of Appeal in *Schubart Park* and *Tswelopele* unwittingly participated in this demonisation. The decision to forego reliance on the ordinary law that applies to all of us in favour of a "special" body of constitutional law clearly marks the two groups of poor people who brought the two cases as other – different and abnormal. For them, the implicit message seems to be, the ordinary law does not suffice. They are deficient in some way, so that a special law and special rights must be created for them.

This demonisation is even more directly and clearly confirmed through the redaction of the story of the *Schubart Park* residents as a result of the rules of evidence. Their story is rejected in the High Court in favour of a story that clearly depicts them as blameworthy and irresponsible. On the basis of the evidence presented by the City the judge there concludes not only that, neutrally, it would be unsafe for the residents to return to the building immediately, but also that they are suspect people in some way ("... children found abandoned in locked rooms by the police ...") and that they are irresponsible, even reckless to want to return ("... I am asked by these applicants to sanction such a state of affairs and I am not prepared to do so ..."). This characterisation of the residents and of the course of events is then simply accepted in the Constitutional Court. The effect of this is of course not only that the bare facts as presented by the City are privileged over those facts as they were presented by the residents. It is also that the rhetorical implications of the City's version is privileged over the rhetorical depiction of the events provided by the residents – the City's version of the applicants as irresponsible freeloaders, content to live with their children and pets in unhygienic, unsafe conditions caused by their own conduct is confirmed to the exclusion of the residents' depiction of themselves as desperately trying to scrape a decent living in trying circumstances and in the face of almost malignant official neglect.

5 2 Insulating the Private Law

The second reason why the two courts' mirroring of the separateness of the poor matters has to do with the participation of the law in the creation and maintenance of poverty.

In a private ownership economy such as the South African economy, common law background rules of property and transaction centrally determine access to and distribution of basic resources.[32] Although the development of constitutional rights so as to establish new and unique

32 Simon 'Rights and redistribution in the welfare system' (1986) 38 *Stanford Law Review* 1431 1433 - 1436; Williams 575 - 577. See in this respect also Sen *Poverty and famines: an essay on entitlement and deprivation* (1981) 166, who writes that access to food (and I would add other basic resources) is most importantly determined by "a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.)", and that these legal relations, or the law itself quite literally "stand between" such resources and those in desperate need of them.

constitutionally based remedies certainly is an important endeavour on its own, to account fully for the relationship between law and poverty, sustained critical engagement also with these common law background rules is crucial. Experience with welfare rights campaigning in the United States has shown how a focus on the development of constitutional protection for welfare rights[33] at the expense of an adequately critical engagement with the common law background rules has, in the struggle for social justice, been counter-productive in the longer term because it sublimates deep political questions regarding distribution of basic resources.[34] The Supreme Court of Appeal and Constitutional Court's explicit choice to rely on the Constitution and leave the common law alone, not only means that they miss the opportunity for the kind of necessary critical engagement with the background rules of transaction, liability and property referred to above. It also means that they implicitly confirm those rules as sound and unproblematic. The implication is that for ordinary life and ordinary people, these background rules and the ideology that they reflect are sufficient. It is only, so it seems, in exceptional circumstances and for abnormal people that the value system that underlies the Constitution becomes relevant.

33 The focus of this movement, which reached its zenith in the Supreme Court decision of *Goldberg v Kelly* (n 20 above), was obtaining for statutory welfare rights the same kind of due process protection as that afforded property and other basic personal rights. See Williams 571 - 575 for an overview.

34 Williams 581 - 582; Simon 1486 - 1489.