

# The right to housing in South Africa

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*Waiting for 'delivery' will not liberate us from our life sentence. Sometimes 'delivery' does not come. When 'delivery' does come it often makes things worse by forcing us into government shacks that are worse than the shacks that we have built ourselves and which are in human dumping grounds far outside of the cities. 'Delivery' can be a way of formalising our exclusion from society.*

– ABAHLALI BASEMJONDOLO, THE SOUTH AFRICAN SHACK-DWELLERS MOVEMENT, 2010.<sup>1</sup>

## Introduction

Under apartheid, access to land (and concomitantly housing) was racially determined. The minority white population owned and had access to the vast majority of the land while the black majority population was relegated to ethnically-based 'homelands' or dormitory townships on the outskirts of cities and towns. This spatial segregation was enforced through a host of repressive legislation including the Natives Land Act 27 of 1913, Group Areas Act 41 of 1950 and the Prevention of Illegal Squatting Act 52 of 1951. Furthermore, the socio-economics of apartheid meant that, in general terms, white people lived in formal houses or flats, whereas black people lived in huts, shacks or rudimentary township houses.

Apartheid land and planning legislation not only 'systematically deprived the African majority of the population of formal access to land and housing in urban areas, thereby entrenching socio-economic and spatial inequality and creating the conditions for the unlawful occupation of land and property', but the common law 'openly favoured strong property rights and allowed private landowners to vindicate their rights through eviction processes that were not balanced against considerations of occupiers' needs and circumstances'.<sup>2</sup>

The racialised nature of access to housing (and land) has been one of the most damaging legacies of apartheid and one that the post-apartheid government has most battled to overcome, giving rise to the fact that the right to housing has been litigated more than any other socio-economic right. Thus, despite internationally unparalleled progress in terms of providing the funding for approximately 1.4 million housing units since 1994,<sup>3</sup> there are enduring human rights-related problems that are highlighted in this paper.

At the root of the housing-related systemic challenges is the government's preoccupation with a private title approach to social housing provision that has focused on rolling out 'RDP houses',<sup>4</sup> often on the peripheries of urban areas and almost entirely to the exclusion of more appropriate alternatives. This approach has rendered housing provision highly bureaucratic, non-participatory and expensive, as well as a significant source of corruption and fraud. It has also had the unintended adverse consequence of stalling definitive action on upgrading informal settlements, which has meant that tens of thousands of households languish in housing- and service-related limbo for years and even decades on end; or have to relocate to even more unsatisfactory locations – usually with substantially worse services or a lack of access to services and work. And it is one of the factors

behind the generalised failure by municipal government – despite a clear legal duty as underscored by the Constitutional Court in the *Grootboom*<sup>5</sup> case and as subsequently legislated in the National Housing Code – to provide emergency shelter for evictees that are likely to be rendered homeless by an eviction. Thus, housing ‘delivery’ has become a fraught and contested terrain. As described in the introductory quote from the shack-dwellers movement, Abahlali baseMjondolo, ‘delivery’ is often a disempowering experience that, instead of improving lives and livelihoods, further marginalises residents and communities.

These issues speak to how complex the right to housing is. This is not only because of the complicated public-private nexus, especially where the State is providing housing for private ownership and/or is evicting households from informal areas. Housing is a deeply emotive issue, given that all people have to live and construct their lives somewhere. Although often not viewed as being as essential to basic life as, for example, water, having secure access to a home is the basis for living as a human being. As recognised in a recent report, individuals and families attach much of their ‘emotional and economic well-being’ to having a secure home, meaning that ‘tensions around housing delivery processes are almost inevitable.’<sup>6</sup> Indeed, the importance of housing, especially to those denied it, is highlighted by the fact that access to housing is the single most cited concern of protestors engaging in the mushrooming wave of local protests around the country since 2004.<sup>7</sup>

This paper provides a human rights analysis of the right to housing in South Africa, first reviewing the legal, policy and functional frameworks, before undertaking a rights-based fault-line analysis of the systemic problems. The paper focuses on urban and peri-urban areas because South Africa has a majority urbanised population (urbanisation is increasing with substantial internal migration to the main cities of Johannesburg, Durban/eThekweni and Cape Town) and urban areas are the site of the most conflict around realising the right to housing.

## International and regional housing law

Article 11 of the main international convention governing socio-economic rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), recognises a right of everyone to an adequate standard of living, including adequate housing. The right to adequate housing is also recognised in relation to membership of vulnerable identity groups including children,<sup>8</sup> rural women,<sup>9</sup> racialised groupings,<sup>10</sup> people with disabilities<sup>11</sup> and migrants.<sup>12</sup> In addition, there have been two General Comments on housing from the United Nations Committee on Economic, Social and Cultural Rights (CESCR, the body that interprets the ICESCR and clarifies related obligations).

In 1991, CESCR adopted General Comment 4 on the right to adequate housing, in which the Committee set out a number of factors related to the meaning of ‘adequacy’, including security of tenure; access to services, materials, facilities and infrastructure; affordability; habitability; accessibility; being located close to opportunities; and being culturally adequate.<sup>13</sup> And, in 1997, responding to the prevalence of evictions around the world, the CESCR adopted General Comment 7 on forced evictions. This General Comment established a general prohibition on forced evictions defined as the ‘permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’<sup>14</sup> General Comment 7 goes on to specify inter alia that states must enact legislation to protect security of tenure, and to take all appropriate measures to ensure adequate alternative housing to the maximum of available resources. States must also put in place procedural and due process protections regarding any planned evictions, including adequate notice, consultation prior to eviction, identification of possible alternative land or housing, provision of information regarding the eviction, and the provision of legal remedies and legal aid if possible.<sup>15</sup>

Moreover, CESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005) highlights that

states parties are bound to 'provide victims of domestic violence, who are primarily female, with access to safe housing' and that the right to adequate housing requires that 'women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so'.<sup>16</sup> And CESCR General Comment 19 on the right to social security (2008) stresses that family and child benefits should be provided on a non-discriminatory basis and must be sufficient to cover housing.<sup>17</sup> Finally, the recent CESCR General Comment 20 on non-discrimination in economic, social and cultural rights emphasises the importance of ensuring access to housing to all groups, particularly women and girl-children, noting that 'ensuring that all individuals have equal access to housing ... will help overcome discrimination against women and girl children and persons living in informal settlements and rural areas', and that access to basic services should not be made conditional on a person's land tenure status.<sup>18</sup>

As with all international socio-economic rights, the international right to housing entails an obligation to immediately satisfy essential levels of the right (minimum core content), as well as a parallel and ongoing obligation to use the maximum available resources to achieving progressively the full realisation of the right.<sup>19</sup> In terms of the international right to adequate housing, General Comment 4 of CESCR stipulates that the minimum core content to be immediately achieved by states (or to be justified in terms of insufficient resources) includes obligations to ensure effective monitoring of the situation regarding access to housing, putting into place 'enabling strategies' including laws, policies and budgets, along with the prohibition on forced evictions.<sup>20</sup> And CESCR General Comment 19 states that it is a core obligation that social security schemes provide a minimum essential level of benefits to all families and individuals that will enable them to acquire 'at least ... basic shelter and housing'.<sup>21</sup>

South Africa has not ratified the ICESCR. However, as a signatory, it is bound to not undermine its provisions.<sup>22</sup> Moreover, in its 1995 judgment on the death penalty, the South African Constitutional Court clarified that, in the context of interpreting the South African Bill of Rights, section 39(1) of the South African Constitution

Act 108 of 1996 (Constitution) requires the courts to consider non-binding, as well as binding international law.<sup>23</sup> Nonetheless, given the non-ratification of the ICESCR, the South African Constitutional Court has taken the view that the South African Government is not obliged to pursue a minimum core content approach to socio-economic rights but rather that it must have a reasonable programme to progressively realise each right within available resources.<sup>24</sup> It should be noted, in light of the government's (as yet unenacted) announcement in October 2012 that it would ratify the ICESCR, that if the ICESCR is ratified, South Africa will be bound to pursue the minimum core approach to socio-economic rights.

South Africa has ratified the African Charter on Human and People's Rights (ACHPR, 1981). Although the ACHPR does not contain an explicit right to housing, Article 24's right to 'a general satisfactory environment' favourable to development has been interpreted by the African Commission on Human and People's Rights to encompass a right to adequate housing.<sup>25</sup> South Africa has also ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003), which, in Article 16, guarantees women's right to equal access to housing.

The legal obligations stemming from international and regional human rights instruments are compelling, but in practice the enforcement of the right to housing (as with all socio-economic rights) in South Africa occurs largely within domestic legal and policy frameworks.

### South African housing law<sup>26</sup>

Section 26(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), guarantees everyone's right of access to adequate housing. Section 26(2) establishes that the state must take reasonable legislative and other measures, within its available resources, to progressively realise this right.<sup>27</sup> Section 26(3) prohibits all arbitrary evictions and states that no one may be 'evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. The meaning of section 26 – and particularly section 26(3) – has been clarified in the course of numerous court cases discussed below.<sup>28</sup>

Part A of Schedule 4 in Chapter 14 of the Constitution lists housing, urban and rural development, and regional planning and development, as functional areas of concurrent national and provincial legislative competence. Part B lists building regulations, electricity and gas reticulation, water and sanitation services, and municipal planning as local government matters. Section 156(4) states that national government and provincial governments must assign to a municipality the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it (see section 2.3 below for a discussion on the accreditation of municipalities to take on the housing function).

Beyond the Constitution, since 1994 a raft of laws have been promulgated relating to housing, which attests to the broad and complex nature of the housing terrain in the country. The main housing-related laws are:

- the Housing Act 107 of 1997 (amended by Acts 28 and 60 of 1999; Act 4 of 2001) (Housing Act);
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE);
- Rental Housing Act 50 of 1999 (amended by Act 43 of 2007) (Rental Housing Act);
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (April 2007) (National Norms and Standards); and
- Social Housing Act 16 of 2008 (Social Housing Act).

The Housing Act is the primary piece of housing legislation in South Africa. However, while the Act contains the framework for housing development, it is the National Housing Code that contains the substance of housing development and implementation – national housing policy and programmes. The housing legislative and policy arrangement in South Africa has been deemed unusual in that it ‘expressly sanctions the inversion of the usual relationship between policy and legislation.’<sup>29</sup> According to McLean, ‘the typical, and desirable, relationship is that policy documents should state the overall objectives of government strategy, while the detailed rules are set out in primary or secondary legislation.’<sup>30</sup>

In South Africa, however, the main principles, policy choices and implementation rules for housing are contained in the National Housing Code, which can be altered by the Minister. Therefore these key components of housing development are not deliberated upon in Parliament or legislated in statute.<sup>31</sup> McLean argues that, while it is always open for government departments to include a substantial portion of policy in regulations and pure ‘policy documents’, the more important aspects of policy should be contained in legislation. She further states that the situation in South Africa may arguably ‘amount to the abdication of Parliament of its constitutionally mandated role, and may, in addition, violate the principle of legality and the rule of law.’<sup>32</sup> The National Housing Code will be discussed below.

The Housing Act provides for a sustainable housing development process, laying down general principles for housing development in all spheres of government; it defines the functions of national, provincial and local governments in respect of housing development; and it lays the basis for financing national housing programmes.

In section 2(1) the Act states that all spheres of government must give priority to the needs of the poor in respect of housing development, and consult meaningfully with individuals and communities affected by housing development. They must ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible; is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; is administered in a transparent, accountable and equitable manner; and upholds the practice of good governance. Further, in section 2(1)(e) the Act states that all spheres of government must promote *inter alia* the following: a process of racial, social, economic and physical integration in urban and rural areas; measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process; higher density in respect of housing development to ensure the economical utilisation of land and services; the meeting of special housing needs including the needs of the disabled; the provision of community and recreational facilities in residential

areas; the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.

A number of amendments were made to the principal Act in 1999 and 2001 respectively. The amended Section 4 of the Housing Act requires the Minister to publish a Code which includes the national housing policy and procedural guidelines for the implementation of the policy.

The Housing Act, and later the National Housing Code (promulgated in 2000, pursuant to section 4 of the Housing Act), sets out the roles and responsibilities of the three tiers of government in respect to housing. These are as follows:

- *National government*: must establish and facilitate a sustainable national housing development process by formulating housing policy. It must also monitor implementation through the promulgation of the National Housing Code and the establishment and maintenance of a national housing data bank and information system.
- *Provincial government*: must act within the framework of national housing policy and create an enabling environment by doing everything in its power to promote and facilitate the provision of adequate housing in its province, including the allocation of housing subsidies to municipalities.
- *Local government*, i.e. municipalities: must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the constitutional right to housing is realised. It should do this by actively pursuing the development of housing, by addressing issues of land, services and infrastructure provision, and by creating an enabling environment for housing development in its area of jurisdiction.

Section 10 of the Act allows for the administration of national housing programmes by local government through the accreditation of municipalities by the provincial Member of the Executive Council (MEC).<sup>33</sup>

According to section 10A of the Housing Act, an owner of a state-subsidised house or serviced site may not sell or 'otherwise alienate' the dwelling/site within a period of eight years from the date that the property was

acquired.<sup>34</sup> Further, if the property is vacated, the relevant provincial housing authority is deemed the owner and no purchase price or other remuneration is paid to the original beneficiary. However, this beneficiary will be eligible for obtaining another state-subsidised house if they still meet the qualifying criteria. These conditionalities have been much criticised<sup>35</sup> and, regardless of the merits, have been largely ineffectual with many beneficiaries vacating their allocated homes and informally 'selling' them (see below). Indeed, in 2004, the Breaking New Ground policy document (outlined later) explained that the above prohibition on selling government-subsidised houses was added to protect subsidy beneficiaries from downward raiding, but had 'also had the unintended consequence of undermining beneficiary choice and housing mobility and has created a significant barrier to formal secondary transactions.'<sup>36</sup> Breaking New Ground sets out that an amendment to section 10A of the Housing Act is to be introduced to reduce the prohibition period following occupation to five years – this amendment (included in the Housing Amendment Bill of 2006) has yet to be enacted.<sup>37</sup>

### Rental housing and eviction

The most important piece of national legislation enacted to give effect to section 26(3) of the Constitution, which protects against evictions, is PIE. The PIE Act provides safeguards against the eviction of unlawful occupiers living on both privately- and publicly-owned land. It has been the subject of a number of high-profile Constitutional Court cases around evictions discussed below. The PIE Act covers all those not protected by other legislation which provides protection for specific individuals or communities facing eviction. These largely rurally focused pieces of legislation are not discussed here (they relate to rural, communal or non-proclaimed township areas) but include the:

- Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act) – protects labour tenants;
- Interim Protection of Informal Land Rights Act 31 of 1996 – protects occupiers of communal, native trust or other indigenous land; and
- Extension of Security of Tenure Act 62 of 1997 (ESTA) – protects occupiers of farmland.<sup>38</sup>

The PIE Act is applicable to everyone who occupies land or property without the express or tacit consent of the owner or the person in charge of the land or property. This includes those who occupied land lawfully at some point in the past but who no longer have the consent of the owner to occupy the land in question, as well as to those who took occupation of land unlawfully in the first place.

PIE also applies to 'holders-on': those who once occupied land lawfully, e.g., in terms of a lease but whose possession subsequently became unlawful, e.g., the lease was validly terminated. This was clarified in the 2002 case *Ndlovu v Ncgobo; Bekker and Another v Jika*,<sup>39</sup> a consolidated decision by the Supreme Court of Appeal (SCA).

Previously, the common law understanding of granting an eviction order was that an owner simply needed to establish ownership of the property and the occupier consequently had no right to remain in possession of the property. The PIE Act interpretation of granting an eviction – where the court needs to determine whether the eviction is 'just and equitable', taking into account special circumstances – has changed this; however, common law principles still apply to affluent tenants. The only relevant circumstances in these latter cases would be that the landlord is the owner, that the lease has come to an end and that the lessee is holding over. While the procedural requirements of PIE still apply to affluent tenants, an eviction would most probably be granted quite easily by a judge given these circumstances.<sup>40</sup>

Sections 4 and 6 of PIE stipulate a number of strict procedural requirements for evictions to be lawful, i.e. steps that must be taken in order to get an eviction order, which pertain to both private bodies and the state respectively.<sup>41</sup> These requirements further allow courts to refuse to grant an eviction order where it would not be 'just and equitable' to do so, attaching special consideration to the personal circumstances of occupiers. The meaning of what is 'just and equitable' has been developed by the courts in case law analysed below.

The main defence available to unlawful occupiers under PIE is to demonstrate the personal or household circumstances of all unlawful occupiers of the property and the likelihood that homelessness will result if these occupiers are evicted. Sections 4(6) and 4(7) of PIE state

that a court must consider the rights and needs of certain vulnerable groups of unlawful occupiers before granting an eviction, which include the elderly, children, female-headed households and the disabled. A court will be reluctant to grant an eviction order if it is satisfied that homelessness will result and that there is no alternative accommodation available. Indeed, Constitutional Court jurisprudence on evictions (such as *Olivia Road*, *Joe Slovo* and *Abahlali* discussed below) has led to a situation where judges are hesitant to grant an eviction order in cases where homelessness may result, until and unless alternative accommodation is provided.

### The fair administration of rentals

The Rental Housing Act is a piece of national legislation that regulates the relationship between landlords and tenants in all types of rental housing. Section 2(1)(a)(i) of the Act stipulates that it is the government's responsibility to 'promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that improve conditions in the rental housing market.'

Section 7 of the Rental Housing Act provides for the establishment of provincial Rental Housing Tribunals to resolve disputes between landlords and tenants concerning 'unfair practices', which are defined in section 1 of the Act as those acts or omissions by a landlord or tenant in contravention of the Act or practices prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord. According to section 15(1)(f), unfair practices can inter alia relate to: the changing of locks; deposits; damage to property; demolitions and conversions; forced entry and obstruction of entry; House Rules; intimidation; issuing of receipts; tenants committees; municipal services; nuisances; overcrowding and health matters; tenant activities; maintenance; reconstruction or refurbishment work etc.

Section 2(3) of the Rental Housing Act stipulates that national government *must* introduce a policy framework on rental housing that sets norms and standards intended to facilitate provincial and local government's efforts to promote rental housing. Further, section 3 of

the Act empowers the Minister to introduce a rent subsidy programme to stimulate the supply of rental housing property for low-income persons. It is unclear if the DHS regards its current social/rental subsidy programmes as having fulfilled these obligations. This is important to ascertain, as section 13(4)(c)(iii) of the Act empowers the Tribunal to discontinue 'exploitative rentals' and section 13(5) empowers it to make rent determinations having regard to prevailing economic conditions of supply and demand; the need for a realistic return on investment for investors in rental housing; and incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the rental housing policy framework referred to in section 2(3).

Neither the Rental Housing Act nor Unfair Practices Regulations passed by provinces explicitly define exploitative rental as an unfair practice. The two sections of the Act dealing with exploitative rentals and rent determinations therefore tend to favour the landlord. In the absence of the third factor – prescribed ministerial norms and standards – the Tribunal, when determining a reasonable, non-exploitative rental, is at best restricted to considering whether a rental is so far in excess of an ordinary market-related rental as to be exploitative. In the *Maphango* case discussed below, the Constitutional Court ruled that if a landlord excessively increases rentals this might be construed as an unfair practice and should be determined by the Rental Housing Tribunal.

In 2013, a revised version of the Rental Housing Amendment Bill was published by the Minister, which seeks to amend sections 7 and 14(1) of the Rental Housing Act in order to render mandatory the establishment of Tribunals in every province and the establishment of Rental Housing Information Offices in every local authority.<sup>42</sup>

### Housing norms and standards

In 1999, the National Norms and Standards for the Construction of Stand Alone Residential Dwellings were introduced by the Minister of Housing in terms of section 3(2)(a) of the Housing Act. These provided minimum technical specifications including environmentally efficient design proposals. On 1 April 2007, these standards were revised in the National Norms and Standards in

respect of Permanent Residential Structures (National Norms and Standards), which are contained in the 2009 National Housing Code. All stand-alone houses constructed through application of the National Housing Programmes must at least comply with these norms and standards. As stipulated, each house must have:

- minimum gross floor area of 40m<sup>2</sup>;
- two bedrooms;
- separate bathroom with a toilet, a shower and hand basin;
- combined living area and kitchen with wash basin; and
- ready board electrical installation, if electricity is available in the project area.<sup>43</sup>

In 2013, the DHS finalised new Norms and Standards for energy efficient dwellings, to cater for full electrical installation for each house.<sup>44</sup> According to a decision by the Minister and Members of the Executive Council, as of 1 April 2014 the Norms and Standards will be substantially adjusted and each house will be internally plastered, externally rendered and fitted with a ceiling and insulation. This will mean a 40 per cent increase in subsidy and the cost of the top structure will be R110 000.<sup>45</sup>

In 2008, the Social Housing Act 16 of 2008 (Social Housing Act) was passed in line with the 2005 Social Housing Policy (see below), providing the enabling legislation for the Social Housing Policy. The Act aims to establish and promote a sustainable social housing environment and defines the functions of national, provincial and local governments in respect of social housing, allows for the undertaking of approved projects by other delivery agents with the benefit of public money and gives statutory recognition to social housing institutions (SHIs). Further, it provides for the establishment of the Social Housing Regulatory Authority (SHRA) and defines its role as the regulator of all SHIs that have obtained, or are in the process of obtaining, public funds. In 2010, the SHRA was established and in 2012 the Minister of Human Settlements published Social Housing Regulations in terms of the Act, which focus on the accreditation and monitoring of SHIs.

## South African housing policy and institutions<sup>46</sup>

Housing has an extremely complex legal, policy and institutional framework. The plethora of policy documents, institutions and inter-governmental relations implications have in large part contributed to the challenges faced in addressing housing needs in the country.

There are three main national housing policy documents in South Africa. They are the 1994 white paper: *A New Housing Policy and Strategy for South Africa* (White Paper on Housing); the 2004 update of the White Paper on Housing, *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (Breaking New Ground or BNG); and the National Housing Code of 2000, as revised in 2009 (National Housing Code).

The White Paper on Housing is the principal, overarching national housing policy and Breaking New Ground is the first major policy amendment/refinement to the White Paper on Housing since 1994. The National Housing Code, first published in 2000 and revised in 2009, was published in accordance with the Housing Act and, falling somewhere between law and policy, is regarded as legally binding on provincial and local spheres of government.<sup>47</sup> It sets out the underlying policy principles, as well as guidelines and norms and standards that apply to all government housing programmes.

The White Paper on Housing provided the framework for the country's ambitious housing development target of building one million state-funded houses in the first five years of office, as set out in the now abandoned ANC Reconstruction and Development Programme (RDP). A cornerstone of this early policy was the National Housing Subsidy Scheme (NHSS), which, among other subsidy systems, provided capital subsidies for housing to qualifying beneficiary households to take full ownership. Later referred to as 'RDP housing', this was a developer-driven process, meaning projects were initiated, planned and built by private construction companies for the national and provincial government. The fundamental policy and development principles introduced by the White Paper on Housing continue to guide

all developments in respect of housing policy and implementation.

In September 2004, *Breaking New Ground* was adopted by the Cabinet as a revised framework for the development of sustainable human settlements. BNG is based on the principles contained in the White Paper on Housing and outlines the strategies to be taken to achieve the government's overall housing aim. While not clearly introducing any new policy direction, the document outlines a comprehensive plan for the development of sustainable human settlements in the next five years.<sup>48</sup>

The National Housing Code, first published in 2000 in accordance with the Housing Act, set out the underlying policy principles, guidelines, and norms and standards that apply to the National Housing Programmes. Some of these programmes have been updated or removed, and new programmes included, after the adoption of BNG in 2004. The Code is binding on provincial and local spheres of government. In 2009, a revised National Housing Code was published and contains the BNG-compliant National Housing Programmes, which are described as the 'building blocks in the provision of sustainable human settlements.'<sup>49</sup> The National Housing Programmes are categorised into different 'Intervention Categories.'<sup>50</sup>

The revised National Housing Code outlines a General Framework applicable to certain National Housing Programmes that form part of the NHSS. This includes the Integrated Residential Development Programme (previously called the Project Linked Subsidy Programme), Individual Subsidies and various other subsidies discussed below. These programmes are administered through an operational and administrative tool called the Housing Subsidy System (HSS). All beneficiaries who have applied for or received housing subsidies are recorded on the National Housing Subsidy Database (NHSDB), which is managed by the DHS and used by provincial departments and accredited municipalities to administer housing projects and subsidy applications. These systems have been developed in line with section 6 of the Housing Act, which obliges the national department to 'establish and maintain a national housing data bank and a national housing information system.' Section

3 provides a rights-based critique of some of these programmes.

There is a set of generic qualifying criteria that must be fulfilled by those applying for state housing subsidies under the NHSS for the National Housing Programmes. The generic qualifying criteria, as outlined in the revised National Housing Code, are summarised as follows:

- *Citizenship*: applicant must be a citizen of the Republic of South Africa, or be in the possession of a Permanent Resident Permit;
- *Competent to contract*: applicant must be legally competent to contract (i.e. over eighteen years of age, or married or divorced, and of sound mind);
- *Not yet benefited from government funding*: the applicant or their spouse may not have received previous housing benefits from the government. In the event of a divorce involving a person who previously derived benefits, the terms of the divorce order will determine such person's eligibility for further benefits; and
- *First time property owner*: the applicant or their spouse may not have owned and/or currently own a residential property. Except for the following cases:
  - disabled persons;
  - persons who:
    - own a vacant stand that was obtained through the Land Restitution Programme;
    - have acquired a residential property for the first time without government assistance and the house/dwelling on the property, if any, does not comply with the National Norms and Standards in respect of permanent residential structures.
- *Married or financial dependants*: The applicant must be married or be constantly living together with a spouse. A single person with proven financial dependants (such as parents or parents-in-law, grandparents or grandparents-in-law, children, grandchildren, adopted children, foster children) may also apply;
- *Monthly household income*: The applicant's gross monthly household income must not exceed R3500. Adequate proof of income must be submitted;
- *Beneficiaries of the Land Restitution Programme*: Beneficiaries of the Land Restitution Programme, should they satisfy the other qualification criteria, may apply for housing subsidies;
- *Persons classified as military veterans as confirmed by the South African National Defence Force*: Military veterans who are single without financial dependants may also apply for housing subsidies;
- *Persons classified as aged*: Aged persons who are single without financial dependants may also apply for housing subsidies. Aged persons are classified as male and female persons who have attained the minimum age applicable to Government's old age social grant scheme; and
- *Persons classified as disabled*: Persons who are classified as disabled, whether single, married or co-habiting or single with financial dependants, may apply for housing subsidies. If a person who has already received state funding for housing and/or who already owns or owned a house, is or becomes disabled, or if his or her dependent(s) is/are or become disabled, such a person may receive an additional variation on the subsidy amount to finance special additions to provide independent living conditions.

In addition to the above requirements, any applicant must also satisfy the following general criteria:

These do not apply to all of the programmes and subsidies, however, and there are some programme-specific criteria which supersede these.

There are a number of legislated housing institutions which undertake specific functions in the South African housing landscape. The National Housing Finance Corporation (NHFC),<sup>51</sup> the National Urban Reconstruction and Housing Agency (Nurcha)<sup>52</sup> and the Rural Housing Loan Fund (RHLLF)<sup>53</sup> are financial institutions involved in

housing development. Some other important institutions include the following:

- The Housing Development Agency (HDA) is a national public entity created by the Housing Development Agency Act 23 of 2008 in 2009. It is tasked with the acquisition, management and release of state- and privately-owned land for human settlements development, and with providing project delivery support services to enhance the capacity of municipalities and provinces to deliver integrated sustainable human settlements.<sup>54</sup>
- The Social Housing Regulatory Authority (SHRA) is a national regulatory authority created by the Social Housing Act and launched in August 2010. The principal function of the SHRA is to increase the amount of rental accommodation available to people in low-income groups, particularly in urban areas. It facilitates and directs increased funding for social housing projects, helps to define norms and standards in order to stimulate the development of new social housing projects in urban areas, and oversees the accreditation of SHIs in terms of the Act and its regulations.

### South African functional and financial arrangements for housing<sup>55</sup>

The legal and constitutional framework related to the provision of housing is highly complex, providing a number of intersecting roles and responsibilities for the various spheres of government and creating multiple institutions to carry out specific housing-related programmes. Arguably this proliferation of arrangements and agencies has complicated the task of ensuring access to adequate housing, suggesting a need for further research into the efficacy of the housing-related functional and financial arrangements.

The Housing Act obliges national government to establish the national institutional and funding framework for the provision of housing, as well as develop national housing programmes by compiling the National Housing Code. In terms of the Housing Act, national government is also empowered to prescribe National

Minimum Norms and Standards for housing development.<sup>56</sup> Recently, the DHS has also set certain developmental goals for the advancement of different housing models in terms of its Outcome 8 Delivery Agreement.<sup>57</sup>

The legal and policy framework envisions that local government will progressively become primarily responsible for the implementation of housing developments. This is clear from the Housing Act,<sup>58</sup> read together with the Municipal Systems Act. Local government is obliged to plan for the progressive realisation of adequate housing within its jurisdiction through its integrated development planning, by including a housing chapter in the municipality's Integrated Development Plan (IDP).<sup>59</sup> Local government participates in National Housing Programmes by promoting or partnering with a developer, acting as a developer once accredited to do so, or disbursing subsidy allocation once accredited to do so.<sup>60</sup>

However, in practice, the Provincial Housing departments have, until recently, been largely responsible for developing housing projects even though this role is increasingly being taken on by municipalities (if accredited to undertake a direct housing function and administer National Housing Programmes). The accreditation process is mandated by section 156(4) of the Constitution which provides that national and provincial government should assign to municipalities the matters in Part A of Schedule 4 of the Constitution (housing is listed as such a matter). Section 156(4) is, however, circumscribed by two caveats, namely that the matter should be most effectively administered by local government and that the relevant local government should have the capacity necessary to administer the matter. Section 10 of the Housing Act therefore provides for an accreditation process to assess whether municipalities can satisfactorily indicate that they are capable of planning, implementing and maintaining projects and programmes that are integrated with their municipal IDPs.

Once it has been established that municipalities have the necessary capacity, the legislative scheme provides for the phased accreditation of municipalities to administer National Housing Programmes.<sup>61</sup> In terms of this process, municipalities will gradually take on expanded functions in relation to the administration of national

housing programmes until they are fully empowered to implement and oversee housing developments.

The accreditation system is structured into three phases: beneficiary management, subsidy budget planning and allocation, and priority programme management and administration (Level One); full programme management and administration of all national and provincial housing programmes (Level Two); and finally, full programme management and administration of all national and provincial housing programmes as well as responsibility of financial administration, including subsidy payment disbursements and financial reporting (Level Three).<sup>62</sup>

The accreditation process has been slow. Although accreditation was provided for when the Housing Act first came into force, to date no municipality has received Level Three accreditation. The DHS has managed to accredit eight municipalities with Level One accreditation; and eight metropolitan municipalities and 12 local municipalities have received Level Two accreditation.<sup>63</sup> Implementation protocols have been signed with 24 municipalities. Recently, the DHS stated that it expected that six metros were to be assigned Level Three accreditation by July 2014, pending Cabinet approval.<sup>64</sup> The drawn-out accreditation process has complicated the intergovernmental provision of housing. Moreover, it is as yet unclear precisely how funding will be allocated between accredited municipalities and provincial departments when Level Three accreditation occurs in 2014 and beyond.<sup>65</sup>

Ultimately, as pointed out in a recent research report,

... a note of caution should be raised regarding the role of local government in taking on the full housing delivery mandate, not least because of the problems witnessed with the decentralised approach to basic services provision, where cost-recovery pressures have dominated delivery and had an often adverse effect on the poor. There is, furthermore, a crisis at local government level around both governance and technical capacity. The ... DHS has acknowledged the 'scant capacity and ability at local authority level in most towns

to deliver, [which] continues to exacerbate the capability to meet our national targets.'<sup>66</sup>

National and provincial government have the constitutional and legislative responsibility to support and strengthen the capacity of local government in the fulfilment of its functions. These spheres of government are also meant to regulate local government to ensure effective performance.

Funds for the provision of housing falls predominantly within the purview of national and provincial government, and are administered through various institutions. The main funding mechanism for the development of housing initiatives is the Human Settlements Development Grant (HSDG). The goal of the HSDG is to facilitate the creation of human settlements that enable an improved quality of household life. The subsidy is intricately linked to the various National Housing Programmes and is utilised to fund residential units delivered in terms of the various housing programmes, serviced sites delivered in terms of housing programmes, finance-linked subsidies approved and disbursed, households in informal settlements provided with household access to services or upgraded services, hectares of well-located land acquired and/or released for residential development, and work opportunities created through related programmes.<sup>67</sup>

In 2011 the Urban Settlements Development Grant (USDG) was introduced by the National Treasury. The USDG is administered through the DHS and is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated way with regard to the provision of infrastructure development and low-cost housing developments in well-located areas near social and economic facilities and opportunities. Due to the broad discretion granted to municipalities, the uses of the USDG have been varied, often prioritising infrastructure development rather than directly addressing the provision of housing. As the provision of access to essential services forms a crucial component of the provision of housing developments, there are also various financial mechanisms related to the provision of sanitation and water which may be relevant in a housing context. These mech-

anisms are, however, not discussed in this position paper.<sup>68</sup>

There are a multitude of National Housing Programmes to ensure funding for various housing development needs. Of these, some of the more important national programmes include the Integrated Residential Development Programme (IRPD), the Social Housing Programme (SHP), the Emergency Housing Programme (EHP) and the Upgrading of Informal Settlements Programme (UISP).<sup>69</sup>

The Integrated Residential Development Programme (IRDP) replaced the Project Linked Subsidy Programme in 2009.<sup>70</sup> The main objective of the IRDP is to shift the focus in housing development from one solely focused on the provision of subsidised housing to a more integrated phased approach to the planning and development of housing, which provides for the provision of a range of housing types and price categories, and includes social and commercial amenities.<sup>71</sup> In terms of this programme, accredited municipalities take on the role of developers (in instances where municipalities lack the necessary financial, technical and managerial capacity, provincial departments can take up this role) and are responsible for all planning and project activities. Municipalities may appoint professionals to aid with technical assistance and contractor to construct housing and services.

The programme requires municipalities to apply for funding to the provincial MEC, who can assess and adjudicate various aspects of the project, approve or reject project applications and distribute or reserve funds. The programme targets persons who qualify in terms of the NHSS. The qualifying criteria provides that beneficiaries should have South African citizenship, be married or have financial dependants, earn a household income of less than R3500 a month, should not previously have benefited from government funded housing and should not have owned property before.<sup>72</sup>

The EHP provides for grants to municipalities, administered through the provincial housing department, to provide temporary relief to persons who find themselves in emergencies, including disasters, imminent disasters or evictions in circumstances where occupiers would be rendered homeless.<sup>73</sup> The EHP provides

for the provision of temporary housing, possible funding for relocation and resettlement of people and funding for the provision of basic services, in certain circumstances.<sup>74</sup> The normal qualifying criteria do not apply in terms of the EHP, as the programme applies to persons in emergencies. As detailed below, implementation of the EHP has been problematic, due to the ad hoc basis on which it is implemented and the complicated inter-governmental relationships set up by the programme, which have meant that municipalities struggle to obtain funding from provincial government.<sup>75</sup>

The delineation of responsibilities between various spheres of government in relation to the provision of emergency accommodation has also been subject to dispute. In the *Blue Moonlight* case,<sup>76</sup> the City of Johannesburg argued that local government's obligations in relation to the provision of temporary emergency accommodation were secondary to the other spheres of government and limited in scope. According to the City, its only obligation in the specific circumstances was to apply to provincial government for funding and assistance. Once this application was refused, the City argued that it had exhausted its responsibilities in relation to the occupiers who faced eviction.<sup>77</sup> The City thus asserted that it was not primarily responsible for the realisation of emergency housing, and was 'entirely dependent' on the policy framework and funding from the provincial and national spheres of government.<sup>78</sup> The Constitutional Court, however, held that the City has a fundamental role to play in the provision of housing.<sup>79</sup> It asserted that the division of responsibilities between the different spheres should not be 'absolute or inflexible'.<sup>80</sup> The legislative framework does not require funding for housing developments and emergency accommodation to originate solely from provincial or national government.<sup>81</sup> In particular, the Court emphasised that there may be a duty on local government to self-fund its housing development projects in certain instances.<sup>82</sup> This is especially so in relation to emergency housing situations, where local government is best suited to 'react to, engage with and prospectively plan around the needs of local communities'.<sup>83</sup> *Blue Moonlight* therefore made provision for the fact that local government may be required to self-fund emergency accommodation in certain instances.

The Upgrading of Informal Settlements Programme (UISP) provides funding for a phased approach to the upgrading of existing informal settlements, with the view of creating serviced stands through in situ upgrading.<sup>84</sup>

The UISP is not confined to the NHSS generic qualifying criteria and has a broader application, including for households who exceed the income threshold, are without dependants and potentially also non-South African citizens.<sup>85</sup> Although the programme has been emphasised as one of the most important housing programmes, implementation in real terms has been lacking as municipalities appear to be unwilling to implement the programme of their own volition.<sup>86</sup> This has led to a number of high-level governmental interventions at national level to try and prioritise informal settlement upgrading as a housing delivery mechanism. These interventions include the Outcome 8 Delivery Agreement aim to upgrade 400 000 households in well-located informal settlements by 2014 and the creation of the National Upgrading Support Programme (NUSP). NUSP is located in the DHS and is aimed at providing technical support to provincial housing departments and municipalities in developing and furthering the upgrading of informal settlements.

The Social Housing Programme (SHP) is aimed at developing 'rental or co-operation housing' for 'low-income persons' which are to be managed by accredited social housing institutions (SHIs) or through accredited social housing projects in designated restructuring zones (i.e. areas that have been flagged for targeted and focused development by local and provincial governments).<sup>87</sup> The programme targets a spread of beneficiaries that earn between R1500 and R7500 with a stable income.

This highly complex machinery relates in part to the fact that housing is a difficult functional area, overlapping with many other rights and government functions including water, sanitation and electricity. It is also the most contested and politically charged socio-economic right, as evidenced by the high number of housing-related cases that have been litigated in South Africa.

### South African housing jurisprudence<sup>88</sup>

In South Africa, socio-economic rights are explicitly justiciable and twenty socio-economic rights-related

cases have been decided by the Constitutional Court since its establishment in 1996. These include judgments on the rights of access to health care, social security, water, sanitation and electricity. However, the vast majority of socio-economic judgments from the Court relate to the right of access to adequate housing.

As mentioned above, the right of access to adequate housing enshrined in the Constitution consists of three interrelated subsections. Precisely how these subsections interact with one another is not entirely clear. However, what is clear is that the right places both positive and negative obligations on the state. The negative obligations, encapsulated in section 26(3) of the Constitution oblige the state and private parties to desist from preventing or impairing the right of access to adequate housing that persons have already realised for themselves.<sup>89</sup> The positive obligations are contained in section 26(1) and (2) and largely relate to what a 'reasonable' state response to the 'progressive realisation' of the right of access to housing 'within available resources' would entail.<sup>90</sup>

### Positive housing obligations<sup>91</sup>

The first time the Constitutional Court considered the impact of the right of access to adequate housing was the far-reaching socio-economic rights case of *Grootboom*,<sup>92</sup> which was the Court's second socio-economic rights case. In this case, the Court set out to determine the state's obligations in terms of the right to housing contained in section 26 of the Constitution. Although *Grootboom* laid the foundation for the adoption of the EHP (initially included as Chapter 12 in the 2000 National Housing Code) which prioritised those in desperate need, it has also led to a restrictive interpretation of the section 26(1) and 26(2) of the Constitution. This is due to the fact that the Court pursued an approach regarding the meaning of the section 26(1) right of everyone to have access to adequate housing as qualified by the section 26(2) caveat of the state's obligation to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. This approach effectively means that neither the section 26(1) right nor the section 26(2) right exist as self-standing or stand-alone entitlements. Rather, 'in

a somewhat inverted analysis', the content of each right rests on the reasonableness of the state's response to progressively realising that right'. So, determining the 'content of each right in the first place – that is, working out what the right entitles citizens to – is to proceed on the basis of a determination in the second place of what it would be reasonable for the state to provide, within available resources, in order to realise the right progressively'.<sup>93</sup>

This approach by the Constitutional Court – of requiring the state only 'to take reasonable legislative and other measures progressively to realise the achievement of the right ... within available resources'<sup>94</sup> – has been criticised for reducing the content of the socio-economic right to being defined by the action that the government takes in advancing access to that good.<sup>95</sup> The Court in *Grootboom* specifically declined the opportunity to affirm that section 26 included a minimum core approach, which would allow citizens to claim certain minimum concrete entitlements or set standards against which government action could be tested.<sup>96</sup> Thus, the Court refused to 'prescribe the exact details of what the government must do or what individuals can claim from the government',<sup>97</sup> a significant departure from the approach of the CESR.

Instead, the Court's reasonableness standard obliges the state to take 'reasonable' measures to provide access to adequate housing. The core requirement for the fulfilment of the right to housing is thus that the state develops a reasonable housing policy or programme. When considering reasonableness, courts do not need to enquire 'whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent'.<sup>98</sup> Reasonableness simply requires the courts to adopt a flexible approach, in terms of which a 'wide range of possible measures' could be adopted by the state in order to comply with its constitutional obligations.<sup>99</sup> The state thus has a relatively broad discretion in relation to the policy it adopts, provided that the policy 'falls within the bounds of reasonableness'.<sup>100</sup>

*Grootboom* set out the parameters of a reasonable housing policy, which must be comprehensive, coherent, flexible and effective; have due regard for the socio-economic

context of poverty and deprivation; take into account the availability of resources; take a phased approach, including making provision for short, medium and long-term needs; allocate responsibilities clearly to all three spheres of government; respond with care and concern to the needs of the most desperate; and be free of bureaucratic inefficiency or onerous regulations.<sup>101</sup> Importantly, the Court stated that '[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing'.<sup>102</sup>

In the end, the *Grootboom* case turned on the fact that the state's housing policy failed to provide for those in desperate and immediate need. The Court held that such a failure rendered the housing policy unreasonable and consequently unconstitutional. As the Court asserted, a reasonable programme must include 'relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.<sup>103</sup>

*Grootboom* also interpreted 'progressive realisation' of housing to mean that the state should, over time, dismantle the range of legal, administrative, operational and financial obstacles which impede access to rights and proactively increase the access to housing to a larger and broader range of people.<sup>104</sup> But the Court did not expand any further on this notion, leaving the concept of progressive realisation largely undefined.

### Negative housing obligations

The *Grootboom* case specifically recognises that 'at the very least', the right to housing places a negative obligation on the state.<sup>105</sup> This negative obligation is contained in section 26(3) of the Constitution. Section 26(3) provides that no one will be evicted from their home or have their home demolished without a court order authorising such action, which would only be granted after having regard to all the relevant circumstances. In order to give effect to this subsection, the South African legislature passed PIE in 1998. This Act set out a more rigorous legal framework to govern evictions by requiring that a court could only authorise an eviction after it was satisfied that such eviction would be 'just and equitable' in the circumstances.

The courts have, over time, developed considerable jurisprudence on what would constitute a breach of the negative obligations in terms of section 26. Breaches have come to range from out-right evictions and relocations to disruption of use and stability of tenure security.

The first housing case that analysed an eviction and spelt out, in greater detail, the interaction between the constitutional provisions governing housing is *Modderklip*.<sup>106</sup> In this case, the Supreme Court of Appeal (SCA) considered the interaction between the right of access to adequate housing in section 26 of the Constitution and owners' property rights in section 25 of the Constitution. This judgment was later confirmed by the Constitutional Court.<sup>107</sup> In the *Modderklip* case, 400 people were evicted in May 2000 from the Chris Hani informal settlement that was situated on municipal-owned land in the jurisdiction of the Ekurhuleni Metropolitan Municipality (although owned by the Ekurhuleni Metropolitan Municipality, the land was administered by the Greater Benoni City Council). Having nowhere else to go, these persons moved onto a portion of a privately-owned farm known as Modderklip Boerdery. By October 2000 the settlement had swelled to include over 4,000 informal shelters inhabited by approximately 18,000 people. At this point, the owner approached the High Court seeking an eviction order against the occupiers. The eviction order was granted. However, by the time the order became executable, the settlement had grown significantly to roughly 40,000 occupiers. The massive size of the informal settlement meant that the cost of executing the eviction order would have been around R1.8 million, substantially more than the land itself was worth. The owner therefore brought a further application in the High Court to compel the state to execute the eviction order on its behalf. The High Court granted this enforcement order, finding that the state was in breach of its constitutional obligation to protect property rights by failing to effectively execute the order. The High Court thus found that the continued unlawful occupation on the owner's land despite an eviction order was a serious deprivation of the private property owner's rights.

Both the eviction order and the enforcement order were appealed to the SCA. In that Court, Judge Harms held that the continued occupation by the unlawful occu-

piers in the face of an eviction order amounted to an infringement of the owner's property rights.<sup>108</sup> Moreover, the Court considered the eviction of the unlawful occupiers – in circumstances where they would effectively be rendered homeless – to constitute a breach of what 'limited' right of access to adequate housing they had realised for themselves.<sup>109</sup> Interestingly, the Court stated that the real issue in the case was the failure on the part of the state to take any steps to provide alternative accommodation to the unlawful occupiers who the Court considered to be 'in desperate need'.<sup>110</sup>

Referring to *Grootboom*, the Court stated that there was an unassailable obligation on the state to ensure that, at the very least, evictions are 'executed humanely'.<sup>111</sup> In the circumstances, it seemed painfully evident that the eviction could not be executed humanely without the state providing some form of alternative accommodation or land.<sup>112</sup> In fact, if the occupiers were evicted, they would have had nowhere else to go which would simply have resulted in them reoccupying the Modderklip land or occupying other vacant land, once again rendering them at risk of eviction. As a result, the Court held that the failure on the part of the state to fulfil its constitutional obligation to take pro-active steps to realise the right to housing of the occupiers 'leads ... to the conclusion that the state simultaneously breached its section 25(1) obligations towards Modderklip'.<sup>113</sup>

According to Judge Harms the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available by the state<sup>114</sup> and to require the state to pay constitutional damages to the property owner for the violation of property rights.<sup>115</sup>

*Modderklip* was thus crucial in a number of respects. Firstly, *Modderklip* emphasised the interconnected nature of the state's constitutional obligations, by emphatically recognising that the state's failure to provide adequate housing to the unlawful occupiers (a positive obligation on the state) also amounted to an infringement of the property owner's rights (a negative obligation on the state). Secondly, the case developed a novel way of balancing the conflicting rights and obligations that arise in eviction cases and affirmed the principle that an unreasonable state failure to give effect to the obligation to

provide, at least, basic temporary alternative shelter for unlawful occupiers who face homelessness constitutes a breach of constitutional rights.

The Constitutional Court's next real engagement with eviction law came in the case known as *PE Municipality*.<sup>116</sup> In that matter, the High Court ordered the eviction of a group of 68 people, including 29 children, from privately-owned land in Port Elizabeth. The municipality had sought the eviction after receiving a petition from 1600 residents of a neighbouring formal township, including the owner of the land. It had offered the occupiers alternative land in the nearby Walmer Township. But the occupiers refused to move because there was no guarantee that they would be given some measure of tenure security on the alternative land. The SCA set aside the eviction order on this basis, finding that the occupiers, many of whom had been evicted before, were entitled to expect that they would not be evicted again after their move to Walmer. The municipality then applied for leave to appeal to the Constitutional Court, seeking a ruling that it was not required to provide alternative accommodation as a matter of course when evicting unlawful occupiers. The basis of the application was somewhat curious, since, on the municipality's version, it had done exactly that, at least in this case.

In a wide-ranging and sensitive judgment, Justice Sachs reviewed the way in which the apartheid legal order – particularly through the Prevention of Illegal Squatting Act – deliberately sought to make eviction as easy as possible. The aim was to keep black people out of most urban areas, and to reduce them to the status of temporary guest workers in South African cities. He then characterised section 26(3) of the Constitution and PIE as an inversion of apartheid law, requiring unlawful occupiers to be treated with 'dignity and respect',<sup>117</sup> not as 'obnoxious social nuisances'.<sup>118</sup> The Constitution has thus substantially altered the law relating to evictions by recognising that the 'normal ownership rights of possession, use and occupation' are now offset by 'a new and equally relevant right not arbitrarily to be deprived of a home'.<sup>119</sup>

Justice Sachs held that Section 26(3) of the Constitution 'evinces special constitutional regard for a person's place of abode', acknowledging that 'a home is more

than just a shelter from the elements. It is a zone of personal intimacy and family security'.<sup>120</sup> While the Constitution and PIE do not provide that under no circumstances should a home be destroyed, a court should be reluctant to conclude that an eviction would be just and equitable unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending access to permanent housing.<sup>121</sup> Sachs held that it was not enough to show that a municipality has in place a programme designed to house the largest number of people over the shortest period of time in the most cost-effective way. In addition to being statistically successful, a municipality must show that its housing programme is sufficiently flexible to respond to immediate housing need. If that cannot be demonstrated through the ability to make land available to relatively settled occupiers facing eviction, then an eviction order can be refused.<sup>122</sup> The municipality's application was accordingly dismissed.<sup>123</sup>

The power of *PE Municipality* lay in its fusion of the conception of justice and equity under PIE, and the constitutional requirement of reasonableness set out in *Grootboom*. Whether it is just and equitable to order an eviction under PIE will normally depend on whether an occupier can find alternative accommodation and, if not, whether the state has taken reasonable measures to make accommodation available to occupiers who are unable to provide it for themselves. Although the implications of the judicial pronouncements made in the *PE Municipality* decision were still to be clarified in later cases, the state and private property owners were, or should have been, on notice that the days of quick and easy eviction orders were over.

The case of *Olivia Road*<sup>124</sup> was of particular importance to the development of eviction jurisprudence. The applicants in this matter were several hundred occupiers of two buildings in the inner city of Johannesburg, which were earmarked for refurbishment by a property developer. The City issued a notice in terms of section 12(4)(b) of the National Building Standards and Building Regulations Act 103 of 1977, which enabled it to circumvent the supposedly onerous provision in PIE and applied to the High Court for an eviction order in order to give effect to the notice.

In the High Court, Judge J Jajbhay dismissed the application on the basis that the City had failed to adopt a policy through which the occupiers could access affordable alternative accommodation. The High Court declared the absence of such a policy to be in breach of the City's constitutional obligations, and interdicted the City from evicting the occupiers until alternative accommodation was made available to them.<sup>125</sup> On appeal to the SCA, Judge JA Harms set aside most of the High Court's order, holding that the City's right to seek the 'evacuation' of buildings it considered unsafe was not conditional on it being able to provide alternative accommodation. The eviction order was reinstated.<sup>126</sup> Nonetheless, Harms held, the City did have a constitutional obligation based on *Grootboom* to provide emergency shelter to all those who requested it on eviction. He accordingly directed the City to open a register upon which the occupiers could register themselves for the provision of emergency accommodation once they were evicted.<sup>127</sup>

Fearing that they would be left homeless while the City compiled its register and identified emergency accommodation, the occupiers applied for leave to appeal to the Constitutional Court. There, the application turned on quite different considerations. Reluctant to delve into the deep questions of whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation, the Court instead focused on the absence of 'meaningful engagement' with the occupiers prior to eviction. It directed the City and the occupiers to meaningfully engage with each other in order to resolve the issue. After two months of intensive negotiations, the matter was finally resolved with the occupiers being offered and accepting accommodation in a building yet to be refurbished nearby in the inner city.

In the Constitutional Court, Judge Yacoob held that the aspects of the dispute relating to the constitutionality of the City's housing policy and eviction practices had become moot because of the agreement reached between the occupiers and the City. Nonetheless, the Court took the opportunity to develop and expand upon the concept of 'meaningful engagement' as constituent of reasonable state action required by section 26(2) of the Constitution.

Most significant steps in the implementation of housing policy, Yacoob held, must be taken after meaningful engagement with the people affected by it.<sup>128</sup> Where the state intends to remove or displace people from their existing housing, engagement is normally a prerequisite to the institution of eviction proceedings.<sup>129</sup> Engagement must be individual and collective,<sup>130</sup> presumably meaning that affected communities must be engaged as a group in relation to the impending removal, as well as at an individual and household level, in order to ensure that all relevant personal circumstances are taken into account in the process. Engagement must be undertaken without secrecy, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed.<sup>131</sup> Because no such engagement had been undertaken by the City in relation to the *Olivia Road* occupiers, Yacoob held that the eviction order issued by the SCA should be set aside.

The Court once again considered a large-scale eviction in *Joe Slovo*.<sup>132</sup> The case concerned a mass relocation of a settled community of 4000 households from the Joe Slovo informal settlement to the peripheral town of Delft in order to facilitate the N2 Gateway housing project.<sup>133</sup> The application was brought by a housing parastatal which sought to relocate the occupiers to temporary alternative accommodation. Although the parastatal initially indicated that 70 per cent of those relocated from Joe Slovo informal settlement would be provided permanent housing in the new development, the occupiers doubted the credibility of these claims as both the parastatal and the state had breached various 'promises' made to the occupiers. The Cape High Court authorised the eviction of the occupiers according to a timetable prescribed by the Court subject to the state reporting back every two months on the implementation of the order and the provision of alternative accommodation. The occupiers therefore appealed directly to the Constitutional Court.

In the Constitutional Court there were two main issues: First, the Court had to determine whether the respondents had made out a case for the eviction of the occupiers in terms of PIE. This meant that, at the time that the eviction proceedings were launched, the occu-

piers had to be ‘unlawful occupiers’ for the purposes of PIE. The occupiers thus argued that they had express or tacit consent to occupy the land and were therefore not ‘unlawful occupiers’. The second issue for determination by the Court was whether the state had, for the purposes of section 26, acted reasonably in seeking the eviction of the occupiers. This question was integrally related to the Court’s consideration of whether the eviction could be considered ‘just and equitable’ in terms of PIE.

The Court delivered five concurring judgments, which each dealt with these questions in different ways. Along with these judgments, the Court also wrote a joint judgment setting out an order. In relation to whether the occupiers were ‘unlawful occupiers’, and therefore fell under the purview of PIE, the judges agreed on differing grounds that, at the time of eviction, the occupiers were unlawful.<sup>134</sup> As to whether the eviction could be considered a reasonable measure in terms of section 26 of the Constitution, the judges each scrutinised the circumstances surrounding the relocation. While many laid significant emphasis on the long period of occupation and acknowledged that relocation is often traumatic and undesirable, generally the judges determined that the purpose for which the relocation was being pursued, namely the development of a housing project, rendered the relocation reasonable within the constitutional and legislative scheme.<sup>135</sup> In this regard, Judge Yacoob held that the ‘eviction constitutes a measure to ensure the progressive realisation of the right to the meaning of section 26(2) of the Constitution.’<sup>136</sup>

The Court in *Joe Slovo* exhibited a particularly deferential attitude to the state. On various occasions the judges indicated that the Court was an institutionally inappropriate forum to determine how the state should realise its section 26 obligations. This is particularly evident in the judgment of Justice CJ Ngcobo who states that ‘it is not for the courts to tell the government how to upgrade an area. This is a matter for the government to decide.’<sup>137</sup> The case was widely criticised for this deferential approach and for the failure on the part of the Court to properly assess the reasonableness of the government’s policy choices.<sup>138</sup>

Ultimately, the Court authorised the eviction subject to a set of strict requirements in relation to the state’s

provision of alternative accommodation in Delft. In doing so, the Court endorsed relocating the residents to temporary residential units (TRUs), setting out the specifications and nature of temporary accommodation to be provided in future, as well as a detailed timetable for the relocation.<sup>139</sup> In ordering that all existing and future TRUs had to comply with the certain minimum specifications or be of superior quality, the Court effectively gave minimum content to alternative accommodation provided by the state. The Court prescribed that TRUs had to:

- be at least 24m<sup>2</sup> in size;
- be accessible by tarred road;
- be individually numbered for identification;
- have walls constructed of Nutec;
- have galvanised corrugated iron roofs;
- be supplied with electricity by a prepayment electricity meter;
- be located within reasonable proximity of communal ablution facilities;
- make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- make reasonable provision for fresh water, which may be communal.<sup>140</sup>

The Court further stated that the state and the occupiers had to engage meaningfully about a range of issues related to the time and consequences of the relocation. This, the Court held, should include consultations relating to individual relocations of households having due regard to their details and personal circumstances; the time, manner and conditions of the relocation; the provision of transport; and information about the current position of individual residents on the housing waiting list.<sup>141</sup> Importantly, the Court also ordered that 70 per cent of the new homes that were to be built at Joe Slovo should be allocated to the former residents who were to be temporarily relocated to Delft.<sup>142</sup>

Another important case that came before the Constitutional Court was *Abahlali*.<sup>143</sup> This case concerned a legal challenge to the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act). Section 16 of the Slums Act empowered the MEC for Housing in KwaZulu-Natal to direct private

owners of unlawfully occupied land to institute eviction proceedings within a certain period on notice in the provincial gazette. If owners were unwilling to do so, the municipality would be compelled to bring eviction proceedings on its own accord. There were also fines attached to a failure to institute eviction proceedings.

Abahlali baseMjondolo (Abahlali), a shackdwellers social movement based in Durban, was particularly worried about the potentially severe consequences that the Slums Act could hold for those without security of tenure living in informal settlements. These fears were based on the mass slum clearances undertaken in Durban over the years, all without court orders. The Act clearly had the potential to lead to mass homelessness. These reservations led Abahlali to approach the Constitutional Court in an attempt to have section 16 of the Act declared unconstitutional.

The Constitutional Court found section 16 of the Act to be inconsistent with the right of access to adequate housing on three grounds. First, the provision precluded meaningful engagement which is an essential component of the housing process and has been read into section 26 of the Constitution.<sup>144</sup> The Court determined that if engagement took place *after* a decision to evict or relocate had already been taken, such engagement would not be genuine.<sup>145</sup> This effectively means that the requirement to meaningfully engage is crucial in determining whether an eviction is just and equitable. Second, the Court found that the provision violated the principle that evictions or relocations should only be considered a measure of last resort. Effectively, this means that the possibility of in situ upgrading of the informal settlement must be considered before the state can resort to evictions or relocation.<sup>146</sup> The final ground on which section 16 was found to be constitutionally invalid was that it undermined security of tenure by allowing eviction proceedings to be instituted without the safeguards contained in PIE.<sup>147</sup>

In *Blue Moonlight*,<sup>148</sup> the Court had to address more closely the concrete duties of a municipality where an ordinary common law eviction would result in homelessness. In this matter, 86 people faced eviction from a disused set of factory buildings in Saratoga Avenue, Berea, Johannesburg. The owner brought an eviction

application relying solely on the *rei vindicatio* (and elected not to utilise the procedures for eviction proceedings prescribed in the PIE Act).<sup>149</sup> The occupiers alleged and proved that an eviction would leave them homeless, and brought an application to join the City of Johannesburg to the proceedings, as a prelude to seeking an order that it provide them with alternative accommodation in the event of their eviction. The City, for its part, stated that it had, since the decision of the Court in *Olivia Road*, devised a policy to provide accommodation to people it removed from unsafe buildings from within its own resources, but denied any obligation to provide accommodation to occupiers facing eviction by a private landowner. The City stated that the obligation lay with provincial government, to which it had applied for funding in terms of the EHP, and been refused.

Taking their cue from *Grootboom* and *PE Municipality*, both the High Court<sup>150</sup> and the SCA<sup>151</sup> judgments declared unconstitutional the City's differentiation between people it evicted from allegedly unsafe properties, and those evicted by private landowners. Both *Grootboom* and *PE Municipality* made it clear that the state had an obligation to respond to the needs of people facing housing emergencies. *PE Municipality* made clear that the primary duty to do so lay with a municipality, even where occupiers were sought to be evicted from privately-owned land.

The City then applied for leave to appeal to the Constitutional Court. In its judgment, Judge Van der Westhuizen confirmed the SCA's findings in all material respects.<sup>152</sup> He found in particular that PIE limited the rights of owners to undisturbed use and enjoyment of their property.<sup>153</sup> If homelessness would otherwise result, section 26 of the Constitution and PIE require that an owner patiently wait to vindicate her property until the state has been given a reasonable opportunity to discharge its obligations, grounded in *Grootboom*, to provide alternative accommodation.<sup>154</sup>

The Court further found that a municipality is not entitled to cast its obligations on national and provincial government. It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on an absence of resources to do so if it has not at least acknowledged its

obligations and attempted to find resources to allocate to emergency housing projects.<sup>155</sup> This obligation becomes particularly apparent when one considers that municipalities are ideally suited to 'react, engage and plan to fulfil the needs of local communities.'<sup>156</sup> Moreover, a municipality cannot pick and choose which housing crises it responds to. Instead, it must prioritise its response to emergency housing situations in a reasonable manner. To differentiate between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of her homelessness is. Her need is the same.<sup>157</sup>

These principles were fleshed out in two decisions handed down just after *Blue Moonlight*. In *Skurweplaas*<sup>158</sup> and *Mooiplaats*<sup>159</sup> the Constitutional Court was dealing with two groups of people who had moved onto vacant land just outside Pretoria because they had been evicted or otherwise displaced from neighbouring informal settlements. Both groups of people had been resident on the land for very short periods of time (in contrast to the occupiers in *Blue Moonlight*, who had resided at Saratoga Avenue for periods of up to 30 years). The Court affirmed its decision in *Blue Moonlight* in all material respects, but added four important observations. First, the Court deplored the citation of the occupiers in both matters as 'invaders'. This description, the Court held, was 'emotive and judgmental' and undermined the occupiers' humanity.<sup>160</sup> Second, the Court took into account that, even though the occupation had only begun a relatively short period before eviction proceedings were instituted, the probability that an eviction would lead to homelessness meant that the provision of alternative accommodation or land was still required.<sup>161</sup> To ensure that the occupiers were not rendered homeless prior to the provision of alternative accommodation, the Court also required a linkage between the date of eviction and the date upon which the municipality should provide alternative accommodation.<sup>162</sup> Third, the Court took into account the owners' failure to demonstrate that they had any urgent or compelling use for the land unlawfully occupied.<sup>163</sup> This militated against ordering a speedy eviction without the provision of alternatives. Finally, the Court emphasised that courts have the power and the duty to

order municipalities to take steps to investigate and furnish information relating to their ability to provide alternative accommodation, in the event that it is found that a municipality's approach is unsatisfactory.<sup>164</sup> *Skurweplaas* and *Mooiplaats* finally spelt out in great detail the obligations on property owners and municipalities in relation to eviction proceedings.

In *Pheko*, the state sought to facilitate an eviction by utilising the Disaster Management Act 57 of 2002 (DMA).<sup>165</sup> In this case, the Ekurhuleni Metropolitan Municipality used the presence of dolomite beneath the Bapsfontein informal settlement as justification for the forcible relocation of a community. The municipality declared the area a 'local state of disaster' in terms of section 55(1) of the DMA, claiming that the dolomite instability posed an imminent threat to the lives of the community and therefore required their immediate relocation. The municipality's urgency seemed peculiar considering the fact that the dolomite had been discovered in the 1980s while the community had remained largely unaffected for the duration of occupation. Nonetheless, the municipality embarked on the relocation without a court order, founding the lawfulness of its action on the authority of the DMA. In response, the occupiers applied for an urgent interdict in the High Court to resist the removals. In the High Court, Judge Makgoba refused to grant the relief sought by the occupiers and justified the actions of the municipality by equating the situation of the community in Bapsfontein to the situation of a person 'burning in a fire and refusing to be rescued'.<sup>166</sup> The Court thus dismissed the application.

Left with no other recourse, the applicants appealed directly to the Constitutional Court. Here, the main question before the Court was whether the constitutional guarantee against eviction in section 26(3) of the Constitution permitted what would effectively amount to an eviction without a court order in instances where the state acted in terms of another legislative instrument. This issue arose from the municipality's argument. The municipality argued that the removal of the occupiers was lawful. In support of this assertion, the municipality stated that section 26(3) of the Constitution should be read disjunctively. If section 26(3) was read in this manner it would consist of two independent elements: a pro-

hibition on evictions without court orders and a prohibition on legislation permitting arbitrary evictions.<sup>167</sup> The municipality further argued that these two components could not be subordinated to one another, which meant that the constitutional provision permitted legislation to authorise evictions without court orders provided that such legislation did not permit arbitrary evictions.<sup>168</sup>

The Constitutional Court critically rejected the municipality's approach to section 26(3), stating that this interpretation would have the effect of inverting the constitutional provision.<sup>169</sup> According to the Court, section 26(3) must be read as prohibiting evictions without court orders in all circumstances, even when authorised by statute.<sup>170</sup> The Court also stated that the DMA should be interpreted narrowly, as granting this legislative tool wide ambit could adversely affect the rights in section 26.<sup>171</sup> This assertion arguably applies to other pieces of legislation that may negatively affect the right to housing.

A further point of contention for the Court was whether the removal of the occupiers amounted to an 'evacuation' for the purposes of the DMA. The Court considered the meaning of 'evacuation', finding that this implied a temporary relocation to a safe area after which residents would be allowed to return to their previous homes.<sup>172</sup> This was clearly not the intention of the municipality in relation to the Bapsfontein residents as the intention of the relocation was to permanently relocate the residents. This was evident from the fact that the municipality had demolished the residents' informal dwellings so that they would not return to the area. The Court indicated its disapproval for the municipality's use of the DMA for purposes other than the legislation was intended for.<sup>173</sup> As the Court stated, 'the powers concerned may not be used for purposes other than evacuation.'<sup>174</sup> This dictum illustrates that courts would be hesitant to rubber stamp de facto evictions effected by manipulation of the legal mechanisms for relocations, removals and evictions. Courts should thus not allow the state to evade the substantive and procedural protections afforded to occupiers in terms of section 26(3) of the Constitution and PIE by employing alternate legislation not designed to facilitate evictions.

Finally, the Court asserted that the High Court had failed to have regard to the 'relevant circumstances'

related to the relocation.<sup>175</sup> The Court set out a number of important factors which should have been considered by the High Court in the circumstances, including whether the disaster was sudden and warranted urgent relocation; whether the areas could be rehabilitated; whether the state entity had developed and implemented disaster management plans; whether the disaster had led to a loss of life or an imminent threat to life; whether alternative land had been made available or could reasonably be made available; and whether the length of occupation.<sup>176</sup> Had the High Court had due regard to these factors, it would have been clear that the relocation and demolition of the occupiers' homes could not have been authorised by the DMA and amounted to an infringement of section 26(3) of the Constitution.<sup>177</sup> As a result the Court ordered the municipality to provide land 'in the immediate vicinity of Bapsfontein' for the resettlement of the community within one year.<sup>178</sup>

The Constitutional Court again dealt with an eviction law in *Schubart Park*.<sup>179</sup> In this case, the Constitutional Court had to determine what could be considered an eviction for the purposes of section 26(3) of the Constitution. This case related to a state-subsidised residential complex in the centre of Pretoria, which was controlled by the City of Tshwane. During the late 1990s the City had continued to rent out units in the complex. But the City allowed the buildings to deteriorate and by September 2011 the City was largely unaware of who occupied the complex. On 21 September 2011, a number of residents embarked on a protest against the deplorable living conditions at the complex during which two localised fires broke out. As a result of the fires, a number of households were expelled from the building and denied further access to the complex. Over the week that followed, the other residents of the complex were also removed in a similar manner. By the end of September, between 3,000 and 5,000 individuals were effectively homeless.

After being removed, the residents immediately brought an urgent application before the North Gauteng High Court, seeking an order allowing them to re-occupy their homes. The Court refused to order such re-occupation, justifying this decision by relying on a conditional tender made by the City in terms of which

residents who met certain criteria and agreed to certain terms were offered temporary accommodation.

The residents then directly appealed to the Constitutional Court. In this Court, the residents argued (on the authority of *Pheko*) that the removal from their homes was unjustified and amounted to an unlawful eviction that did not comply with the requirements of section 26(3) of the Constitution, in that their removal had not been authorised by legislation or a court order made after considering all the relevant circumstances.<sup>180</sup> In acting in this manner, the City had disregarded various legislative instruments that provide for the removal, evacuation or eviction of persons living in unsafe buildings and had effectively circumvented the legal protections afforded to occupiers in terms of these instruments.<sup>181</sup>

The Court held that neither the conditional tender made by the City nor the High Court order amounted to justification for an eviction in terms of section 26(3).<sup>182</sup> This was due to the fact that the conditional tender only provided for occupation of the property to the residents who could prove their rights to occupancy and accept the conditions of the municipal tender. Those who could not prove a right to occupy or refused to accept the tender were left without a remedy. However, the Court found that the removal of the occupiers did not amount to a permanent dispossession of their homes as the dispossession was foreseen to be temporary in nature.<sup>183</sup> As the City provided that it would restore the complex for re-occupation by the occupiers once the buildings were safe, the removal did not amount to an eviction. The Court recognised that this finding may leave room for abuse in eviction proceedings. It thus stated that in instances where urgency dictates that restoration or re-occupation should not be ordered in circumstances such as these, the relevant court should make clear that such order would not lay the foundation for a lawful eviction under section 26(3).<sup>184</sup> The order before the High Court thus fell short of the protection afforded by section 26(3).

The Court further criticised the City's inadequate engagement with the occupiers. In particular the Court asserted that the City's unilateral 'top-down' approach, by the imposition of a conditional tender, was an inappropriate basis for reasonable engagement.<sup>185</sup> According

to the Court, this approach indicated that the City regarded the occupiers as 'obnoxious social nuisances', who contributed to 'crime, lawlessness and other social ills'.<sup>186</sup> Finally, the Court affirmed that meaningful engagement should take place at every stage of the removal and re-occupation process.<sup>187</sup>

In *Motswagae*<sup>188</sup> the Constitutional Court was once again faced with interpreting the meaning of 'eviction' in relation to section 26(3) of the Constitution. This matter related to construction work, authorised by the Rustenburg Local Municipality, on property occupied by the fifteen applicants, which the applicants argued interfered with their right not to be disturbed in the peaceful occupation and possession of their homes without a court order.<sup>189</sup> The municipality sought to redevelop the provincially owned land occupied by the applicants for the purposes of a housing development and set out to engage with the applicants in an attempt to facilitate their relocation to alternative accommodation. At some point, negotiations between the parties broke down and no final consensus was reached in relation to the redevelopment. In spite of this, the municipality contracted with a construction organisation and proceeded to embark on construction work on the property. In particular, the contractor bought a bulldozer onto the property and excavated land directly adjacent to an outer wall of a house occupied by one of the applicants, thereby exposing the foundations of the house.

The applicants consequently approached the North West High Court for an urgent interdict to prohibit the municipality, through its construction company, from further unlawfully disturbing or interfering with the applicants' peaceful possession of their homes. The High Court dismissed the application holding that the applicants would not suffer irreparable harm as they retained their right to privacy and to remain in their homes.<sup>190</sup>

After the High Court and SCA refused to grant the applicants leave to appeal, they appealed directly to the Constitutional Court. Here, the case turned on whether the guarantee against eviction enshrined in section 26(3) of the Constitution is 'sufficiently wide to ensure protection of the applicants in their occupation of their homes'.<sup>191</sup> The Court thus had to determine whether the right not to be evicted from one's home without a court

order could be read in a manner that would grant protection against other negative infringements of the right to housing. In this regard, the Court found that the provision did provide such protection. To hold otherwise would render the provision 'pointless and afford no protection at all'.<sup>192</sup> The Court thus held that an 'eviction' in terms of section 26(3) did not solely refer to the physical expulsion of someone from their home. Instead an 'eviction' also includes the infringement or obliteration of the 'incidents of occupation'.<sup>193</sup> In relation to the case before the Court, Judge Yacoob specifically stated that section 26(3) 'guarantees any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference'.<sup>194</sup>

The Court further lambasted the unlawful conduct of the municipality.<sup>195</sup> The Court determined that the municipality's actions amounted to a 'significant' interference of the applicants' peaceful and undisturbed occupation, to the extent that the intrusion 'constituted a form of eviction'.<sup>196</sup> In fact, the Court went so far as to say that the actions of the municipality had been engineered to 'achieve the eviction of the applicants through the back door'.<sup>197</sup> Such conduct by an organ of state is impermissible, unreasonable and unconstitutional.<sup>198</sup>

*Motswagae* is a relatively recent case, which has potentially far-reaching consequences. While the implications of *Motswagae* are still to be worked out, the case seems to have led to a progressively wide interpretation of section 26(3) by expanding the meaning of 'eviction' to include an infringement or obstruction of the composite elements of adequate housing. The case has consequently strengthened the protections afforded to home occupiers in relation to a broad range of negative obligations attached to the right to housing. Moreover, the case has also indirectly given substantive content to the right to housing in that it acknowledged that undisturbed and peaceful occupation was an essential component of the right to housing, thereby furthering an understanding of section 26(1) and (2).

Although the majority of housing cases before the Constitutional Court related to eviction law, the Court has also pronounced on actions which infringe the negative obligations contained in the right to housing in some other manner. Two cases in particular are important

here. These relate to execution of debt against residential property.

The right to execute against property is fundamental to the operation of the credit and banking system. Yet, it is open to abuse.<sup>199</sup> It seems evident that the sale of a very poor person's home for a trifling amount is an abuse of the rules of court and the common law which permits execution against property to recover debt. In the South African context of deep poverty and gross structural inequality, execution against a person's home may have an impact disproportionate to the interest a creditor has in recovering a debt. Unless properly controlled, it is an additional mechanism through which poor people can be unfairly deprived of access to adequate housing and excluded from full urban citizenship.

In *Jaftha*<sup>200</sup> the Constitutional Court was required to consider the appropriate constitutional response required to safeguard against the unjustified execution of debt against a person's home. The case concerned two sales in execution against immovable property that had been amalgamated into one. Ms Jaftha was an unemployed woman in ill health. She borrowed R250, repayable in instalments. When she fell behind with her instalments the debt was referred to an attorney, who obtained judgment against her for R632.45 plus interest and costs. Ms Jaftha had no moveables which could be executed against and as a result the execution was levied against her home, which had been acquired with a state subsidy. By the time of execution, the debt had ballooned to R7000.<sup>201</sup> Ms van Rooyen borrowed R190 to buy groceries. She was also poor and had acquired her home by inheritance. By the time her house was sold, her debt had ballooned to R1000.

By the time their case reached the Court, the sole issue remaining for determination was the constitutional validity of section 66(1)(a) of the Magistrates' Court Act 32 of 1994, which permitted an execution against a person's immovable property for the recovery of a debt if insufficient moveable property is found to satisfy a judgment debt. The High Court had found that section 66(1)(a) of the Act was not unconstitutional because, among other reasons, the right of access to adequate housing does not protect a person's ownership of a home. It only protects occupation, deprivation of which is regulated by PIE.<sup>202</sup>

Judge Mokgoro, in a unanimous judgment, held that security of tenure forms part of the negative aspect of the right of access to adequate housing.<sup>203</sup> Although Mokgoro does not expressly say so, it is impossible to make sense of the scheme of the decision in *Jafitha* unless it is accepted that ownership of one's home forms part of the exercise of the right of access to adequate housing. As one of the strongest forms of security of tenure, it must be understood as one of the range of interests protected by the right. As a consequence, a deprivation of ownership of one's home must be considered an interference with the negative aspect of the right of access to adequate housing. It is in this light that Mokgoro J's statement that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)'. One of those rights, it must be accepted, includes the common law right of ownership.

Once this is accepted, the question becomes one of justification. Applying section 36 of the Constitution, Judge Mokgoro enquired into the circumstances in which it would be permissible to execute against a person's home to recover a debt. Mokgoro considered a wide range of circumstances which would be relevant to the question of justification. These include the availability of alternative mechanisms to satisfy the debt, the degree of proportionality between the interest of the creditor in obtaining payment of the debt and the interests of the debtor in retaining ownership of her home, the circumstances in which the debt arose, the nature and size of the debt, the efforts made by a debtor to pay the debt off and the availability of a source of income from which a debt may be paid off.

The open nature of the enquiry and the wide range of circumstances to be taken into account require that the decision of whether to authorise execution against residential property is properly one for a judicial officer. To the extent that section 66(1)(a) of the Act authorised execution without judicial oversight, it was unconstitutional. As the statute did permit execution to be authorised by a clerk of the court, and not a Magistrate, Mokgoro declared the provision unconstitutional, and read in a proviso requiring execution to be authorised by a court, after considering all the relevant circumstances.

The reach of the Court's decision in *Jafitha* was disputed for several years. While the execution of all debts against immovable property in the Magistrates' Courts had now to be subjected to the *Jafitha* enquiry, execution against immovable property in the High Court carried on more or less as before. Indeed, many debts which fell within the monetary jurisdiction of the Magistrates' Courts were enforced in the High Courts, because there the Registrar was still empowered, in certain circumstances, to grant orders declaring immovable property executable.<sup>204</sup> An early attempt to extend *Jafitha* principles to execution in the High Court failed.<sup>205</sup> Finally, almost seven years later, the Court took up the issue again.

In *Gundwana*<sup>206</sup> the Court had to consider whether the *Jafitha* principles applied to mortgage bond agreements, or merely to other debts which were not specifically secured against a person's home. Elsie Gundwana was the proud owner of the only black-owned bed and breakfast establishment in George.<sup>207</sup> The establishment was housed in her extended home in Thembelethu Township. During 2003, she ran into difficulties repaying the bond she had taken out in order to extend the property. The bank called up the debt and obtained default judgment against her, together with an order declaring her home specifically executable in terms of the mortgage bond agreement. The order was obtained from the Registrar. The bank did not take further action in relation to execution for four years, during which time Gundwana restructured her payment plan with the bank and formed the impression that the bank's claim had been compromised and the default judgment had been abandoned. When she fell into difficulties again four years later, the bank executed upon the default judgment it had obtained in 2003 and sold her home to Steko Development.

When Gundwana's case reached the Court, the 'ultimate constitutional issue'<sup>208</sup> was described as whether a High Court Registrar was empowered to grant an order declaring a person's home specifically executable. It was argued on behalf of the bank that because Gundwana voluntarily placed her home at risk by putting it up as security for a debt, she had accepted that she would lose her property if she did not comply with the terms of

the bond agreement. Judge Froneman, for a unanimous Court, rejected this contention. He held that a debtor who places their home at risk does not thereby waive the right of access to adequate housing and the protections it affords, including the right to execution only under court sanction. Intriguingly, Froneman also held that a debtor does not agree that execution could be carried out 'in bad faith'.<sup>209</sup> The suggestion that section 26 precludes the exercise of a contractual power to cause execution against a person's home is entirely novel. It is nowhere to be found in *Jaftha* and it remains to be seen how, and if, this principle is developed in future cases.

In any event, we confine ourselves here to the observation that the waiver argument bears a striking resemblance to the reasoning of Brand JA in *Maphango*<sup>210</sup> – that, by entering into a contract a person limits her constitutional rights and subjects them to the strictures of the common law. But *Gundwana*, taken together with *Jaftha*, constitutes powerful authority for the opposite contention – that common law relationships will always be subject to constitutional control where they affect a person's ability to exercise a constitutional right. The question will always be whether the exercise of the right is reasonable and proportionate in the circumstances. In the case of execution against residential property, this determination will always have to be made by a judicial officer. The nature of the relationship between the debt and the property against which it is secured, together with the common law governing the arrangement, will always be important considerations in the decision-making process. They are not, however, determinative of whether execution should be permitted. Elise Gundwana's case was referred back to the High Court for it to balance these considerations out.

*Gundwana* emphasises that execution against a person's home must be a proportionate response to the failure to pay a debt, even if the debt is specifically secured on it. These decisions should, we consider, be seen as incidents of an evolving constitutional principle. This principle is that the exercise of private power which infringes on constitutional rights must have a legitimate purpose, and must be proportionate to that purpose.

### Meaningful engagement

One of the most interesting developments in the housing and eviction jurisprudence in South Africa is the creation of the requirement of 'meaningful engagement', which was first flagged in the *PE Municipality* case.<sup>211</sup> In this case, the Constitutional Court focused on the importance of engagement and mediation as important legal mechanisms in eviction proceedings, and housing policy more broadly.<sup>212</sup> In underscoring the usefulness of engagement and mediation, the Court stated that 'the procedural and substantive aspects of justice cannot always be separated'<sup>213</sup> and that in exercising their managerial functions to ensure just and equitable evictions, courts may have to be more 'innovative' in sculpting their remedies.<sup>214</sup>

The Court stated that an effective method of obtaining reconciliation between parties in a dispute would be to 'encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions'.<sup>215</sup> Mediation and engagement encourage the humanisation of the other parties to a dispute, furthering an awareness of each as an individual bearer of rights and dignity.<sup>216</sup> Moreover, the special nature of the interests involved in eviction proceedings mean that it would generally not be just and equitable to order an eviction if 'proper discussions and, where fitting, mediation were not attempted'.<sup>217</sup>

In the *Olivia Road* case, the Constitutional Court expressly developed and gave content to the concept of meaningful engagement. In that case, the Court made an interim ruling in terms of which it ordered the parties to engage meaningfully with one another in an attempt to reach mutually acceptable solutions to the issues raised before the Court and ways to improve the safety of the building in the interim. On their return, the Court gave reasons for its decision to order meaningful engagement and elaborated on what this form of engagement would entail. The Court stated that the obligation to engage meaningfully flowed from section 26(2) of the Constitution.<sup>218</sup> Meaningful engagement is therefore an essential component of a reasonable state response to the housing programme.<sup>219</sup> According to the Court, when a municipality evicts occupiers and homelessness could ensue, meaningful engagement is a requirement.<sup>220</sup> Courts are

then empowered to endorse the agreements reached between the parties in instances where those agreements are reasonable, thereby exercising due vigilance.<sup>221</sup>

Meaningful engagement means that the occupiers, owner and relevant municipality have to meaningfully engage on all aspects related to the eviction and the provision of temporary shelter to those who require it.<sup>222</sup> All the parties must set out to be genuine during the engagement process by acting reasonably and approaching the engagement in good faith.<sup>223</sup> Parties should engage about the consequences of a possible eviction, whether the municipality can alleviate some of the potentially dire consequences that result from eviction, the obligations of the municipality in relation to any possible eviction, and how and when the municipality should fulfil its obligations.<sup>224</sup> Of particular importance in meaningful engagement is the need to address questions of homelessness that may ensue, potential temporary measures that may stave off homelessness (including sub-market leasing) while the state provides alternative accommodation, whether the owner's interests could be vindicated without an eviction order being granted, or whether the owner could contribute to the efforts of the state to provide an alternative.<sup>225</sup> Engagement must be aimed at arriving at mutually acceptable solutions.

The various judgments in the *Joe Slovo* case underscored the importance of meaningful engagement to any housing project, especially when relocation or eviction is pursued to facilitate such a project. Most of the Court criticised the insufficient state engagement with the community.<sup>226</sup> In particular, Judge Sachs denounced the 'top-down' approach to engagement adopted by the state, in terms of which state officials would unilaterally make decisions without consultation or inclusion of the community.<sup>227</sup> This approach was in conflict to Judge Yacoob's more deferential approach. According to Yacoob, the state was only obliged to ensure that it reasonably engaged with the occupiers.<sup>228</sup> This means that although individual and careful engagement with each person or household might be desirable, the engagement between the parties in eviction proceedings should not be devoid of 'realism and practicality'.<sup>229</sup> Despite the Court's recognition that state engagement was insufficient, the Court allowed the eviction and insisted on the

parties meaningfully engaging about the date and conditions under which the relocation would take place. It may be argued that this watered-down version of meaningful engagement sits in stark contrast to the Court's earlier pronouncements in *Olivia Road*.

The obligation to meaningfully engage provides potentially significant protections for unlawful occupiers facing evictions and has far-reaching consequences for state decision-making in eviction proceedings. Despite the potential benefits of this concept, there is a very real risk that meaningful engagement could become 'a purely procedural "box to tick"', thereby circumventing the quality and purpose of engagement.<sup>230</sup> This approach to engagement has been considered by the Constitutional Court on two occasions. In *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)*<sup>231</sup> the Court determined that if engagement took place *after* a decision to evict had already been taken, the engagement would not be genuine.<sup>232</sup> Moreover, proper engagement would include a comprehensive assessment of the needs of the affected community.<sup>233</sup> In *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality (Schubart Park)*<sup>234</sup> the conditional tender made by the City of Tshwane in terms of which residents who met certain criteria and agreed to certain terms were offered temporary accommodation, was held to form an inadequate basis for proper engagement.<sup>235</sup> Specifically, the Court criticised the 'top-down' premise from which the City proceeded, in terms of which the City had unilaterally predetermined all the conditions.<sup>236</sup> The Court further affirmed the principle that engagement should take place at every stage of the eviction and housing process.<sup>237</sup>

### The right to housing's impact on private property owners

In *PE Municipality*, the Court alluded to the fact that an owner's right to property could be limited in instances where evictions may lead to homelessness, by emphasising the fact that the constitutional rights require a balancing of the property rights in section 25 of the Constitution and the right of access to adequate housing in section 26 of the Constitution. This reinforced the notion

that unlawful occupiers now have considerable protection afforded to them in terms of their section 26 rights.

This position was expressly confirmed in *Blue Moonlight*. In this case, the Court dealt with the rights of a private owner of property that is unlawfully occupied and the obligations of a municipality to provide alternative accommodation to occupiers if they were evicted. The court affirmed that the private owners' property rights (protected in terms of section 25 of the Constitution) could, in circumstances where an eviction leads to homelessness, conflict with the occupiers' right of access to adequate housing (as protected by section 26 of the Constitution).<sup>238</sup> As a result the protection against arbitrary deprivation of property in section 25 should be balanced by the protection against arbitrary eviction in section 26(3).<sup>239</sup> The right of access to adequate housing may thus temporarily limit the right to private property.<sup>240</sup>

Unlawful occupation results in the deprivation of property in terms of section 25. But such deprivation may pass constitutional scrutiny if it is mandated by legislation and is not arbitrary.<sup>241</sup> In *Blue Moonlight*, the Court also addressed the question whether the eviction was just and equitable in terms of PIE. This suggests that if a court refused to authorise an eviction on the grounds that such eviction was not 'just and equitable' in the circumstances, such refusal would amount to a legitimate limitation of the right to property in terms of section 25 of the Constitution.<sup>242</sup>

The Court in *Blue Moonlight* considered an open list of factors to determine whether an eviction would be just and equitable given the circumstances. These factors include the length and duration of occupation by the occupiers (some of the occupiers had been in occupation for considerable periods of time), whether their occupation was once lawful, whether the owner was aware of the occupiers when purchasing the property, whether the eviction would lead to homelessness, and whether there is a competing risk of homelessness on the part of the private owner of the property.<sup>243</sup> This led the Court to conclude that owners may have to be patient while their ownership rights are temporarily restricted by unlawful occupation in situations where evictions may lead to homelessness.<sup>244</sup>

This nuanced position was further etched out in *Skurweplaas*. In that case, the Court specified that it would not be just and equitable for a court to authorise an eviction without ensuring that such eviction would not lead to homelessness prior to the provision of alternative accommodation.<sup>245</sup> The Court thus stated that it is necessary to require a linkage between the date of the eviction and the date upon which the municipality must provide alternative accommodation to ensure that vulnerable occupiers are not rendered homeless in the interim.<sup>246</sup>

In *Skurweplaas* and *Mooiplaats* the Court further confirmed the approach taken in *Blue Moonlight*, namely that the right to ownership cannot be regarded as wholly unqualified.<sup>247</sup> Instead the Court found that owners may have to be patient while their ownership rights are temporarily restricted until alternative accommodation could be provided.<sup>248</sup> Finally, the Court also considered the fact that the owner of the property was not going to use the property 'gainfully in the foreseeable future'.<sup>249</sup> This would act as a factor militating against a speedy eviction.<sup>250</sup>

These are not the only limitations on ownership that have been brought about by the right of access to adequate housing. In *Maphango*,<sup>251</sup> the Constitutional Court had to consider the impact of section 26 on the landlord-tenant relationship, specifically in relation to the unfettered right of landlords to terminate a lease on notice. The landlord in the present case terminated the leases of poor tenants and invited them to enter new leases, on the same terms, but at significantly increased rental (between 100 and 150 per cent increases). The tenants approached the Rental Housing Tribunal to have their lease terminations under these circumstances declared an 'unfair practice'. However, before the Rental Housing Tribunal could deliver its ruling, the landlord applied for the tenants' eviction. The Constitutional Court determined that the right of access to adequate housing has horizontal application between private persons, but on the facts this application is effected through the medium of the Rental Housing Act.<sup>252</sup> The Court thus focused on and applied the Act, despite the applicants not relying on the Act explicitly, as a vehicle to inform public policy. The Court stated that regardless of the manner the appli-

cants relied on the Act, the case could not be decided without it.<sup>253</sup> This is because the Court held that the Act ‘superimposes’ a comprehensive scheme of regulation on the landlord tenant relationship.<sup>254</sup> The Act provides a ‘complex, nuanced and potentially powerful system for managing disputes between landlords and tenants.’<sup>255</sup>

Crucial to the Court’s reasoning was the concept of ‘unfair practice’. The tenants relied on provisions in the Act prohibiting ‘exploitative rentals’ and provisions on the Unfair Practices Regulations<sup>256</sup> prohibiting ‘oppressive or unreasonable conduct’. The Court contended that the Act should be read to preclude unfair lease terminations.<sup>257</sup> In deciding this, the Court held that the concept of unfair practice does not require incessant or systemic conduct, but could include a single act such as a lease termination.<sup>258</sup> *Maphango* therefore limits an owner’s property rights to the extent that such owner is now obliged to act reasonably and fairly in a landlord-tenant relationship.

The limitation of ownership rights is not permanent or irreversible however. It is temporary in nature. Moreover, such limitation may, in cases where the state unreasonably fails or refuses to provide alternative shelter, entitle the owner to compensation from the state.<sup>259</sup>

### The issue of executive non-compliance with court orders for alternative accommodation following the *Blue Moonlight* judgment

Following the *Blue Moonlight* judgment requiring the City of Johannesburg to provide alternative accommodation in the wake of an eviction by Blue Moonlight Properties, there has been a shocking failure on the part of the City of Johannesburg to uphold various court orders (that had stacked up while waiting for the *Blue Moonlight* judgment to be handed down by the Constitutional Court) for the provision of alternative accommodation pending eviction of low-income residents by private landlords. These cases include *Chung Hua Mansions*<sup>260</sup> and *Hlophe*,<sup>261</sup> all cases currently being litigated by legal non-governmental organisations (NGOs) in order to get the City of Johannesburg to try to provide court-ordered alternative accommodation to desperately poor residents of Johannesburg’s inner city being evicted by private landlords. In each case the City has delayed processes,

missed court deadlines to file papers and manifestly failed to meaningfully engage with the residents to discuss the alternatives, admitting on record that it had no accommodation available.<sup>262</sup> This has necessitated lengthy and repeat litigation and has recently resulted in a new tactic among litigating NGOs, of holding municipal authorities directly responsible for the non-compliance with court orders.

Thus, in the case of *Hlophe*, an application for enforcement of the *Chung Hua Mansions* order to provide alternative accommodation, SERI has asked the court to declare the Executive Mayor, the City Manager and the Director of Housing of the City of Johannesburg, in their respective capacities, statutorily obliged to ensure that the City complies with the *Chung Hua Mansions* order granted on 14 June 2012 (in terms of which the City was meant to have provided alternative accommodation to the residents of Chung Hua Mansions as close as possible to their current location by no later than 30 January 2013, but has not). This litigation is ongoing but signals a worrying trend for the government to ignore court orders, significantly undermining the right of poor people to adequate housing. This trend also signals the need for human rights lawyers to move away from a largely reactive approach to housing litigation and to actively strategise around proactive legal options to ensure that the government complies with its housing-related positive obligations, particularly in the context of the alternative accommodation it offers to households facing evictions.

### Systemic human rights-related problems

Undoubtedly, great advances have been made in line with the rights-based frameworks set out above to extend basic water services to poor households in South Africa. However, a number of systemic problems remain that compromise the enjoyment of the right of access to adequate housing, which are analysed here across human rights-related axes.

#### Housing availability

Despite the impressive delivery of over a million subsidised houses or housing units since 1994, there are still

substantial housing-related backlogs which are, in fact, increasing rather than decreasing due to natural population increases as well as rural-urban migration.<sup>263</sup>

Beyond the backlog issue per se, housing delivery has been undermined by enduring quality-related issues (discussed below), as well as systemic problems with the approach and execution of housing programmes and practices. The three main availability-related challenges are dealt with here: evictions and the absence of emergency housing programmes to provide appropriate alternative accommodation; problems with the RDP house allocation process; and eradication of, or prohibition on the establishment of new, informal settlements. These factors combine to undermine the provision of housing, meaning that there is a substantial unmet demand for low-cost housing that is not being addressed.

Regarding evictions and the failure to provide alternative accommodation, although this paper focuses on urban areas as the site of the main thrust of both population movement and public housing intervention, in the context of evictions it is worth noting that in the decade after 1994 over a million people were evicted from commercial farmlands.<sup>264</sup> This process has undoubtedly added to 'the pace and scale of movement towards', as well as the pressure on South Africa's urban areas.<sup>265</sup> There has not been a comprehensive study of the number of evictions in urban areas since 1994.<sup>266</sup> However, it is evident (not least from the scale of litigation opposing proposed evictions) that up until – and indeed after – the landmark cases on evictions such as *PE Municipality*, *Olivia Road*, *Pheko*, *Blue Moonlight* and *Schubart Park*, that evictions from urban areas have continued to take place without the provision of alternative accommodation as now required by law and housing jurisprudence.

As pointed out in 2011, 'it has not been until relatively recently that Parliament and the courts have begun to share principles which aim to manage and control the practice of eviction' and 'the state, especially South Africa's municipalities, has been slow to reformulate policy and adapt practice to cater for these changes in law'.<sup>267</sup> Indeed, over a decade after the *Grootboom* case and the National Housing Code made it compulsory to have emergency housing programmes catering for the most vulnerable groups, it is not clear how many of

South Africa's municipalities have emergency housing programmes that provide temporary shelter for evicted people who would otherwise be homeless. At the heart of the evictions problem, according to Stuart Wilson, lies 'fundamental disagreement about what developmental role the state generally and planning law in particular is supposed to perform'. At the crux of the disagreement is the fact that, notwithstanding national policies and laws, traditionally, 'municipalities have conceived of their role as being merely to ensure that building regulations are complied with and health and safety by-laws are enforced' – in this scenario, eviction has 'often been a key means of enforcement'.<sup>268</sup> This schizophrenia, particularly at the local government level, raises concerns about the devolved local government accreditation scheme set out above.

That the government continues to use evictions (often without a court order) to pursue its own formal plans for cities regardless of the homes and lives of poorer residents is highlighted in the recent actions by eThekweni Municipality, which, during September 2013, began demolishing shacks and attempted to evict the residents of Cato Crest informal settlement with a bogus court order and in the face of numerous interdicts and court challenges.<sup>269</sup>

Like disconnections of water supply to households that cannot afford to pay water bills (as discussed in the FHR position paper on water by J Dugard), the enduring practice of evicting (whether by public or private landowners) poor households that cannot afford market rates for housing without government provision of alternative accommodation seriously compromises the national government's efforts to ensure housing for all, as well as affected households' rights to adequate housing. Further frustrating the mission to ensure adequate housing, and also indicative of the government's desire to privatise housing, is the emerging trend of governmental non-compliance with court orders for alternative (publicly provided and managed) accommodation as witnessed in the City of Johannesburg. As outlined above, NGOs have had to go back to the court several times to ensure compliance with orders for the government to provide alternative accommodation ahead of evictions

by private landlords. Such failure by the executive to uphold court orders is a deeply worrying development.

Moreover, even where there are emergency housing programmes<sup>270</sup> – often achieved as a result of repeat litigation such as by litigating NGOs in the City of Johannesburg – it is typically inadequate to meet the demand and in the City of Johannesburg comes with numerous rights-related problems including gender segregation and draconian rules, e.g., lockout during daylight hours (these aspects are discussed below). Thus, as highlighted in ongoing litigation, all emergency shelter rooms provided by the City of Johannesburg are currently occupied with no indication of when or if further emergency housing places will be provided.<sup>271</sup> It is also highlighted by litigation against eThekweni Municipality regarding its policy of evicting people to transit camps and leaving them there for years on end.<sup>272</sup>

Beyond evictions and emergency housing (or the lack thereof), the two major availability-related fault lines relate to problems with the government's RDP housing programme and a failure to resolve the question of what to do about informal settlements. This has resulted in a trend towards attempting to prevent and eradicate informal settlements rather than to embark on in situ upgrading in concert with the residents.

The government's preoccupation with formality and ownership – as exemplified by the provision of low-density RDP houses – has meant that housing provision has been a very slow, expensive and highly bureaucratic process that has also suffered from corruption and, perhaps inevitably, failed to address housing needs. There are several reasons for this, all of which undermine the government's ability to deliver adequate housing on the scale required. One of the main challenges is that there is widespread misunderstanding – as exacerbated by the opacity of the processes and a paucity of information provided to hopeful beneficiaries, discussed below – about the various highly complicated housing allocation databases operated nationally, provincially and at the local level as discussed above. Confusion over the various systems for allocating houses has led to the popular perception that there is a 'housing queue' or 'waiting list' that operates in a straightforward manner, to allocate the first ten houses built to the first ten names on the list.

However, as highlighted in a recent report, such assumptions 'appear to be wrong and the housing "waiting list" does not exist or function in any way that it is understood to exist or function.'<sup>273</sup> Rather than operating like a first-come first-served waiting list, allocation systems are highly idiosyncratic and discretionary, and utilise complicated criteria including location.<sup>274</sup> They also engage sometimes contradictory processes. For example, in an effort to speed up delivery, since 2001 payment of subsidies to developers for houses has been de-linked from the beneficiary selection and approval processes, meaning that developers can be paid for building houses that are not yet allocated to beneficiaries – one of the consequences of this practice is that 'state-subsidised houses are built with no specific beneficiaries in mind',<sup>275</sup> rendering the newly built homes vulnerable to unauthorised occupation (so-called 'queue-jumping').

Discounting the inordinate amount of time potential housing recipients spend on housing demand databases, nuanced methods of allocation are not necessarily problematic. However, in the absence of transparency and information, they do lead to misunderstanding and frustration, and provide a cover for corrupt allocation practices. Indeed, given the opaqueness of the systems and the large amounts of money involved in housing developments, there is much potential for graft and there has been a high degree of corruption and fraud experienced in the allocation of subsidised houses, as well as in the public tender processes for housing developments. In 2005, an Auditor-General's audit report was tabled before the Minister of Housing that raised serious queries about the approval and allocation process of housing subsidies at provincial housing departments.<sup>276</sup> The report identified a number of loopholes in the allocation of housing subsidies processes, especially regarding subsidy approvals to government employees earning in excess of the housing subsidy threshold. This was verified by comparing the housing applicant data on the HSS with the electronic government personnel salary database to identify instances of subsidy approvals to government employees who earned more than R42 000 per year.<sup>277</sup> Other problems encountered included:

- subsidy approvals to applicants under the age of 21 years in contravention of the National Housing Code;
- subsidy approvals to applicants with invalid Identity Document numbers;
- duplicate subsidy approvals for a specific property;
- manual overrides of the HSS in the approval of housing subsidies (all users and administrators had the authority to override the provincial HSS); and
- approved housing subsidies not listed on the NHSD. <sup>278</sup>

The findings were so serious that, in June 2006, a meeting was held with members of the Standing Committee on Public Accounts (SCOPA), members of the Parliamentary Portfolio Committee on Housing and officials from NDoH to discuss it further. <sup>279</sup> And, on 25 April 2007, the President mandated the Special Investigating Unit (SIU) to undertake an investigation into 'any fraud, corruption and maladministration in respect of the development and delivery of low-cost housing in South Africa through the national Department of Housing, the provincial departments of housing, the former housing development boards and corporations and local authorities and their appointed agents'. <sup>280</sup> A five-year service level agreement was signed between the SIU and NDoH to cleanse the national housing database of disentitled housing subsidy beneficiaries, recover losses from fraudulent beneficiaries, identify weaknesses in the HSS and make recommendations on improving systemic deficiencies through tighter policies and better control mechanisms, as well as to institute corrective action including civil, criminal and disciplinary action. <sup>281</sup> According to the SIU's 2010/2011 Annual Report, such investigations had resulted in 1,291 acknowledgement of debt forms being signed and a total of 625 unlawful beneficiaries were arrested, and 528 beneficiaries were convicted. <sup>282</sup>

As a result of this process, the NDoH has made some improvements to the HSS including introducing the necessity for all applications to be authorised at a second level by a senior official to prevent fraudulent manual overrides of the system by junior officials, as well as instituting better verification processes. <sup>283</sup> However, despite

these reforms, problems with the subsidy and database systems persist. For example, in March 2012, gross irregularities in the Gauteng Department of Local Government and Housing emerged in a provincial SCOPA report in relation to the allocation of over R7 million that is 'related to housing subsidies paid to beneficiaries not appearing on the Housing Subsidy System'. <sup>284</sup> The report indicates that in Gauteng fraud and corruption in relation to housing allocation is rife. <sup>285</sup> In late-2013, responding to widespread problems with the allocation of subsidised houses, the Public Protector began a systemic investigation into the delivery of RDP houses across the country.

Corruption, maladministration and fraud not only siphon off funds meaning that there is less public money available to provide housing, but such activities also frustrate attempts to ensure rational allocation of houses to the most needy beneficiaries. They also contribute to a widespread perception that the allocation process is political and that homes are allocated in return for political support. The bottom line is that, as a result of such activities, fewer homes can be provided for the same amount of funds.

It is also worth noting that despite the government's focus on formal title, the process of registering beneficiaries' titles has been extremely slow and ineffective, meaning that in many cases title has not been conferred as it should have been, leaving recipients in ownership limbo and vulnerable to having their home 'hijacked' or re-allocated. The murky world of RDP titles evidenced in the significant discrepancies between the number of subsidies granted and the number of formal titles received – the figures suggest that, 'potentially, over 1.5 million housing subsidy beneficiaries who received a state housing asset have not had the house registered in the Deeds Registry and do not have formal title'. <sup>286</sup>

Moreover, contrary to the policy that attempts to lock beneficiaries into not being able to sell their RDP house for eight years, <sup>287</sup> it is clear that 'a very high percentage of people who actually receive state-subsidised houses engage in informal transfers, either renting or selling their houses for cash, and move back to shacks in backyards or informal settlements to be close to economic and social opportunities', <sup>288</sup> a reality that attests

to the complexities of the housing crisis, and calls into question the premise of the RDP programme. Ultimately, regardless of various efforts to reform the allocation process, households still wait many years and even decades to be allocated a home. Indeed, in a recent focus group, one participant said that registering one's name on a waiting list or demand database has become 'a rite of passage for people when they turn 18' but there is no sense of how long they will wait or what options might be available to them.<sup>289</sup>

Possibly because of the complexities and problems entailed in the RDP housing allocation process, and perhaps signalling a nascent shift in the focus on private title, from 2005 there has been a consistent decrease in the number of state-subsidised houses registered 'and this is continuing and becoming worse'.<sup>290</sup> This, combined with evidence that the number of housing opportunities being created by government is declining and the achievement of targets is 'very low',<sup>291</sup> indicates that the government might be shifting its focus away from the provision of RDP houses, suggesting the need to reassess needs and solutions in consultation with hopeful beneficiaries, social movements and housing-related civil society organisations.

Regarding the complexities of allocation processes per se, it is noteworthy that in 2002 eThekweni Municipality decided to scrap all existing housing waiting lists in favour of a project-based register developed for each new subsidised housing project of any kind (including informal settlement upgrading) and now operates a register specifically for each project and only for the duration of the project. The municipality considers this to be a fairer, more rational and more transparent way to allocate housing opportunities.<sup>292</sup>

Finally, turning to the practice regarding informal settlements, notwithstanding policy directives to the contrary, the government's focus on formal titling has also fostered a reluctance towards accepting the presence of informal settlements. This has resulted in a prohibition on new informal settlements, adding to housing-related pressure, as well as the relocation of informal settlement residents (such as those in the *Pheko* litigation) further away from urban centres, as discussed under physical accessibility below.

How to deal with informal settlements, in which a conservative estimate of 1.2 million households (or ten per cent of the population) live,<sup>293</sup> has been an enduring challenge of the post-apartheid era. BNG recognises the need to shift the official policy response to informal settlements from one of 'conflict or neglect' to one of 'integration and co-operation, leading to the stabilisation and integration of these areas into the broader urban fabric',<sup>294</sup> and this approach is consolidated in programmes such as NUSP and UISP. Yet, the reality is far from these prescriptions. Marie Huchzermeyer has pointed out that notwithstanding being formally in favour of in situ upgrading, the government's dominant approach remains to try to eradicate informal settlements.<sup>295</sup> This has involved a prohibition on new informal settlements, forcing people into backyard shacks and the kinds of inner-city buildings that people are often evicted from – perpetuating a cycle of insecure tenure, as well as, ironically, entrenching informality. Huchzermeyer points out that 'active informal settlement eradication coupled with land invasion control has repressed ordinary people's attempts to defy the exclusionary formal city' in South Africa but that, due to large unmet demand for well-located housing, these practices have not stamped out informality – because people have to live somewhere, the number of backyard shacks, especially in Johannesburg, is now more than double the number of shacks in informal settlements.<sup>296</sup> To date, this mushrooming of often cramped and under-serviced backyard shacks has occurred under the government's radar. Yet, this phenomenon warrants further attention as it is unlikely that backyard shacks provide an optimal solution to South Africa's low-cost housing deficits.

#### Accessibility (physical and economic)

Despite the Constitutional Court's reference to the importance of location in housing cases such as *Blue Moonlight*, and notwithstanding both BNG's and the CESCRC General Comment 4's emphasis on the location of housing initiatives, there is still insufficient attention to the issue of the location of housing in government practice.<sup>297</sup> Thus, while the government acknowledges that the response to the crisis of housing 'must be innovative and diverse', and not focused on only 'the numbers

that must be built,<sup>298</sup> this target-driven approach, which has replicated the distorted apartheid geography, has dominated.

The overwhelming thrust of housing programmes – mostly unmediated by policies such as Breaking New Ground that emphasise unlocking well-located land – has been that of RDP housing, which is typically built in greenfield sites far away from urban centres, on the periphery where land is cheaper. And the government's focus on formalised private ownership with its concomitant reluctance to accept informal settlements has meant that – although BNG and other policies outlined earlier advocate in situ upgrading of informal settlements in desirable locations and only recognise relocation as a last resort – upgrading initiatives are often pursued through the relocation of vulnerable communities even further away from urban centres.<sup>299</sup>

As highlighted by the National Planning Commission, such practices have resoundingly failed to address the apartheid-inherited spatial inequality in South Africa's towns and cities,<sup>300</sup> reinforcing spatial segregation and the isolation of the poor from livelihood opportunities and social services.<sup>301</sup> Such practices also obviously fundamentally compromise the accessibility component of the right to housing. Indeed, South Africa's racialised spatial distribution remains largely the same – both in terms of the rural-urban divide but also in terms of location in and around urban areas.<sup>302</sup>

In May 2013, the revised Finance Linked Individual Subsidy Programme (FLISP) was launched by the DHS. The FLISP is designed to increase affordability levels to aspirant first-time homeowners who earn between R3500 and R15 000 per month and qualify for home loan finance from accredited banks. FLISP interventions either reduce the initial mortgage amount, making the monthly repayment to banks more affordable (FLISP used towards a deposit), or augment the shortfall between the qualifying amount and purchase price of the property (FLISP used as a top-up to a home loan). The maximum financed property price (for existing or new houses) under FLISP is R300 000 and it is available to first-time homeowners only.<sup>303</sup> FLISP is implemented by the National Housing Finance Corporation (NHFC) and is meant to be rolled out in conjunction with govern-

ment's Mortgage Default Insurance (MDI), which mitigates the risks taken on by the banks. Though introduced in 2010, the MDI has still not been implemented due to delays in the approval process.

In 2013/2014 the estimated number of FLISP units to be developed (or sourced from the open market) is 7900.<sup>304</sup> As of August 2013, however, only 195 FLISP subsidies have been approved (138 of which were in Gauteng). The NHFC has identified the following challenges with the FLISP: delays in the conclusion of the Implementation Protocols with provinces; provinces do not have the capacity to manage and co-ordinate the programme; administration challenges given the different approach to processing applications and the slowness of the HSS; delays in concluding memoranda of understanding with the banks due to the sale restriction provision in terms of Section 10A and 10B of the Housing Act and the risk it places on banks; and, finally, the high levels of indebtedness, impaired credit records and inadequate disposable income of targeted groups (public and civil servants being the main target group).<sup>305</sup>

Thus, regarding economic access, although there have been some attempts by the government to encourage banks to provide financial loans to lower income households, with an unemployment rate of above 30 per cent and a worrying practice of bank foreclosures on housing loans as illustrated in the *Gundwana* case outlined above, bank financing of private homes remains a largely elite preserve.

In terms of rental properties, in most urban areas, and particularly metropolitan municipalities, market-related rentals are unaffordable for low- or no-income households. This would seem to suggest a need for rent control. However, the Rental Housing Act repealed the Rent Control Act 80 of 1976, which means that rent control no longer exists. Instead, notwithstanding the recent limits placed on landlords' abilities to charge what they want for rental housing as introduced following the *Maphango* litigation, for the most part the market determines rental housing prices. This means that to the extent that the government has intervened to subsidise rental housing – which, probably due to the focus until recently on the provision of RDP houses, is woefully inadequate to meet the demand,<sup>306</sup> especially in the big-

ger cities such as Johannesburg – it has done so by attempting to provide subsidised rental housing through its social housing programmes, as managed through the SHRA. One of the main problems with the social housing programmes is that, on their own terms, the few social housing projects<sup>307</sup> that exist (in cities such as Johannesburg) are aimed at the upper lower income market (households that earn between R3500 and R7500 per month) and are self-evidently unaffordable to the lowest income households.

Moreover, the rate of delivery of such rental housing has been dismal. According to the DHS, as of September 2013 it had provided a total number of 33 020 affordable rental units, representing 41.3 per cent of the total target of 80 000 units by 2014. According to the DHS, if the units built in terms of the USDG are counted, then the figure increases to 37 189 units (46.5 per cent of the 2014 target). If private rental units delivered during the period are counted (10 368 units) then the total number delivered is 47 557 units representing 59.4 per cent of the 2014 target. To date, the Gauteng province has delivered 10 678 units to date, which is 55.5 per cent of its 2014 target. The inclusion of private sector rental housing has been questioned by Parliament in the past, as DHS does not have a national private sector strategy, despite being requested to present one. According to the DHS's 2012/2013 Annual Report, a national private sector strategy to guide the implementation of private rental housing was meant to be finalised and submitted for approval, however this has not occurred. The department has said that it does not have adequate budget to meet the target of 80 000 units, and would probably settle for 70 per cent of the target achieved.<sup>308</sup>

In the meantime, it is clear that the existing social housing projects are insufficient and too expensive to address the demand for low-income residents. So, while celebrating new initiatives – for example, on 12 November 2013 an inner-city development company (The Affordable Housing Company or Afhco) announced that, 'in a first' for Johannesburg, it was going to convert 470 units for earners of around R3750 per month who will be charged R1700 to live in rooms with communal bathrooms<sup>309</sup> – it is important to highlight that there is still no formal accommodation available for the approxi-

mately 51 per cent of the City's population with a household income of below R3200 per month. In recent court papers, the City of Johannesburg, as the largest metropolitan municipality in South Africa, acknowledges an 'urgent need' for a rental housing sector that caters for the rental range of between R300 and R600 per month.<sup>310</sup>

Finally, regarding attempts to ensure that private landlords do not unilaterally dramatically escalate rentals such as in the *Maphango* case, it is worrying that there are not yet Rental Housing Tribunals in all the provinces – indicating a need for the Rental Housing Amendment Bill to be passed to ensure that there are Rental Housing Tribunals in all provinces. Further, there is a need for the Minister to develop a national policy framework and norms and standards, as mandated in section 2(3) of the Rental Housing Act, in order to guide Rental Housing Tribunals when making rulings on 'exploitative rentals'. Rental Housing Tribunals currently struggle in this policy vacuum, particularly when it comes to ensuring the protection of poor and low-income households in an environment of high demand for rental accommodation.

### Housing quality – acceptability, participation, information and gender dimensions

During his tenure as Minister of Human Settlements, Tokyo Sexwale highlighted, through a National Audit Task Team, the widespread problems of the poor quality and corruption associated with the building of BNG houses.<sup>311</sup> According to the 2009 General Household Survey, across the country, 16.1 per cent of households living in RDP dwellings felt that the walls of their dwellings were weak or very weak, and 19.9 per cent felt that their roof was weak or very weak.<sup>312</sup> And, towards the end of 2009, then Minister Sexwale identified nearly 3000 RDP houses in the Eastern Cape and KwaZulu-Natal that had to be demolished because of intolerably inferior quality.<sup>313</sup> During 2010, then Minister Sexwale announced that government would be using R1.3 billion, representing ten per cent of the department's annual budget, to demolish and rectify approximately 40 000 badly constructed houses.<sup>314</sup>

It is by now apparent that the pressure to produce houses in a short-time frame – possibly complicated by

the desire to include black economic empowerment housing companies in the construction of RDP housing – has resulted in sub-standard houses being built. More research is necessary to examine the quality of all houses rolled out as part of the RDP housing programme, as well as to understand why, notwithstanding the vast and complex housing-related machinery, there is ineffective monitoring and regulation of housing standards and quality.

Beyond the poor quality of RDP houses, as outlined above, one of the difficulties encountered with the government's housing allocation systems is that they are highly complex, not very transparent and are not publicised. Indeed, a recent access to information request by residents in Soweto for Gauteng's housing databases was denied by provincial government on the grounds that publicising the list would compromise public order.<sup>315</sup> Such opacity not only enables fraud and corruption, but also results in confusion and a lack of reliable information to beneficiaries. In recent focus groups, hopeful beneficiaries of housing programmes expressed frustration with the lack of information and explanation provided to those waiting for housing allocations, noting that they are not informed of processes or developments and are left in the dark for years on end wondering what has happened to their application without any communication from the authorities.<sup>316</sup>

Further contributing to the non-participatory approach of housing provision, the de-linking of RDP subsidies from beneficiary selection and approval processes (outlined above) is the fact that the 'de-linking of beneficiaries from the development and construction phase in order to speed up delivery ... severely limits the say beneficiaries have in projects'<sup>317</sup> and fundamentally restricts any potential participation in the process. Thus, a CSSR study concludes that South African housing policy 'does not leave much scope for personal choice' in terms of the form, location or any special needs.<sup>318</sup> Regarding the latter point, even though disabled persons and those with special needs are formally able to register for a special needs house, this fact is not widely known and usually persons and those with special needs are placed on the same registration-date-based system as everyone else and without linking their needs to specific

requirements, meaning that when/if they are allocated a home, it might not satisfy their special needs.<sup>319</sup> This is clearly a violation of the rights of disabled persons.

Turning to the emergency or temporary housing programmes that do exist, there are human rights-related difficulties with these, too. For example, the temporary accommodation in Ekuthuleni shelter provided to the former occupiers in the *Blue Moonlight* case has come with a myriad rights-violating and unacceptable conditionalities, including the fact that residents are locked out of the shelter during the day, and have to live in gender-segregated units, thereby violating family rights.<sup>320</sup> Transit camps – such as in Richmond Farm (Durban) and Blikkiesdorp (Cape Town) – too, come with gender-related problems in that they are on the whole not large enough to accommodate families.<sup>321</sup> Addressing these violations has necessitated ongoing litigation, which has not been concluded.

Emergency housing is not the only gendered aspect of housing. Homelessness and problems with housing provision have a disproportionate affect on women, as the main carers of children, the elderly and the sick, and the lowest earners in society.<sup>322</sup> Women face specific barriers in rural areas where farm owners or traditional authorities often do not allocate houses to single women. Moreover, low-income women do not 'have the same economic means, building skills or free time as men, in order to be able to participate equally in the incremental housing process', meaning that where improvements are required, women are less likely than men to be able to undertake these.<sup>323</sup> Finally, women are at risk from high levels of domestic abuse and violence, which, in the context of limited social housing, often forces them to make difficult choices between leaving their shared homes and staying in abusive relationships. Research indicates that even where choices exist – for example in the limited number of shelters often run by church organisations – 'there are constraints in exercising those choices' in that such shelters usually provide only temporary shelter and, again, lock out residents during the day.<sup>324</sup>

## The underlying determinants of systemic housing problems

According to its public relations information website, the South African government's goal is to 'create sustainable housing developments whereby people own their properties'.<sup>325</sup> However, it is clear – not least from the approximately 12 million South Africans who do not have access to adequate housing<sup>326</sup> – that South Africa's focus 'on the delivery of ownership of houses at the expense of other forms of tenure and types of housing' has seriously limited the potential to holistically address access to housing deficits in a way that integrates housing into other livelihood and social networks.<sup>327</sup>

The initial idea behind RDP housing was that it would constitute a 'starter house' that beneficiaries could add to and consolidate over time. However, this has not happened in the main because beneficiaries were unable or unwilling to finance developments to houses located largely on the peripheries of housing markets.<sup>328</sup> This has meant that there have not been any incremental advances or progressive realisation but, if anything, there has been a form of regression where residents have moved to unsafe and/or unsavoury accommodation closer to work opportunities. Indeed, over the years many RDP settlements have become 'residential dormitories' with many beneficiaries choosing 'to trade their houses and move back to informal settlements or other informal housing to be closer to work'.<sup>329</sup> According to research conducted by Urban LandMark in 2010, since 2005, approximately eleven per cent of all RDP houses were unofficially (and unlawfully) traded by owners who were barred from selling their houses due to the mandatory lock-in period of eight years.<sup>330</sup> It might be argued that such trades at least provide RDP beneficiaries with cash, but over half of these transactions were for relatively small amounts of between R5750 and R17 000 per house.<sup>331</sup>

This reality calls into question the efficacy of the lock-out clause and tends to suggest the need for reform as contemplated in the Housing Act Amendment Bill. However, any such reconsideration of the lock-in clause should start by determining the purpose of housing policy – and specifically the provision of RDP housing: is

it to address housing backlogs or to confer an asset to an individual title-holder? The current policy, with its lock-in clause, seems to uncomfortably fall between both these objectives, providing private title and ownership of houses but not allowing owners to use their houses as assets. Arguably a better policy would provide public housing (not conferring title but ensuring security of tenure), but if the focus is to remain on private titling, then it would be useful to undertake a cost-benefit analysis of the lock-in clause.

Such issues, along with the quality- and corruption-related problems outlined above, suggest that, at the very least, it is necessary to re-evaluate the housing allocation and provision process, including the means of allocation perhaps using the eThekweni approach of instituting project-based registration for the duration of each project. The RDP house reality also indicates a need for greater national monitoring and regulation of all processes involved in the allocation and building of subsidised housing.

At the same time, the government's preoccupation with low-density ownership has been at the expense of expanding access to affordable rental accommodation, meaning that current social housing policy 'has made little impact on stimulating the supply of rental accommodation affordable to lower-income households' earning below R3500 per month.<sup>332</sup>

Meanwhile, the flipside of the focus on formality is a highly schizophrenic and antagonistic approach to informal settlements, which, languishing with inadequate services between limbo and threats of eviction and relocation, are a time bomb waiting to explode. Of major concern is government's overwhelming disregard for policies and programmes that emphasise the need for in situ upgrading – 'the reality is that we have yet to see one successful and properly executed in situ upgrade of an informal settlement'.<sup>333</sup> This non-compliance with policies and programme directives in respect of informal settlement, indicates a broader failure of national regulation that requires urgent attention.

Finally, as outlined in this paper, the way that policies and programmes – whether RDP allocation, social housing provision or resolution of the status of informal settlements – have been implemented has been overwhelm-

ingly heavy-handed, autocratic and non-participatory. This is evidenced not only in the government's failure to consult with housing beneficiaries about their needs, and its dogged adherence to private titling and the eradication of informal settlements, but also in its continued eviction of low-income residents, and its non-compliance with court orders requiring the provision of alternative accommodation ahead of evictions. Ultimately, these dominant (and dominating) approaches have perpetuated the apartheid-inherited marginalisation of the poor and have meant that housing delivery has had only a limited impact on poverty alleviation.<sup>334</sup>

## Conclusion

The right to housing is a nexus right, encompassing so much more than just bricks (or tin) and glass (or plastic). The provision of housing is 'very closely tied to the provision of basic services (water, electricity and sanitation)' and, most crucially, 'stripped of government targets', housing affects people on an emotional and psychological level in the most profound way.<sup>335</sup> Or, as argued by Ricardo Hausmann:

... people do not demand houses; they demand habitats. A house is an object; a habitat is a node in a multiplicity of overlapping networks – physical (power, water and sanitation, roads), economic (urban transport, labour markets, distribution and retail, entertainment) and social (education, health, security, family, friends). The ability to connect to all of these makes a habitat valuable.<sup>336</sup>

For these reasons, it is one of the most complex rights to realise. As highlighted in this paper, despite commendable progress in terms of delivering housing units to poor households, as yet the government has not pursued the kind of holistic approach to housing that is required to entrench security and improve people's lives. Current housing options are insufficient and beset with problems that serve to undermine gains and violate human rights. Firstly, the focus on ownership of houses has not met the need for mass accommodation in well-located areas

close to work opportunities. Beyond this, the costs of spending public funds on conferring private houses is prohibitive and probably unaffordable even for an upper middle income country like South Africa. The current housing deficit is estimated at two million units, at a cost of over R800 billion, and this number keeps growing rather than shrinking, leading the Financial and Fiscal Commission to call the current housing model 'unsustainable'.<sup>337</sup> Therefore it is absurd that the government is focused on improving the housing product substantially, thereby increasing the subsidy and unit cost.

What is needed is 'a new public discourse on housing and a more complex and nuanced way of characterising the rational, appropriate and human responses to the broad range of housing needs in South Africa, which are not currently catered for by the market'.<sup>338</sup> In the first instance, government needs to match practice with policies to genuinely unlock well-located housing in urban areas, and to do so in a participatory, consultative manner. Beyond this, given the failures of the focus on ownership, it is perhaps time to consider alternatives such as rent control and/or the provision of rooms with security of tenure. As proposed by Lone Poulsen, there is an urgent need for the government to provide access to low- or no-rental rooms in inner-city areas to satisfy the demand for well-located housing that is close to work opportunities.<sup>339</sup> Such public housing projects would probably have to comprise communal living units with shared ablution and kitchen facilities, perhaps combining individual and shared family rooms, along the lines of the housing arrangements provided to the residents in the *Olivia Road* litigation. However, as highlighted by Poulsen, this model requires careful design and constant on-site management, which has thus far been missing from any of the current projects.

At the same time, there is an urgent need for national government to monitor and regulate all housing-related processes, including to ascertain whether provinces and municipalities have EHPs and, if so, whether these comply with the corresponding laws. It should be noted that this paper's note of caution on the capacity of local government to take over housing-related functions appears to fly in the face of the National Planning Commission's recommendation that 'responsibility for housing should

shift to the level at which planning is executed – the municipal level. Weak capacity in poorly resourced local authorities does not justify chaos. These problems must be fixed for effective urban development'.<sup>340</sup> While we could not agree more that such problems need to be addressed, we do caution that municipal chaos is a very real impediment to housing development and suggest that the issue of municipal responsibility for the implementation of housing programmes requires further evaluation.

More generally, national government needs to ensure that the other spheres of government do not evict unlawfully, do required in situ upgrading of informal settlements, and that there is compliance with court orders, as well as quality-related criteria for public housing. In this regard, there is an urgent need to assess the efficacy of the current housing-related functional arrangements and, in particular, to evaluate the monitoring and regulatory functions of housing agencies and institutions.

Finally, in order to reverse apartheid's spatial segregation we agree wholeheartedly with the recommendations of the National Planning Commission that government must prioritise:

- upgrading informal settlements;
- increasing urban population density while improving the liveability of cities by providing parks and other open spaces, and ensuring safety;
- providing more reliable and affordable public transport with better coordination across municipalities and between different modes; and
- moving jobs and investment towards dense townships that are on the margins of cities (and that the building of new settlements far from places of work should be discouraged through planning and zoning regulations).

On the basis of this paper's findings, we recommend further research, as follows:

- A comprehensive assessment and rethink of the private title bias of current housing policy, as informed by the needs of hopeful beneficiaries, as well as the realities and problems encountered in the RDP housing process to date.
- A thorough analysis of the current housing-related machinery with a view to rationalising the multiple agencies, institutions and arrangements and with a particular need to assess the viability of local government as the locus of housing delivery, as well as to evaluate the role of any monitoring and regulatory institutions, including provinces which are taking on this new role.
- Research into the options and possible consequences for recognition or voluntary relocation (to more advantageous sites) of backyard shacks.
- Research into alternative low-cost housing options in well-located city areas in light of rural-urban migration.
- An audit of all public housing-related tenders and allocations.

## Bibliography

- Auditor-General 'Report of the Auditor-General on the findings identified during a performance audit of the approval and allocation of housing subsidies at provincial housing departments' (January 2006)
- Benjamin C 'Call to probe "rot" in Gauteng housing scheme' *Corruption Watch* (22 March 2012): [m.corruptionwatch.org.za/news-categories/housing](http://m.corruptionwatch.org.za/news-categories/housing)
- Berkowitz P 'Building houses vs building communities' (3 September 2013) *The Daily Maverick*: [www.dailymaverick.co.za/article/2013-09-03-building-houses-vs-building-communities/](http://www.dailymaverick.co.za/article/2013-09-03-building-houses-vs-building-communities/)
- Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) Oxford: Oxford University Press
- Bilchitz D 'What is reasonable to the court is unfair to the poor' (16 March 2010) *Business Day*: [www.bdlive.co.za/articles/2010/03/16/david-bil-](http://www.bdlive.co.za/articles/2010/03/16/david-bil-)

- chitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor
- Centre for Applied Legal Studies (CALs) 'Comment on General Notice 1851 of 2006: Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006' (20 February 2007) 10–11
- Centre for Social Science Research (CSSR) 'The Social Consequences of Establishing "Mixed" Neighbourhoods: Does the mechanism for selecting beneficiaries for low-income housing projects affect the quality of the ensuing "community" and the likelihood of violent conflict' (May 2010) CSSR Research Report: [www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed](http://www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed)
- Charlton S and Kihato C 'Reaching for the Poor? An Analysis of the Influences of the Evolution of South Africa's Housing Programme' in Pillay U, Tomlinson R and Du Toit J (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006)
- Chenwi L and McLean K "A Woman's Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa' 25 *South African Journal on Human Rights*
- Chenwi L 'Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?' (2012) 23(3) *Stellenbosch Law Review* 540–563
- Davie L 'Lowest rentals in Joburg first' (12 November 2013) *Media Club South Africa*: [www.mediaclub-southafrica.com/democracy/3547-lowest-rentals-in-joburg-first](http://www.mediaclub-southafrica.com/democracy/3547-lowest-rentals-in-joburg-first)
- DHS 'Annual Report 2010/2011' (2011): [www.dhs.gov.za/uploads/DHS\\_Annual\\_Report\\_2010-2011\\_A.pdf](http://www.dhs.gov.za/uploads/DHS_Annual_Report_2010-2011_A.pdf)
- DHS 'Department of Human Settlements on its 2013 Annual Report and Evaluation Plan' Parliamentary Monitoring Group (10 October 2013)
- DHS 'Outcome 8: Human Settlements Agreement: Progress Report' (5 November 2013) a presentation before the National Council of Provinces (NCOP) Select Committee on Public Services: [www.pmg.org.za/report/20131105-outcome-8-human-settlements-progress-report-department-human-settlements](http://www.pmg.org.za/report/20131105-outcome-8-human-settlements-progress-report-department-human-settlements)
- Dugard J 'Beyond Blue Moonlight: The implications of judicial avoidance in relation to the provision of alternative housing', draft article submitted to *Constitutional Court Review*
- eNCA 'R800-billion needed to solve housing woes by 2020' (21 October 2013): [www.enca.com/south-africa/r800-billion-solve-countys-housing-woes-2020](http://www.enca.com/south-africa/r800-billion-solve-countys-housing-woes-2020)
- Gauteng Legislature Standing Committee on Public Accounts (SCOPA) 'SCOPA Report on the Auditor-General's Report on the Financial Statements and Performance Information of the Department of Local Government and Housing for the Year Ended 31 March 2011 [Pr166/2011]' (9 March 2012)
- Hausmann R 'People do not want houses, they want habitats' (10 October 2013) *Business Day*: [www.bdlive.co.za/opinion/2013/10/10/people-do-not-want-houses-they-want-habitats](http://www.bdlive.co.za/opinion/2013/10/10/people-do-not-want-houses-they-want-habitats)
- HDA 'South Africa: Informal settlements status' (2012): [www.thehda.co.za/images/uploads/HDA\\_Informal\\_settlements\\_status\\_South\\_Africa.pdf](http://www.thehda.co.za/images/uploads/HDA_Informal_settlements_status_South_Africa.pdf)
- Huchzermeyer M 'Humanism, Creativity and Rights: Invoking Henri Lefebvre's Right to the City in the Tension Presented by Informal Settlements in South Africa Today', inaugural Lecture, School of Architecture and Planning, University of the Witwatersrand (12 November 2013)
- Huchzermeyer M *Cities with 'Slums': From informal settlement eradication to a right to the city* (2011) Johannesburg: Juta Academic
- Jain H 'Community protests in South Africa: Trends, analysis and explanations' (2010) Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape
- Langford M, Stacey R and Chirwa D 'Water' in Woolman S, Roux T, Klaaren J, Stein A, Chaskalson M and Bishop M (eds) *Constitutional Law of South Africa Volume 4 2<sup>nd</sup> edition, revision service 5* (2013) 56B-i to 56B-79
- Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) Johannesburg: Juta Law
- LRC press release 'LRC welcomes High Court judgment in housing matter' (15 May 2013): [www.lrc.org.za/](http://www.lrc.org.za/)

- press-releases/2724-2013-05-15-press-statement-1rc-welcomes-high-court-judgment-in-housing-matter-
- Mbanjwa X 'Sexwale declares war on housing crooks' *IOL* (3 November 2009): [www.iol.co.za/news/politics/sexwale-declares-war-on-housing-crooks-1.463450](http://www.iol.co.za/news/politics/sexwale-declares-war-on-housing-crooks-1.463450)
- Molathlwa O 'Allow RDP owners to sell' *The Times* (12 September 2013): [www.timeslive.co.za/thetimes/2013/09/12/allow-rdp-owners-to-sell](http://www.timeslive.co.za/thetimes/2013/09/12/allow-rdp-owners-to-sell)
- McLean K 'Constitutional Deference, Courts and Socio-Economic Rights in South Africa' (2009): [www.pulp.up.ac.za/pdf/2009\\_13/2009\\_13.pdf](http://www.pulp.up.ac.za/pdf/2009_13/2009_13.pdf)
- McLean K 'Meaningful engagement: One step forward or two back? Some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 223–242
- McLean K 'Housing' in Woolman S et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) (2nd ed Original Service 2006) 55–9 – 55–12
- Naidu E and Isaacson M 'How to build quality houses for R55,000' *IOL* (6 December 2009): [www.iol.co.za/news/south-africa/how-to-build-quality-houses-for-r55-000-1.466848](http://www.iol.co.za/news/south-africa/how-to-build-quality-houses-for-r55-000-1.466848)
- National Housing Finance Corporation (NHFC) 'FLISP Roll-Out Programme' presentation to the Select Committee on Public Services (20 August 2013): [d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/hzabxPfkInjeSpVmgOyDBkHRSi9Qkvc\\_ErgJN-FiQeKc/mtime:1381381128/files/130820nhfc.pdf](http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/hzabxPfkInjeSpVmgOyDBkHRSi9Qkvc_ErgJN-FiQeKc/mtime:1381381128/files/130820nhfc.pdf)
- National Planning Commission 'National Development Plan: Vision for 2030' (2013): [www.webcitation.org/6TXIobO1T](http://www.webcitation.org/6TXIobO1T)
- National Treasury 'Chapter 6: Human Settlements' in *Provincial Budgets and Expenditure Review 2005/06-2011/12* (September 2009): [www.webcitation.org/6TXIDVE3s](http://www.webcitation.org/6TXIDVE3s)
- Polity* 'This Week in Parliament' (12 June 2006)
- Portfolio Committee on Human Settlements 'Budgetary Review and Recommendation Report of the Portfolio Committee on Human Settlements on the Budget Vote 31 – Human Settlements for the financial year end 31 March 2012' (17 October 2012)
- Poulsen L 'A Room in the City: Strategies for Accessing Affordable Accommodation' (2010) 21 *Urban Forum* 21–36
- Public Services Commission 'Consolidated Monitoring and Evaluation Report on the Development of Housing (Human Settlements): Evaluation Cycle 2009/2010' (July 2010)
- SERI 'eThekweni Municipality goes Rogue, Illegally Evicts Residents' (2 September 2013): [www.seri-sa.org/images/Cato\\_PressRelease\\_2Sep13.pdf](http://www.seri-sa.org/images/Cato_PressRelease_2Sep13.pdf)
- Social Housing Foundation (SHF) and Urban LandMark 'Eviction Process Mapping Guide: A Manual for Rental Housing Managers & Tenants' (June 2010): [www.shra.org.za/images/stories/2011/pdfs/Eviction\\_Guide.pdf](http://www.shra.org.za/images/stories/2011/pdfs/Eviction_Guide.pdf)
- Shisaka Development Management Services 'Housing Subsidy Assets: Exploring the Performance of Government Subsidised Housing in South Africa – Overall Analysis' (November 2011): [www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf](http://www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf)
- SIU 'Annual Report 2007/2008' (2008): [www.siu.org.za/docs/reports/SIU%20AR%20Binder2.pdf](http://www.siu.org.za/docs/reports/SIU%20AR%20Binder2.pdf)
- SIU 'Annual Report 2010/2011' (2011): [www.siu.org.za/docs/reports/SIU\\_Annual\\_Report\\_FRI17AUG.pdf](http://www.siu.org.za/docs/reports/SIU_Annual_Report_FRI17AUG.pdf)
- Statistics South Africa 'General Household Survey 2012' (4 October 2013): [beta2.statssa.gov.za/publications/Po318/Po318August2012.pdf](http://beta2.statssa.gov.za/publications/Po318/Po318August2012.pdf)
- Strauss M and Liebenberg S 'Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa' *Planning Theory* (forthcoming 2014; copy of article with author)
- Tissington K 'A Review of Housing Policy and Development in South Africa since 1994' SERI/SPII Research Report (September 2010) 73: [www.spil.org.za/agentfiles/434/file/Research/Review\\_of\\_the\\_Right\\_to\\_Housing.pdf](http://www.spil.org.za/agentfiles/434/file/Research/Review_of_the_Right_to_Housing.pdf) (accessed on 5 January 2014)
- Tissington K 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: [www.seri-sa.org/images/stories/SERI\\_Housing\\_Resource\\_Guide\\_Feb11.pdf](http://www.seri-sa.org/images/stories/SERI_Housing_Resource_Guide_Feb11.pdf)

- Tissington K et al, "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) SERI Research Report: [www.seri-sa.org/images/Jumping\\_the\\_Queue\\_MainReport\\_Jul13.pdf](http://www.seri-sa.org/images/Jumping_the_Queue_MainReport_Jul13.pdf)
- National Treasury and DHS 'Human Settlements Development Grant: First Quarter 2013 Spending' (13 September 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Appropriations: [www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements](http://www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements)
- van Wyk J 'The Role of Local Government in Evictions' (2011) 14(3) *Potchefstroom Electronic Law Journal* (2011)
- Wegerif M, Russell B and Grundling I 'Still Searching for Security: The reality of farm dweller evictions in South Africa' (2005) Research Report, Social Surveys Africa and the Nkuzi Development Association
- Wessels L 'Black market highlights RDP cracks' (31 March 2010) *Fin24*: [www.fin24.com/Business/Black-market-highlights-RDP-cracks-20100331](http://www.fin24.com/Business/Black-market-highlights-RDP-cracks-20100331)
- Wilson S 'Curing the poor: State housing policy in Johannesburg after Blue Moonlight' Draft article submitted to *Constitutional Court Review*
- Wilson S 'Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality' (2009) 126(2) *South African Law Journal*
- Wilson S 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential for "Meaningful Engagement"' (2011) 22 *Urban Forum*: [www.seri-sa.org/images/stories/wilson\\_uf\\_article\\_online.pdf](http://www.seri-sa.org/images/stories/wilson_uf_article_online.pdf)
- Wilson S 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential for "Meaningful Engagement"' (2011) 22 *Urban Forum*: [www.seri-sa.org/images/stories/wilson\\_uf\\_article\\_online.pdf](http://www.seri-sa.org/images/stories/wilson_uf_article_online.pdf)
- Zikode S and Nsiband Z 'Serving our life sentences in the shacks' (16 July 2010): [www.abahlali.org/node/7187](http://www.abahlali.org/node/7187)
- ### International and regional law
- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979)
- Convention on the Rights of Persons with Disabilities (2007)
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- International Convention on the Rights of the Child (CRC, 1989)
- United Nations CESCR General Comment 3 on the nature of states parties obligations (1990): [www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664](http://www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664)
- United Nations CESCR General Comment 4 on the right to adequate housing (1991): [www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e](http://www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e)
- United Nations CESCR General Comment 7 on forced evictions (1997): [www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument)
- United Nations CESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005): [www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf) (accessed on 21 November 2013)

- United Nations CESCR General Comment 19 on the right to social security (2008): [www.ref-world.org/docid/47b17b5b39c.html](http://www.ref-world.org/docid/47b17b5b39c.html)
- United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009): [www.webcitation.org/6TXNanglk](http://www.webcitation.org/6TXNanglk)

### Domestic law (including Bills)

- Disaster Management Act 57 of 2002 (DMA)
- Extension of Security of Tenure Act 62 of 1997 (ESTA)
- Extension of Security of Tenure Amendment Bill, 2013 GG 1035 of 2013 (17 October 2013): [www.gov.za/documents/download.php?f=201255](http://www.gov.za/documents/download.php?f=201255)
- Housing Act 107 of 1997 (amended by Acts 28 and 60 of 1999; Act 4 of 2001) (Housing Act)
- Housing Amendment Bill, 2006 GG 1852 of 2006 (22 December 2006): [us-cdn.creamermedia.co.za/assets/articles/attachments/04343\\_notice1852.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/04343_notice1852.pdf)
- Interim Protection of Informal Land Rights Act 31 of 1996 – protects occupiers of communal, native trust or other indigenous land
- Land Reform (Labour Tenants) Act 3 of 1996
- National Building Regulations and Building Standards Act 103 of 1977
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (April 2007) (National Norms and Standards)
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)
- Regulations in terms of the Rental Housing Act 50 of 1999: Gauteng Unfair Practices Regulations, 2001
- Rental Housing Act 50 of 1999 (amended by Act 43 of 2007) (Rental Housing Act)
- Rental Housing Amendment Bill, 2013: [www.parliament.gov.za/content/b%2056%20-%202013%20\(rental%20housing\).pdf](http://www.parliament.gov.za/content/b%2056%20-%202013%20(rental%20housing).pdf)
- Social Housing Act 16 of 2008 (Social Housing Act)

### Policies

- DHS 'Accreditation of Municipalities' Part 3 Vol. 3 of the National Housing Code (2009): <http://www.webcitation.org/6kfIuuHA4>
- DHS 'Emergency Housing Programme' Part 3 Vol. 4 of the National Housing Code (2009): <http://www.webcitation.org/6kfj5ixTo>
- DHS 'Housing Chapters of Integrated Development Plans' Part 3 Vol. 3 of the National Housing Code (2009): <http://www.webcitation.org/6kfjDj3PI>
- DHS 'Integrated Residential Development Programme' Part 3 Vol. 4 of the National Housing Code (2009): <http://www.webcitation.org/6kfjLKh5d>
- DHS 'Social Housing Policy' Part 3 Vol. 6 of the National Housing Code (2009): <http://www.webcitation.org/6kfjSI8Nf>
- DHS 'Technical and General Guidelines' Part A of Part 3 Vol. 2 of the National Housing Code (2009): <http://www.webcitation.org/6kfjYQgqS>
- DHS 'Upgrading of Informal Settlements Programme' Part 3 Vol. 4 of the National Housing Code (2009): <http://www.webcitation.org/6kfjJgsqzC>
- NDoH 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (2004): [www.westerncape.gov.za/text/2007/10/bng.pdf](http://www.westerncape.gov.za/text/2007/10/bng.pdf)
- NDoH 'National Housing Code' (2000)

### Table of cases

CASE NAME	SALR
<i>Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others</i>	2010 (2) BCLR 99 (CC)
<i>Absa Bank v Ntsane</i>	2007 (3) SA 554 (T)
<i>Blue Moonlight Properties v Occupiers of Saratoga Avenue</i>	2010 ZAGPJHC 3 (4 February 2010)
<i>City of Johannesburg v Blue Moonlight Properties</i>	2011 (4) SA 337 (SCA judgment)

CASE NAME	SALR
<i>City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others</i>	2012 (6) SA 294 (SCA)
<i>City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another</i>	2012 (2) SA 104 (CC)
<i>City of Johannesburg v Rand Properties</i>	2007 (6) SA 417 (SCA) (SCA judgment)
<i>City of Johannesburg v Rand Properties</i>	2007 (1) SA 78 (W) (W judgment)
<i>Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another</i> South Gauteng High Court,	Case No 39502/2012
<i>Government of the Republic of South Africa v Grootboom</i>	2001 (1) SA 46 (CC)
<i>Gundwana v Steko Development</i>	2011 (3) SA 608 (CC)
<i>Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others</i>	2013 (4) SA 212 (GSJ)
<i>Jaftha Schoeman; Van Rooyen v Stoltz</i>	2005 (2) SA 140 (CC)
<i>Maphango v Aengus Lifestyle Properties</i>	2012 (3) SA 531 (CC)
<i>Mchunu and Others v Executive Mayor, eThekweni Municipality and Others</i>	2013 (1) SA 555 (KZD)
<i>Minister of Health and Others v Treatment Action Campaign and Others (No 2)</i>	2002 (5) SA 721 (CC)
<i>Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd</i>	2004 (3) All SA 169 (SCA)
<i>Motswagae v Rustenburg Local Municipality</i>	2013 (2) SA 613 (CC)
<i>Ndlovu v Ncgobo; Bekker and Another v Jika</i>	2003 (1) SA 113 (SCA)
<i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others</i>	2008 (3) 208 (CC)
<i>Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread</i>	2012 (2) SA 337 (CC) (
<i>Occupiers of Skurweplaas v PPC Aggregate Quarries</i>	2012 (4) BCLR 382 (CC)

CASE NAME	SALR
<i>Pheko v Ekurhuleni Metropolitan Municipality</i>	2012 (2) SA 598 (CC)
<i>Port Elizabeth Municipality v Various Occupiers</i>	2005 (1) SA (CC)
<i>Residents of Joe Slovo Community, Western Cape v Thubelisha Homes</i>	2010 (3) SA 454 (CC)
<i>S v Makwanyane and Another</i>	1995 (3) SA 391 (CC)
<i>Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality</i>	2013 (1) SA 323 (CC)
<i>Social and Economic Rights Action Centre (SERAC) and Another v Nigeria</i>	(2001) AHRLR 60 (ACHPR 2001)

## Glossary

ACCESS	Alliance for Children's Entitlement to Social Security
ACHPR	African Charter on Human and Peoples' Rights
ADSL	asymmetric digital subscriber line
ANC	African National Congress
ARV	Anti-retroviral
ASIDI	Accelerated schools infrastructure delivery initiative
BCCSA	Broadcasting Complaints Commission of South Africa
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies
CCC	Complaints and Compliance Committee
CCL	Centre for Child Law
CDE	Centre for Development and Enterprise
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
CFO	chief financial officer

CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)	FBW	free basic water
		FICA	Financial Intelligence Centre Act 38 of 2001
Comtask	Communications Task Group	FHR	Foundation for Human Rights
COO	chief operating officer	FLISP	Finance Linked Individual Subsidy Programme
COSATU	Congress of South African Trade Unions	FXI	Freedom of Expression Institute
CRC	Convention on the Rights of the Child	GCEO	group chief executive officer
CSIR	Council for Scientific and Industrial Research	GCIS	Government Communication and Information System
CSSR	Centre for Social Science Research	GDE	Gauteng Department of Education
DA	Democratic Alliance	GEC	General Education Certificate
DBE	National Department of Basic Education	GG	Government Gazette
		HDA	Housing Development Agency
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)	HOD	head of department
		HSDG	Human Settlements Development Grant
DMA	Disaster Management Act 57 of 2002	IBA	Independent Broadcasting Authority
DMMA	Digital Media and Marketing Association	ICASA	Independent Communications Authority of South Africa
DORA	Division of Revenue Act (renewed annually)	ICCPR	International Covenant on Civil and Political Rights
DPLG	Department of Provincial and Local Government (now CoGTA)	ICERD	International Convention on the Elimination of all forms of Racial Discrimination
DPME	Department of Planning, Monitoring and Evaluation	ICESCR	International Covenant on Economic, Social and Cultural Rights
DWA	Department of Water Affairs (previously DWAF)	ICTs	information and communications technologies
DWAF	Department of Water Affairs and Forestry (now DWA)	IDP	Integrated Development Plan
ECA	Electronic Communications Act	IEC	Independent Electoral Commission
ECDoE	Eastern Cape Department of Education	IP	Internet protocol
		IPTV	Internet protocol television
ECS	electronic communications service	IRDP	Integrated Residential Development Programme
ECT	electronic communications and transactions	ISP	Internet service provider
EEA	Employment of Educators Act 76 of 1998	ISPA	Internet Service Providers' Association
		LDoE	Limpopo Department of Education
EFF	Economic Freedom Fighters	LRC	Legal Resources Centre
EHP	Emergency Housing Programme	LSM	Living Standards Measurement
ES	equitable share	LTSM	Learning and Teaching Support Materials
ESTA	Extension of Security of Tenure Act 62 of 1997	MAT	Media Appeals Tribunal
FBSan	free basic sanitation		

MDDA	Media Development and Diversity Agency	RDP	Reconstruction and Development Programme
MEC	Member of the Executive Council (provincial 'cabinet minister')	RGA	Regulation of Gatherings Act 205 of 1993
MIG	Municipal Infrastructure Grant	RHIG	Rural Household Infrastructure Grant
NDoH	National Department of Housing (now called Department of Human Settlements or DHS)	RHLF	Rural Housing Loan Fund
NDP	National Development Plan	RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act
NERSA	National Energy Regulator of South Africa	SA	South Africa
NGO	non-governmental organisation	Saarf	South African Advertising Research Foundation
NHFC	National Housing Finance Corporation	SABC	South African Broadcasting Corporation
NHSDB	National Housing Subsidy Database	SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
NHSS	National Housing Subsidy Scheme	SADF	South African Defence Force
NIA	National Intelligence Agency	SADTU	South African Democratic Teachers' Union
NPC	National Planning Commission	SAHRC	South African Human Rights Commission
NSC	National Senior Certificate	SAICE	South African Institution of Civil Engineering
Nurcha	National Urban Reconstruction and Housing Agency	SANDU	South African National Defence Union
NUSP	National Upgrading Support Programme	Sanef	South African National Editors' Forum
NWSRS	National Water Services Regulation Strategy	SAPS	South African Police Service
OBE	Outcomes Based Education	SASA	South African Schools Act 84 of 1996
OECD	Organisation for Economic Co-operation and Development	SATRA	South African Telecommunications Regulatory Authority
PAJA	Promotion of Administrative Justice Act 3 of 2000	SCA	Supreme Court of Appeal
PCSA	Press Council of South Africa	SCOPA	Standing Committee on Public Accounts
PDMSA	Print and Digital Media South Africa	SERI	Socio-Economic Rights Institute of South Africa
PDMTTT	Print and Digital Media Transformation Task Team	SERs	social and economic rights
PED	Provincial Education Department	SGB	school governing body
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	SHF	Social Housing Foundation
PMSA	Print Media South Africa	SHI	Social Housing Institution
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004	SHP	Social Housing Programme
R2K	Right to Know Campaign	SHRA	Social Housing Regulatory Authority
		SIU	Special Investigating Unit
		SSA	State Security Agency

TIMSS	Trends in International Mathematics and Science Study
TRU	temporary residential unit
TV	television
UISP	Upgrading of Informal Settlements Programme
UKZN	University of KwaZulu-Natal
UN	United Nations
UPM	Unemployed Peoples' Movement
UPR	Universal Periodic Review
USAASA	Universal Service and Access Agency of South Africa
USDG	Urban Settlements Development Grant
VIP	ventilated improved pit latrine
Waspa	Wireless Applications Service Providers' Association
WSA	water services authority
WSDP	water services development plan
WSP	water services provider

## Notes

1. S Zikode and Z Nsibandé 'Serving our life sentences in the shacks' (16 July 2010): [www.abahlali.org/node/7187](http://www.abahlali.org/node/7187).
2. M Strauss and S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' *Planning Theory* (2014) vol. 13 no. 4 428–448.
3. [www.southafrica.info/about/social/govthousing.htm](http://www.southafrica.info/about/social/govthousing.htm). It should be noted that there is disagreement about the total number of houses and housing units built and taken up, with differing figures provided by different government agencies. There are also discrepancies between the figures of subsidies provided to developers and the number of houses in which formal title has been transferred to the owner – this could be due to delays in conferring titles. See K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) and Community Law Centre (CLC) Research Report 22–23: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
4. An RDP house is the name given to houses provided by the government – named after the African National Congress's first macro-economic policy, the Reconstruction and Development Programme, which promised houses for all. Although the RDP policies and practice regarding housing have been superseded by the Breaking New Ground policy, for the sake of consistency we use the term RDP houses throughout the paper (this is also how most beneficiaries refer to such houses).
5. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*).
6. Centre for Social Science Research (CSSR) 'The Social Consequences of Establishing "Mixed" Neighbourhoods: Does the mechanism for selecting beneficiaries for low-income housing projects affect the quality of the ensuing "community" and the likelihood of violent conflict' (May 2010) CSSR Research Report, 36: [www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed](http://www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed).
7. H Jain 'Community protests in South Africa: Trends, analysis and explanations' (2010) Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape, 29.
8. Article 27(3) of the Convention on the Rights of the Child (CRC, 1989) obliges states parties to take appropriate measures to assist parents to ensure that children have adequate 'nutrition, clothing and housing'.
9. Article 14(2)(h) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) provides that all states parties must take all the appropriate measures to eliminate discrimination against women in rural areas including to allow them 'to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply ...'.
10. Article 5(e)(iii) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965) requires states parties to eliminate racial discrimination in respect of the enjoyment of the right to housing.
11. Article 9(1)(a) of the International Convention on the Rights of Persons with Disabilities (2007) compels states parties to ensure equal access by persons with disabilities to housing, and Article 28(1) reinforces the right of people living with disabilities to adequate housing, as well

- as states parties obligations to take appropriate steps to safeguard and promote the realisation of the right.
12. Article 43(1)(d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) stresses that migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to 'access to housing, including social housing schemes, and protection against exploitation in respect of rents'.
  13. United Nations CESCR General Comment 4 on the right to adequate housing (1991), para. 8: [www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e](http://www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e).
  14. United Nations CESCR General Comment 7 on forced evictions (1997), para. 3: [www.escr-net.org/resources/general-comment-4](http://www.escr-net.org/resources/general-comment-4).
  15. United Nations CESCR General Comment 7 on forced evictions (1997), paras 10–21: [www.escr-net.org/resources/general-comment-7](http://www.escr-net.org/resources/general-comment-7).
  16. United Nations CESCR General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005), paras 27 and 28: [www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/CESCR-GC16-2005.pdf).
  17. United Nations CESCR General Comment 19 on the right to social security (2008), para. 18: [www.refworld.org/docid/47b17b5b39c.html](http://www.refworld.org/docid/47b17b5b39c.html).
  18. United Nations CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (2009), paras 8 and 25: [tinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2fzo&Lang=en](http://tinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2fzo&Lang=en).
  19. United Nations CESCR General Comment 3 on the nature of states parties obligations (1990): [www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664](http://www.unhchr.ch/tbs/doc.nsf/o/94bdbaf59b43a424c12563edo052b664).
  20. United Nations CESCR General Comment 4 on the right to adequate housing (1991), paras 13–18: [www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e](http://www.unhchr.ch/tbs/doc.nsf/o/469f4d91a9378221c12563edo053547e).
  21. United Nations CESCR General Comment 19 on the right to social security (2008), para. 59a: [www.refworld.org/docid/47b17b5b39c.html](http://www.refworld.org/docid/47b17b5b39c.html).
  22. In October 2012, the South African government publicly announced it was going to ratify the ICESCR. However, as of October 2013, when this paper was completed, such ratification had not yet occurred. Ratification was completed in January 2015, entering into force on 12 April 2015.
  23. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (*Makwanyane*), para. 35.
  24. For the Constitutional Court's reasoning behind the apparent rejection of the minimum core obligations, see *Grootboom* paras 31–33; and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (*Treatment Action Campaign*), paras 26–29.
  25. *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
  26. This section is an edited version of an in-depth overview of housing-related policy in K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
  27. The precise meaning of and interaction between the section 26(1) and section 26(2) provisions is as yet unclear. See also K McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) (2nd ed. Original Service 2006) 55–9 – 55–12.
  28. Other relevant constitutional rights are: section 9's equality clause, which requires that there be no unfair discrimination in the provision of services, section 10's right to human dignity, section 24's right to an environment that is not harmful to health or wellbeing and section 27(1)(b)'s right of access to sufficient water. Also relevant is section 33 on the right to just administrative action which, along with the Promotion of Administrative Justice Act 3 of 2000 (PAJA), creates the framework for procedural fairness (embracing the rights to reasonable notice of a decision and an opportunity to make representation regarding your circumstances before a decision affecting your rights is taken) in all administrative decisions including those related to the provision and allocation of subsidised and/or public housing. This means that public housing services must comply with administrative justice requirements, and if anyone's rights are adversely affected by an administrative action, such action can be brought under review.
  29. Theunis Roux 'Background Report 2: Review of National Legislation Relevant to Informal Settlement Upgrading' Unpublished paper written for the National Department of Housing (2004) 1.

30. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.
31. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.
32. Kirsty McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006), 55-5.
33. For more on municipal accreditation, see below.
34. This does not appear to mean that owners of state-subsidised RDP or BNG houses cannot rent their properties if they so choose.
35. For example, Leon Louw of the Free Market Foundation was recently quoted as arguing to allow 'black people to sell their RDP houses the next day [after receiving them]' – in Louw's words, 'I don't see why, if the government wants to fund housing, it cannot trust people to be sensible' cited in O Molatlhwa 'Allow RDP owners to sell' *The Times* (12 September 2013): [www.timeslive.co.za/thetimes/2013/09/12/allow-rdp-owners-to-sell](http://www.timeslive.co.za/thetimes/2013/09/12/allow-rdp-owners-to-sell).
36. NDoH 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (2004) section 2.4.
37. Housing Amendment Bill, 2006 Government Gazette Notice 1852 of 2006 (22 December 2006).
38. In 2013 the Minister for Rural Development and Land Reform published the Extension of Security of Tenure Amendment Bill, 2013. See [www.ruraldevelopment.gov.za/legislation-and-policies/file/1957](http://www.ruraldevelopment.gov.za/legislation-and-policies/file/1957).
39. *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) (*Ndlovu*).
40. Centre for Applied Legal Studies (CALS) 'Comment on General Notice 1851 of 2006: Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006' (20 February 2007) 10–11: [abahlaliold.shackdweller.org/files/PIE%20ACT%20AMENDMENTS%20SUBMISSION.pdf](http://abahlaliold.shackdweller.org/files/PIE%20ACT%20AMENDMENTS%20SUBMISSION.pdf)
41. If an eviction application is brought in the High Court, a notice of motion as per Rule 6 of the Uniform Rules of Court should be served in addition to notice served in terms of section 4(2) of PIE. A consolidated notice may be served when an eviction application is brought in the Magistrate's Court. For a step-by-step guide to the eviction process see Social Housing Foundation (SHF) & Urban LandMark 'Eviction Process Mapping Guide: A Manual for Rental Housing Managers & Tenants' (June 2010): [www.shra.org.za/images/stories/2011/pdfs/Eviction\\_Guide.pdf](http://www.shra.org.za/images/stories/2011/pdfs/Eviction_Guide.pdf).
42. Rental Housing Amendment Bill 2013: [www.parliament.gov.za/content/b%2056%20-%202013%20\(rental%20housing\).pdf](http://www.parliament.gov.za/content/b%2056%20-%202013%20(rental%20housing).pdf).
43. DHS 'Technical and General Guidelines' Part A of Part 3 Vol. 2 of the National Housing Code (2009) 21. A ready board is a pre-manufactured electricity distribution unit used in most township electrification projects. It is often installed together with a prepayment electricity meter (although these are not the same thing).
44. See DHS 'Unification of standards for construction, house sizes, electrification and energy efficient standards' Presentation to the Select Committee on Public Services (11 June 2013): [www.pmg.org.za/report/20130611-new-housing-norms-and-standards-provincial-and-local-response-department-human-settlements-briefing](http://www.pmg.org.za/report/20130611-new-housing-norms-and-standards-provincial-and-local-response-department-human-settlements-briefing).
45. Louis van der Walt, DHS (21 January 2014).
46. This section is an edited version of an in-depth overview of housing-related policy in K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
47. See K McLean 'Housing' in S Woolman et al (eds) *Constitutional Law of South Africa Volume 4 2nd edition, revision service 5* (2013) (2nd ed Original Service 2006) 55-9 – 55-12.
48. S Charlton and C Kihato 'Reaching for the Poor? An Analysis of the Influences of the Evolution of South Africa's Housing Programme' in U Pillay, R Tomlinson and J Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006): 256.
49. A useful summary of the national housing policy and subsidy programmes included in the revised Code is archived at [www.webcitation.org/6TXFOqz18](http://www.webcitation.org/6TXFOqz18).
50. These are highly detailed and complex. For further details, see K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide: [www.seri-sa.org/images/stories/SERI\\_Housing\\_Resource\\_Guide\\_Feb11.pdf](http://www.seri-sa.org/images/stories/SERI_Housing_Resource_Guide_Feb11.pdf).
51. The NHFC was established by the government to mobilise finance for housing from sources outside the state in partnership with the broadest range of organisations.
52. Nurcha's mandate is to facilitate the flow of finance from financial institutions into low-income housing develop-

- ment. To this end, it issues guarantees for both bridging finance and end user finance loans, as well as administering the saving programme for housing.
53. The RHLF focuses on its core business of providing loans, through intermediaries, to low-income households for incremental housing purposes, i.e. as a people-driven process. Its mandate is to empower low-income families in rural areas to access credit that enables them to mobilise self-help and savings schemes to build and improve their shelter incrementally.
  54. For more on the HDA, see: [www.thehda.co.za](http://www.thehda.co.za)
  55. This section was written by Michael Clark.
  56. The Minister of Housing published the National Minimum Norms and Standards in 1999. These Norms and Standards were later revised, with the revised norms and standards taking effect from 1 April 2007. See DHS 'Technical and General Guidelines' Part A of Part 3 Vol. 2 of the National Housing Code (2009).
  57. DHS 'Outcome 8 Delivery Agreement: Sustainable Human Settlements and an Improved Quality of Household Life' (2009) (Delivery Agreement). The Delivery Agreement aims to synchronise a more holistic development of different forms of human settlements and the housing market. The outputs in terms of the agreement are to upgrade 400 000 households in well-located informal settlements, to improve access to basic services, to facilitate the provision of 600 000 accommodation units within the so-called gap market (individuals earning between R3500 and R12800), and to ensure that the identification and development of well-located public land for low-income and affordable housing is prioritised.
  58. See specifically sections 9 and 10 of the Housing Act.
  59. An IDP is a single inclusive strategic plan for the development of a municipality that links, integrates and coordinates plans for the development of a municipality. See DHS 'Housing Chapters of Integrated Development Plans' Part 3 Vol. 3 of the National Housing Code (2009).
  60. Section 9(2) of the Housing Act.
  61. See section 10 of the Housing Act and DHS 'Accreditation of Municipalities' Part 3 Vol. 3 of the National Housing Code (2009) 9.
  62. DHS 'Outcome 8: Human Settlements Agreement: Progress Report' (5 November 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Public Services: [www.webcitation.org/6TXFc-sII8](http://www.webcitation.org/6TXFc-sII8).
  63. Information provided by DHS on municipal accreditation as per email to Kate Tissington, 4 February 2013. See also DHS 'Annual Report 2010/2011' (2011), 23: [www.dhs.gov.za/uploads/DHS\\_Annual\\_Report\\_2010-2011\\_A.pdf](http://www.dhs.gov.za/uploads/DHS_Annual_Report_2010-2011_A.pdf).
  64. DHS 'Outcome 8: Human Settlements Agreement: Progress Report' (5 November 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Public Services: [www.pmg.org.za/report/20131105-outcome-8-human-settlements-progress-report-department-human-settlements](http://www.pmg.org.za/report/20131105-outcome-8-human-settlements-progress-report-department-human-settlements).
  65. K Tissington, et al "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 78: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
  66. K Tissington 'A Resource Guide to Housing in South Africa, 1994-2010' (February 2011) SERI resource guide 11: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2) (accessed on 26 November 2013), citing NDoH 'Annual Report 2006-2007' (2007) 22.
  67. National Treasury and DHS 'Human Settlements Development Grant: First Quarter 2013 Spending' (13 September 2013), a presentation before the National Council of Provinces (NCOP) Select Committee on Appropriations: [www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements](http://www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements).
  68. For more information on the funding mechanisms related to the provision of water and sanitation, see the FHR position papers on water and sanitation by J Dugard.
  69. There are many other national housing programmes, including the Individual Subsidy programme (ISP), the Enhanced Extended Discount Benefit Scheme (EEDBS), the Provision of Social and Economic Facilities Programme, the Operational Capital Budget Programme (OPS/CAP), the Rectification of Pre-1994 Residential Properties Programme, the Enhanced People's Housing Process (ePHP), the Community Residential Units Programme (CRU) and the Consolidated Subsidy Programme. See the National Housing Code. For further details, see K Tissington 'A Resource Guide to Housing in South Africa,

- 1994–2010’ (February 2011) SERI resource guide 74–104: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
70. See, generally, DHS ‘Integrated Residential Development Programme’ Part 3 Vol. 4 of the National Housing Code (2009).
71. DHS ‘Integrated Residential Development Programme’ Part 3 Vol. 4 of the National Housing Code (2009) 9.
72. In addition to these requirements, special provision is made for the elderly, disabled, military veterans and beneficiaries in terms of the Land Restitution Programme. See K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 22–23: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
73. In 2004, to give expression to the *Grootboom* judgment, the state introduced the Housing Assistance in Emergency Housing Circumstances in the previous Housing Code. The Emergency Housing Programme is the revised version of this programme. See DHS ‘Emergency Housing Programme’ Part 3 Vol. 4 of the National Housing Code (2009) 9.
74. See K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 94: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
75. See K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 94: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
76. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (*Blue Moonlight*).
77. *Blue Moonlight* paras 48–49.
78. *Blue Moonlight* para. 50.
79. *Blue Moonlight* para. 46.
80. *Blue Moonlight* para. 54.
81. *Blue Moonlight* para. 63.
82. *Blue Moonlight* para. 57.
83. *Blue Moonlight* para. 57.
84. In 2004, the UISP was contained in Chapter 13 of the National Housing Code. This programme has, however, been revised in the 2009 Code. See DHS ‘Upgrading of Informal Settlements Programme’ Part 3 Vol. 4 of the National Housing Code (2009).
85. K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 86: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
86. K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 85–92: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2) (accessed on 26 November 2013); M Huchzermeyer *Cities With ‘Slums’: From Slum Eradication to a Right to the City in Africa* (2011) 170–171.
87. DHS ‘Social Housing Policy’ Part 3 Vol. 6 of the National Housing Code (2009).
88. This section is written by Michael Clark and Stuart Wilson. We have written quite a lot for the jurisprudence section – this is because there have been many more housing rights cases than any other socio-economic right and, since some of the cases are fairly recent, they have not previously been as comprehensively reviewed as they are here.
89. *Grootboom* para. 34.
90. *Grootboom* paras 35–39.
91. It should be noted that, especially in respect of the right of access to adequate housing, there are not clear lines between negative and positive obligations. This is so because, as clarified by the courts, when an eviction would lead to homelessness, the state is required to provide alternative accommodation. For this reason, many of the positive obligations entailed in the right to housing have emerged from cases concerning evictions.
92. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*).
93. M Langford, R Stacey and D Chirwa ‘Water’ in S Woolman, et al (eds) *Constitutional Law of South Africa Vol. 4 2nd edition, revision service 5* (2013) 56B-i to 56B-79; 56B-i, 56B-24, 56B-25. Although Langford writes in the context of the right to water, the Constitutional Court has adopted the same approach in relation to all socio-economic rights. The principles are thus equally relevant. In the context of housing see, for example, S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 131–227; K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 172–180.
94. *City of Johannesburg and Others v Mazibuko and Others* 2010 (4) SA 1 (CC) (*Mazibuko*), para. 50.
95. See, for example, D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007).

96. *Grootboom* paras 29–33; D Bilchitz ‘What is reasonable to the court is unfair to the poor’ (16 March 2010) *Business Day*: [www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor](http://www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor).
97. D Bilchitz ‘What is reasonable to the court is unfair to the poor’ (16 March 2010) *Business Day*: [www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor](http://www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor).
98. *Grootboom* para. 41.
99. *Grootboom* para. 41.
100. *Mazibuko* para. 9. As Bilchitz states: ‘The emphasis is placed on whether ... government can provide an adequate justification for their policies and action in a particular area’ (D Bilchitz ‘What is reasonable to a court is unfair to the poor’ (16 March 2010) *Business Day*: [www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor](http://www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor)).
101. *Grootboom* paras 39, 42, 43, 44, 45, and 99; S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality’ (2009) 126(2) *South African Law Journal* 270, 270–290.
102. *Grootboom* para. 82.
103. *Grootboom* para. 99.
104. *Grootboom* para. 45. See also K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 27–28: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
105. *Grootboom* para. 34.
106. *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (*Modderklip* SCA judgment).
107. See also *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (*Modderklip* CC judgment).
108. *Modderklip* SCA judgment para. 21.
109. *Modderklip* SCA judgment para. 22.
110. *Modderklip* SCA judgment para. 22, referencing *Grootboom* para. 63.
111. *Modderklip* SCA judgment para. 26.
112. *Modderklip* SCA judgment para. 26.
113. *Modderklip* SCA judgment para. 28.
114. *Modderklip* SCA judgment para. 41.
115. *Modderklip* SCA judgment para. 43 and 44. The Court left open the question of the monetary value of such constitutional damages, but did state that damages would be based on either the value of the land and/or the length of occupation.
116. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) (*PE Municipality*).
117. *PE Municipality* para. 12.
118. *PE Municipality* para. 41.
119. *PE Municipality* para. 23. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 274.
120. *PE Municipality* para. 17.
121. *PE Municipality* para. 28.
122. *PE Municipality* para. 29.
123. *PE Municipality* para. 61.
124. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC) (*Olivia Road*).
125. *City of Johannesburg v Rand Properties* 2007 (1) SA 78 (W) (*Rand Properties* W judgment).
126. *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA) (*Rand Properties* SCA judgment).
127. *Rand Properties* SCA judgment para. 78.
128. *Olivia Road* para. 9ff.
129. *Olivia Road* para. 30.
130. *Olivia Road* para. 13.
131. *Olivia Road* paras 14, 18 and 21.
132. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo*).
133. The N2 Gateway housing project is one of the flagship pilot projects commissioned in terms of the Breaking New Ground plan.
134. *Joe Slovo* para. 4. Yacoob J found that the occupiers did not have consent to occupy the land at all, while Moseneke DCJ, Ngcobo J, O’Regan J and Sachs all held, for various reasons, that the occupiers initially had consent to occupy but that such consent was conditional and subsequently revoked.
135. *Joe Slovo* paras 5, 115 and 229.
136. *Joe Slovo* para. 115.
137. *Joe Slovo* para. 253.
138. See, for example, K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 152–159; K

- McLean 'Meaningful engagement: One step forward or two back? Some thoughts on Joe Slovo' (2010) 3 *Constitutional Court Review* 223, 223–242; L Chenwi 'Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?' (2012) 23(3) *Stellenbosch Law Review* 540, 540–563; and K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 48–52: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
139. *Joe Slovo* paras 5 and 7.
140. *Joe Slovo* para. 7.
141. *Joe Slovo* para. 7.
142. *Joe Slovo* paras 5 and 7.
143. *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*).
144. *Abahlali* paras 113–115.
145. *Abahlali* paras 69 and 120.
146. *Abahlali* paras 114 and 126.
147. *Abahlali* paras 102, 113, 114, 115 and 118.
148. *Blue Moonlight*.
149. The *rei vindicatio* is a common law remedy available to an owner to reclaim his or her property wherever it is found and from whomever is unlawfully holding it.
150. *Blue Moonlight Properties v Occupiers of Saratoga Avenue* 2010 ZAGPJHC 3 (4 February 2010).
151. *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA judgment).
152. *Blue Moonlight* para. 102.
153. *Blue Moonlight* paras 37 and 40.
154. *Blue Moonlight* para. 40.
155. *Blue Moonlight* para. 74.
156. *Blue Moonlight* paras 47 and 57.
157. *Blue Moonlight* para. 95.
158. *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC) (*Skurweplaas*).
159. *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC) (*Mooiplaats*).
160. *Mooiplaats* para. 4; *Skurweplaas* para. 3.
161. *Mooiplaats* para. 16; *Skurweplaas* para. 14.
162. *Skurweplaas* para. 13.
163. *Mooiplaats* para. 18; *Skurweplaas* para. 12.
164. *Mooiplaats* para. 13.
165. *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*).
166. *Pheko* para. 15.
167. *Pheko* para. 21.
168. *Pheko* para. 21.
169. *Pheko* para. 35.
170. *Pheko* para. 35.
171. *Pheko* para. 37.
172. *Pheko* para. 38–40.
173. *Pheko* para. 42.
174. *Pheko* para. 42.
175. *Pheko* para. 43.
176. *Pheko* para. 43.
177. *Pheko* paras 44 and 45.
178. *Pheko* para. 53.
179. *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) (*Schubart Park*).
180. *Schubart Park* para. 18.
181. The City had failed to act in terms of the National Building Regulations and Building Standards Act 103 of 1977, the DMA or PIE. The City later half-heartedly attempted to justify the removal of the occupiers in terms of the legal framework even though it was clear from the circumstances that the removal had not been executed lawfully in terms of any legislation. The Court found that the City's attempt at justifying its actions in this manner seemed to give credence to the residents' argument that the City had 'used the crisis as an excuse to evict the residents without complying with the law' (*Schubart Park* para. 39).
182. *Schubart Park* para. 30.
183. *Schubart Park* paras 36–37.
184. *Schubart Park* para. 38.
185. *Schubart Park* para. 50.
186. *Schubart Park* para. 50, quoting *PE Municipality* paras 45 and 46.
187. *Schubart Park* para. 51.
188. *Motswagae v Rustenburg Local Municipality (Rustenburg)* 2013 (2) SA 613 (CC) (*Motswagae*).
189. *Motswagae* para. 8.
190. *Motswagae* para. 5.
191. *Motswagae* para. 12.
192. *Motswagae* para. 12.
193. *Motswagae* para. 12.
194. *Motswagae* para. 12.
195. *Motswagae* paras 13–17.
196. *Motswagae* para. 13.

197. *Motswagae* para. 16.
198. *Motswagae* paras 16–17.
199. See *Absa Bank v Ntsane* 2007 (3) SA 554 (T), where a bond was called upon and sought to be executed upon for arrears of R18.46.
200. *Jaftha Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (*Jaftha*).
201. *Jaftha* para. 4.
202. *Jaftha* para. 13.
203. *Jaftha* paras 25 and 29.
204. *Gundwana* para. 18.
205. *Standard Bank v Saunderson* 2006 (2) SA 264 (SCA).
206. *Gundwana*.
207. See Founding Affidavit of Elsie Gundwana, application for leave to appeal, on file with the Constitutional Court Registrar (*Gundwana*).
208. *Gundwana* para. 1.
209. *Gundwana* para. 44.
210. *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).
211. See *PE Municipality* paras 39–47. See also K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 46: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
212. Some have argued that meaningful engagement should be distinguished from mediation, which is a more formal process, where a third party is appointed to help settle a dispute. See J van Wyk ‘The Role of Local Government in Evictions’ (2011) 14(3) *Potchefstroom Electronic Law Journal* 50, 65. However, at the core of these divergent processes lies the need to negotiate and engage. As a result, these processes may be grouped together here.
213. *PE Municipality* para. 39.
214. *PE Municipality* para. 39.
215. *PE Municipality* para. 39.
216. *PE Municipality* para. 41.
217. *PE Municipality* para. 43. The Court provided that this principle may only be departed from in ‘special circumstances’.
218. *Olivia Road* paras. 17–18.
219. *Olivia Road* para. 17.
220. *Olivia Road* para. 18.
221. *Olivia Road* paras 24–30.
222. *Olivia Road* para. 14.
223. *Olivia Road* para. 20.
224. *Olivia Road* para. 14.
225. S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality’ (2009) 126(2) *South African Law Journal* 270, 290.
226. *Joe Slovo* paras 302–303 and 378.
227. *Joe Slovo* para. 378.
228. *Joe Slovo* para. 117.
229. *Joe Slovo* para. 117.
230. K Tissington ‘A Resource Guide to Housing in South Africa, 1994–2010’ (February 2011) SERI resource guide 46 note 179: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
231. *Abahlali*.
232. *Abahlali* paras 69 and 120.
233. *Abahlali* paras 114 and 126.
234. *Schubart Park*.
235. *Schubart Park* para. 50.
236. *Schubart Park* para. 50.
237. *Schubart Park* para. 51.
238. *Blue Moonlight* paras 16–18.
239. *Blue Moonlight* para. 34.
240. See S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality’ (2009) 126(2) *South African Law Journal* 270, 289.
241. *Blue Moonlight* para. 37.
242. *Blue Moonlight* para. 40.
243. *Blue Moonlight* para. 39.
244. *Blue Moonlight* para. 40.
245. *Skurweplaas* para. 13.
246. *Skurweplaas* para. 13.
247. *Skurweplaas* para. 11; *Mooiplaats* para. 17.
248. *Skurweplaas* para. 11; *Mooiplaats* para. 17.
249. *Skurweplaas* para. 12; *Mooiplaats* para. 18.
250. *Skurweplaas* para. 12; *Mooiplaats* para. 18.
251. *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) (*Maphango*).
252. *Maphango* para. 48.
253. *Maphango* para. 48.
254. *Maphango* para. 51.
255. *Maphango* para. 49.
256. Regulations in terms of the Rental Housing Act 50 of 1999: Gauteng Unfair Practices Regulations, 2001 GN 4004 of 2001.
257. *Maphango* para. 50.

258. *Maphango* para. 50.
259. *Modderklip*; S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality' (2009) 126(2) *South African Law Journal* 270, 289.
260. *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) (*Tikwelo* or *Chung Hua* case). For more on the ongoing litigation in this case, see the website of the Socio-Economic Rights Institute (SERI): [www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua](http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua).
261. *Hlophle and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 212 (GSJ) (*Chung Hua*). For more on the ongoing litigation in this case, see the website of the Socio-Economic Rights Institute (SERI): [www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua](http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua).
262. See, for example, LRC press release 'LRC welcomes High Court judgment in housing matter' (15 May 2013): [www.lrc.org.za/press-releases/2724-2013-05-15-press-statement-lrc-welcomes-high-court-judgment-in-housing-matter-](http://www.lrc.org.za/press-releases/2724-2013-05-15-press-statement-lrc-welcomes-high-court-judgment-in-housing-matter-).
263. According to the 2012 General Household Survey published by Statistics South Africa, between 2002 and 2012 the percentage of people in South Africa living in informal dwellings (backyard shacks and informal settlements) increased by one per cent. Statistics South Africa 'General Household Survey 2012' (4 October 2013) 22: [beta2.statssa.gov.za/publications/Po318/Po318August2012.pdf](http://beta2.statssa.gov.za/publications/Po318/Po318August2012.pdf). The backlog has grown over 10 years despite the construction of over 1.2 million houses since 2002. See National Treasury 'Chapter 6: Human Settlements' in *Provincial Budgets and Expenditure Review 2005/06-2011/12* (September 2009) 10: [www.treasury.gov.za/publications/igfr/2009/prov/06.%20Chapter%206%20-%20Human%20Settlements.pdf](http://www.treasury.gov.za/publications/igfr/2009/prov/06.%20Chapter%206%20-%20Human%20Settlements.pdf).
264. M Wegerif, B Russell and I Grundling 'Still Searching for Security: The reality of farm dweller evictions in South Africa' (2005) Research Report, Social Surveys Africa and the Nkuzi Development Association.
265. S Wilson 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential for "Meaningful Engagement"' (2011) 22 *Urban Forum*: [www.seri-sa.org/images/stories/wilson\\_uf\\_article\\_online.pdf](http://www.seri-sa.org/images/stories/wilson_uf_article_online.pdf).
266. A micro study based on an access to information request from the City of Johannesburg estimated that, on a conservative estimate, between 2002 and 2006 approximately 10 000 people were evicted from derelict land and buildings in the inner city of Johannesburg alone (S Wilson 'Human Rights and Market Values: Affirming South Africa's commitment to socio-economic rights' Centre for Applied Legal Studies Newsletter).
267. S Wilson 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential for "Meaningful Engagement"' (2011) 22 *Urban Forum*: [www.seri-sa.org/images/stories/wilson\\_uf\\_article\\_online.pdf](http://www.seri-sa.org/images/stories/wilson_uf_article_online.pdf).
268. S Wilson 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential for "Meaningful Engagement"' (2011) 22 *Urban Forum*: [www.seri-sa.org/images/stories/wilson\\_uf\\_article\\_online.pdf](http://www.seri-sa.org/images/stories/wilson_uf_article_online.pdf).
269. See, for example, press release from SERI 'eThekweni Municipality goes Rogue, Illegally Evicts Residents (2 September 2013): [www.seri-sa.org/images/Cato\\_PressRelease\\_2Sep13.pdf](http://www.seri-sa.org/images/Cato_PressRelease_2Sep13.pdf).
270. There has been no comprehensive study of how many municipalities have EHPs and whether these nominally comply with the Constitution and other legislation – this is an area that could definitely benefit from further research.
271. Supporting affidavit of L Royston in *Dladla* (30 August 2013): [www.seri-sa.org/images/Dladla\\_Royston\\_Affidavit\\_final.pdf](http://www.seri-sa.org/images/Dladla_Royston_Affidavit_final.pdf).
272. See *Mchunu and Others v Executive Mayor, eThekweni Municipality and Others* 2013 (1) SA 555 (KZD). See also, in relation to ongoing litigation in this matter, the website of the Socio-Economic Rights Institute (SERI): [www.seri-sa.org/index.php/litigation-9/cases/19-litigation/case-entries/102-mchunu-and-others-v-executive-mayor-of-ethekweni-and-others-mchunu](http://www.seri-sa.org/index.php/litigation-9/cases/19-litigation/case-entries/102-mchunu-and-others-v-executive-mayor-of-ethekweni-and-others-mchunu).
273. K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic

- Rights Institute of South Africa (SERI) Research Report, 7: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
274. Location has been introduced into most systems after the conflict generated previously when individuals in a specific community were allocated houses to the exclusion of others. See K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 7: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2) (accessed on 28 November 2013). Another variable that has been introduced is gender. However, while more research is needed to confirm this, most evaluations show that housing policy directives that focus on gender equality are largely neglected in provinces. See L Chenwi and K McLean “A Woman’s Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa’ 25 *South African Journal on Human Rights* 517, 534.
275. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 15: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
276. Auditor-General ‘Report of the Auditor-General on the findings identified during a performance audit of the approval and allocation of housing subsidies at provincial housing departments’ (January 2006).
277. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 72: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
278. *Polity* ‘This Week in Parliament’ (12 June 2006).
279. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 72: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
280. Special Investigating Unit (SIU) ‘Annual Report 2007/2008’ (2008), 13: [www.siu.org.za/docs/reports/SIUARBinder2.pdf](http://www.siu.org.za/docs/reports/SIUARBinder2.pdf).
281. SIU ‘Annual Report 2007/2008’ (2008), 31.
282. SIU ‘Annual Report 2010/2011’ (2011), 24: [www.siu.org.za/docs/reports/SIU\\_Annual\\_Report\\_FRI17AUG.pdf](http://www.siu.org.za/docs/reports/SIU_Annual_Report_FRI17AUG.pdf).
283. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 74: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
284. Gauteng Legislature Standing Committee on Public Accounts (SCOPA) ‘SCOPA Report on the Auditor-General’s Report on the Financial Statements and Performance Information of the Department of Local Government and Housing for the Year Ended 31 March 2011 [Pr166/2011]’ (9 March 2012), 8.
285. C Benjamin ‘Call to probe “rot” in Gauteng housing scheme’ *Corruption Watch* (22 March 2012): [m.corruption-watch.org.za/news-categories/housing](http://m.corruption-watch.org.za/news-categories/housing).
286. Shisaka Development Management Services ‘Housing Subsidy Assets: Exploring the Performance of Government Subsidised Housing in South Africa – Overall Analysis’ (November 2011), 23: [www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf](http://www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf).
287. Section 10 of the Housing Act.
288. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 7: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
289. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 59: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
290. Shisaka Development Management Services ‘Housing Subsidy Assets: Exploring the Performance of Government Subsidised Housing in South Africa – Overall Analysis’ (November 2011), 23: [www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf](http://www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf).
291. Portfolio Committee on Human Settlements ‘Budgetary Review and Recommendation Report of the Portfolio Committee on Human Settlements on the Budget Vote 31 – Human Settlements for the financial year end 31 March 2012’ (17 October 2012) 23.
292. K Tissington, et al “Jumping the Queue”, Waiting Lists and Other Myths: Perceptions and Practice around Housing

- Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 26: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
293. Housing Development Agency (HDA) 'South Africa: Informal settlements status' (2012), 23: [www.thehda.co.za/images/uploads/HDA\\_Informal\\_settlements\\_status\\_South\\_Africa.pdf](http://www.thehda.co.za/images/uploads/HDA_Informal_settlements_status_South_Africa.pdf).
294. NDOH 'Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements' (2004), section 4.1.
295. M Huchzermeyer *Cities with 'Slums': From informal settlement eradication to a right to the city* (2011) 3.
296. M Huchzermeyer 'Humanism, Creativity and Rights: Invoking Henri Lefebvre's Right to the City in the Tension Presented by Informal Settlements in South Africa Today' Inaugural Lecture, School of Architecture and Planning, University of the Witwatersrand (12 November 2013) 3. See also Gauteng City Region Observatory (GCRO) information on the growth of backyard shacks particularly in Gauteng: [www.gcro.ac.za/gcr/review/2013/gcro/space-and-mobility/locating-housing-growth-and-backyard-shacks](http://www.gcro.ac.za/gcr/review/2013/gcro/space-and-mobility/locating-housing-growth-and-backyard-shacks).
297. M Strauss and S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' *Planning Theory* (2014) vol. 13 no. 4 428–448.
298. NDoH 'National Housing Code' (2000) part 1, 15.
299. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 68: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
300. National Planning Commission 'National Development Plan 2030: Our future – make it work' (2012) Department of the Presidency, Pretoria, 47, as cited in M Strauss and S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' *Planning Theory* (2014) vol. 13 no. 4 428–448.
301. S Charlton and C Kihato 'Reaching for the Poor? An Analysis of the Influences of the Evolution of South Africa's Housing Programme' in U Pillay, R Tomlinson and J Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 252–282, 255 cited in M Strauss and S Liebenberg 'Contested spaces: Housing rights and evictions law in post-apartheid South Africa' *Planning Theory* (2014) vol. 13 no. 4 428–448.
302. See, for example, the following website for maps of the residential location of people in South Africa across racial groups: [adrianfrith.com/2013/09/08/dot-maps-of-racial-distribution-in-south-african-cities](http://adrianfrith.com/2013/09/08/dot-maps-of-racial-distribution-in-south-african-cities).
303. National Housing Finance Corporation (NHFC) 'FLISP Roll-Out Programme' presentation to the Select Committee on Public Services (20 August 2013).
304. NHFC 'FLISP Roll-Out Programme' presentation to the NCOP Select Committee on Public Services (20 August 2013).
305. NHFC 'FLISP Roll-Out Programme' presentation to the NCOP Select Committee on Public Services (20 August 2013).
306. There is no reliable data on the extent of the demand for very low-cost rentals, but it is clear from the high number of people who live in derelict buildings, backyard shacks and informal settlements that there is a large unmet demand for affordable accommodation in urban centres.
307. These schemes provide an incentive to private developers who, for a government provided capital grant subsidy, must ensure that at least 30 per cent of units in the development are for households earning between R1500 and R3500 per month.
308. DHS 'Department of Human Settlements on its 2013 Annual Report and Evaluation Plan' *Parliamentary Monitoring Group* (10 October 2013).
309. L Davie 'Lowest rentals in Joburg first' (12 November 2013) *Media Club South Africa*: [www.mediaclubsouthafrica.com/democracy/3547-lowest-rentals-in-joburg-first](http://www.mediaclubsouthafrica.com/democracy/3547-lowest-rentals-in-joburg-first).
310. *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*, South Gauteng High Court, Case No 39502/2012. For more details on the case and to access all the court papers, visit the SERI website: [www.seri-sa.org/index.php/litigation-9/cases/19-litigation/case-entries/124-residents-of-ekuthuleni-shelter-v-city-of-johannesburg-and-another](http://www.seri-sa.org/index.php/litigation-9/cases/19-litigation/case-entries/124-residents-of-ekuthuleni-shelter-v-city-of-johannesburg-and-another).
311. E Naidu and M Isaacson 'How to build quality houses for R55,000' IOL (6 December 2009): [www.iol.co.za/news/south-africa/how-to-build-quality-houses-for-r55-000-1.466848](http://www.iol.co.za/news/south-africa/how-to-build-quality-houses-for-r55-000-1.466848).
312. K Tissington 'A Review of Housing Policy and Development in South Africa since 1994' SERI/SPII Research Report (September 2010) 73: [www.spil.org.za/agentfiles/43](http://www.spil.org.za/agentfiles/43)

- 4/file/Research/Review%20of%20the%20Right%20to%20Housing.pdf.
313. X Mbanjwa 'Sexwale declares war on housing crooks' IOL (3 November 2009): [www.iol.co.za/news/politics/sexwale-declares-war-on-housing-crooks-1.463450](http://www.iol.co.za/news/politics/sexwale-declares-war-on-housing-crooks-1.463450).
314. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 80: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
315. Gauteng Department of Local Government and Housing 'Response to request in terms of Promotion of Access to Information Act 2 of 2000 (PAIA)' (16 November 2010).
316. K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 8: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
317. Public Services Commission 'Consolidated Monitoring and Evaluation Report on the Development of Housing (Human Settlements): Evaluation Cycle 2009/2010' (July 2010), 11–12; 20–22.
318. CSSR 'The Social Consequences of Establishing "Mixed" Neighbourhoods: Does the mechanism for selecting beneficiaries for low-income housing projects affect the quality of the ensuing "community" and the likelihood of violent conflict' (May 2010) CSSR Research Report, 36: [www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed](http://www.cssr.uct.ac.za/publications/research-report/2010/social-consequences-establishing-mixed).
319. K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 59: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
320. For an analysis of the ongoing problems with the City of Johannesburg's shelter options following the *Blue Moonlight* judgment see J Dugard 'Beyond Blue Moonlight: The implications of judicial avoidance in relation to the provision of alternative housing' draft article submitted to *Constitutional Court Review*; and S Wilson 'Curing the poor: State housing policy in Johannesburg after Blue Moonlight' draft article submitted to *Constitutional Court Review*.
321. L Chenwi and K McLean "A Woman's Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa' 25 *South African Journal on Human Rights* 517, 538.
322. L Chenwi and K McLean "A Woman's Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa' 25 *South African Journal on Human Rights* 517, 529–530.
323. L Chenwi and K McLean "A Woman's Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa' 25 *South African Journal on Human Rights* 517, 534.
324. L Chenwi and K McLean "A Woman's Home is Her Castle?": Poor Women and Housing Inadequacy in South Africa' 25 *South African Journal on Human Rights* 517, 537.
325. See [www.southafrica.info/about/social/govthousing.htm](http://www.southafrica.info/about/social/govthousing.htm).
326. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 33: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
327. See [www.southafrica.info/about/soical/govthousing.htm](http://www.southafrica.info/about/soical/govthousing.htm).
328. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 61: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
329. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 62: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
330. Cited in K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 62: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
331. L Wessels 'Black market highlights RDP cracks' (31 March 2010) *Fin24*: [www.fin24.com/Business/Black-market-highlights-RDP-cracks-20100331](http://www.fin24.com/Business/Black-market-highlights-RDP-cracks-20100331).
332. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide, 67: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
333. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI Resource Guide, 9: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
334. K Tissington 'A Resource Guide to Housing in South Africa, 1994–2010' (February 2011) SERI resource guide 61: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
335. P Berkowitz 'Building houses vs building communities' (3 September 2013) *The Daily Maverick*: [www.dailymaverick.co.za/article/2013-09-03-building-houses-vs-building-communities/](http://www.dailymaverick.co.za/article/2013-09-03-building-houses-vs-building-communities/).

336. R Hausmann 'People do not want houses, they want habitats' (10 October 2013) *Business Day*: [www.bdlive.co.za/opinion/2013/10/10/people-do-not-want-houses-they-want-habitats](http://www.bdlive.co.za/opinion/2013/10/10/people-do-not-want-houses-they-want-habitats).
337. eNCA 'R800-billion needed to solve housing woes by 2020' (21 October 2013): [www.enca.com/south-africa/r800-billion-solve-countys-housing-woes-2020](http://www.enca.com/south-africa/r800-billion-solve-countys-housing-woes-2020).
338. K Tissington, N Munshi, G Mirugi-Mukundi and E Durojaye "Jumping the Queue", Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa' (April 2013) Socio-Economic Rights Institute of South Africa (SERI) Research Report, 7: [www.webcitation.org/6TXG9MrD2](http://www.webcitation.org/6TXG9MrD2).
339. L Poulsen 'A Room in the City: Strategies for Accessing Affordable Accommodation' (2010) 21 *Urban Forum* 21–36, 28.
340. National Planning Commission 'National Development Plan: Vision for 2030' (2013): [www.webcitation.org/6TXIobO1T](http://www.webcitation.org/6TXIobO1T).