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PLJ

The People's Law Journal

THE URBAN LAND QUESTION



"Everyone has the right to have access to adequate housing"

Constitution 26(1)

FOREWORD

Most of the national debate around land injustice focuses on rural land and the slow progress of restitution of the vast tracts of land owned by mainly white farmers, corporations, and the state.

While this remains an important and unresolved injustice, the majority of people in South Africa live in its cities. Here, although apartheid spatial planning has formally ended, people are still struggling with its legacy.

South African cities remain largely untransformed. Despite the Constitutional Right to housing and equality, poor and working class people still live on the outskirts of the city, far away from work opportunities, subjected to inadequate housing and violent evictions.

This crisis calls for radical policy and action from our metros. This edition of the PLJ helps to present a few areas relating to the urban land question. It explores the law on housing in a simple and straightforward way, together with articles on evictions, the sale of state land and opportunities for expropriation and densification.

It is hoped that it will be used by activists and social movements to forward the struggle for urban land justice and equality.

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Why Lwandle matters

THE EVICTION THAT SHOCKED SOUTH AFRICA

By Mandisa Shandu

IN EARLY JUNE, 2014, APPROXIMATELY 800 PEOPLE WERE FORCIBLY REMOVED FROM THE LWANDLE INFORMAL SETTLEMENT IN NOMZAMO, STRAND. THE SHERIFF OF THE HIGH COURT, SUPPORTED BY THE SOUTH AFRICAN POLICE SERVICE, DEMOLISHED THEIR SHACKS. THE LAND FROM WHICH THE RESIDENTS WERE REMOVED IS OWNED BY THE SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED (SANRAL).

For some, the Lwandle evictions will be remembered for the political controversy surrounding the evictions. For others, the Lwandle evictions in the midst of harsh winter cold, have come to symbolise the inhumane displacement of communities - which triggered significant humanitarian support.

However, when the dust settles and the political controversy no longer makes news headlines, the Lwandle evictions must be remembered for something more. The evictions are a reminder of our inequality and that landlessness has become a permanent feature of South Africa's cities.

In the face of this, building homes on urban land could be seen as an act of desperation. Though unlawful, occupying

land is a direct response to the housing crisis - people have few alternatives.

We must understand landlessness and the law on evictions in the context of South Africa's history of land dispossession and forced removals. Deputy Chief Justice Moseneke in the Joe Slovo judgment explains this well:

"Our history sketches a bleak picture of several decades of forced removals. In fact, between 1963 and the late 1980s, a period where forcible evictions reached their most frequent, South Africa saw approximately 3.5 million people forcibly removed...[Professor] Bundy makes the point that "trauma, frustration, grief, dull dragging apathy and [the] surrender of the

will to live" are indeed some of the effects of forcible evictions on the human condition. And, the consequences span over multiple areas of social life: frequently it is the case that families are left homeless, their social support structures severed and their welfare services, jobs and educational institutions, rendered inaccessible."

It is because of this that South African post-apartheid housing and eviction case law has been deliberately and progressively developed.

South African law now pays careful attention to the consequences of evictions and seeks to ensure that when

people occupy land "unlawfully", they are still given procedural protection (against arbitrary evictions, for example) and legal protections (the provision of alternative accommodation, where needed).

This comes from section 26(3) of the Constitution, which provides 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 Prevention of Illegal Eviction from an Unlawful Occupation of Land Act (19 of 1998), often referred to as PIE, and a series of Constitutional Court and Supreme Court of Appeal cases interprets and gives meaning to the Constitution.

When a court grants an eviction order, everyone has to pay careful attention to the PIE protections. PIE should guarantee that nobody is evicted in the way that the Lwandle residents were. So what happened?

In the Lwandle evictions, an interim interdict, which sought to stop **more** people from moving onto the land, was used by the South African National Roads



Photo: Tim Flack

Agency Limited (SANRAL) to evict people already living there.

The main concern is that an interdict used in this way effectively becomes an eviction order, but avoids the anti-eviction section of the Constitution and the protections of PIE.

This issue was considered by the Constitutional Court in the Zulu case in June, 2014, where a similar interdict was used to evict people from Madlala Village in Durban. Although not dealt with in the main judgment, Justice Van der Westhuizen's concurring judgment supports the argument that such interdicts are in fact eviction orders, and are unlawful because they circumvent PIE, "[t]he interim order is inevitably unlawful insofar as it was issued in contravention – or disregard – of the provisions of PIE."

Justice Van der Westhuizen's judgment is important for the Lwandle residents because a



Although SANRAL explained to the media that the evictions were necessary for upcoming road works on the N2, plans for the N2 detour were not attached to the court papers.

potentially unlawful interdict order was used. Had the provisions of the Constitution and PIE been applied and all the relevant circumstances considered (even if an eviction order was authorised), it is unlikely that the Lwandle evictions would have unfolded in the manner that they did.

To put it simply, a brutal and violent eviction in midwinter resulting in families living in an over-crowded community hall for more than two months could have been avoided.

Clearly, our courts' requirement of a just, equitable and fair eviction order was not applied – in circumstances such as this, it is only just and equitable to evict occupiers if alternative accommodation has been provided.

Although SANRAL explained to the media that the evictions were necessary for upcoming



road works on the N2, plans for the N2 detour were not attached to the court papers. Instead, letters from the neighbouring residents of the Strand Ridge security complex were used to support the interdict application. Among other things, the Strand Ridge residents complained that "squatters" had caused them "severe discomfort." It can be reasonably assumed that these complaints, and not the N2 detour, prompted the City of Cape Town to direct SANRAL to "rectify the situation" by instituting evictions proceedings.

This matters because the Strand Ridge residents, the City, and SANRAL attitudes toward the

Lwandle residents, as well as the presiding judge's decision to grant a potentially unlawful interdict, are reminiscent of the ease with which eviction orders were issued under apartheid. It is about the continued land injustice, exclusion and marginalisation of poor communities and an inability to address the housing crisis in a humane and compassionate manner.

Justice Van de Westhuizen's remarks in the Zulu case are instructive in this regard – "Not for a moment do I doubt the seriousness of illegal land invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else

to live." He adds, "Few things are more final than being dispossessed of one's home, particularly when that home is destroyed."

The Lwandle evictions matter because they are symbolic of the daily insecurity and forced evictions experienced by poor and working class people across the country. Evictions that are largely invisible.

We remember the struggles of the people in Cato Crest, Madlala Village and Marikana Settlement in Phillippi, and Lenasia.



Photo: Tim Flack

Nowhere to go

LWANLDE YOUTH TALK ABOUT THE EVICTIONS

"I am most concerned about my school books and notes that were damaged and lost during the evictions. My exams are coming up and I will try my best to write them but it is not promising because all of my books have been lost and damaged. I will probably have to repeat grade 11 because I lost everything and now I will fall behind."

– Ncebakazi, 6 June 2014



"The place where I used to study with my friends has been destroyed. I am not sure about my upcoming exams as I have lost my books and school uniform. I am feeling sad because most of my school books were destroyed and I know the school will ask me to repay them for the books."

– Mpumelelo, 6 June 2014

"When I came back from school, I returned to our shack to find that our entire home had been destroyed.

My ID card, passport, clothes, food, and all other possessions had been destroyed. All I had was the school uniform I was wearing and my schoolbooks."

– Florence, 6 June 2014

"I thought about what my brother experienced in Lonmin and I see that happening to me now. The police do not treat us with respect and dignity. They do not care about us. They should be able to talk to us before beating us."

– Thabo, 6 June 2014

"I am very worried about my sister because I have to leave her alone in the really cold community hall when I go to school and her TB is getting much worse. She has been coughing a lot and cannot stop. The hall we have to sleep in is very cold, even when they give us blankets. She was not able to take her medication on the Tuesday evening because her medication was taken away with the rest of our belongings."

– Bongiwe, 6 June 2014



"I was at school and I got a phone call from a friend. She told me "you must not bother coming here, there is no house." I did not believe her, but I went home and when I got there everything was gone."

– Khayakazi, 6 June 2014

"The whole experience was painful, I feel very hurt inside. I really cannot explain how I feel because we have nowhere to go now. Maybe I need counseling."

– Angelisa, 6 June 2014

"When I got home they had destroyed the house again and this time they had taken everything. I found my aunt and cousin behind the barbed wire. My aunt was just looking into the distance looking weak and helpless. I asked my aunt what we were going to do. My aunt replied saying that she doesn't know. She said that they saw the police coming again and they ran to grab things but they were stopped by the police who were firing rubber bullets at them."

– Siziphiwe, 6 June 2014

"As I was trying to get some of my possessions from the house, I was physically dragged out of the house by the police. They were shouting "get out, get out!", and then they grabbed me and threw me out."

– Thabo, 6 June 2014

What is a Home?

EVICCTIONS WITHOUT COURT ORDERS

By Dustin Kramer and Zenande Booï

They first came and marked some of our houses with an 'X'

Between April 2013 and January 2014 the City of Cape Town undertook a series of evictions and demolitions of homes built by a group of poor and working class people on land near Philippi, on the outskirts of Cape Town. On 10 January 2014, the City and the owner of the land, Ms. Fischer, went to the Western Cape High Court to prevent any more people from building on the land.

One of the residents, Mr Ramahlele, explained to the court that people first moved onto the land following another eviction that left them destitute and homeless. Mr Ramahlele explained that, for years, the land had been vacant, unused, and unsafe. He spoke of how the bodies of women who had been raped and murdered had been dumped in the thick vegetation covering the Fischer land. Those who moved there had nowhere to else to go.

An elderly resident, Judith Sikade, explained how they tried to survive until the City came back in January:

"After they demolished our homes during May last year, we lived in tents for a while. We would put the tent up every evening and put it down again every morning. We rebuilt our homes and now they have come back in the new year to harass us."

Mr Ramahlele said that the ensuing demolitions were violent, arbitrary, and unconstitutional. One resident, Cindy Ketani, described how:

"When they come to destroy these shacks... they just pull these people out like dogs."

Indeed, Monde Matushe, explained how the eviction 'notice' was given:

"They first came and marked some of our houses with an 'X'. They say it's a warning that they are going to demolish."

Justice Gamble, who heard the case at the High Court, had to deal with the reasons the City gave for demolishing the structures without a court order. The City argued that it did not need to obtain a court order because the structures it demolished were not 'homes'. The City claimed that its Anti-Land Invasion Unit (ALIU) – the City's unit that does these evictions – simply removed structures that were in the process of being built.

Section 26(3) of the Constitution prevents arbitrary eviction. It 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. No legislation may permit arbitrary evictions."

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) is the law that makes the constitutional protection against arbitrary eviction real.

Before an eviction, the state must get a court order, take into account the context of the people involved, and make arrangements for alternative accommodation.

As Justice Sachs explained in the PE Municipality case, PIE was an important move away from Apartheid laws such as the Prevention of Illegal Squatting Act (PISA). Law such as PISA played an important role in the "forced removal of black people from land", criminalising them and compelling "them to live in racially designated locations". PIE gives all people, but especially the most marginalised and vulnerable, the right to be heard by a court of law before being evicted.

In the Fischer case, the responsible ALIU officer claims to have used "normal [ALIU] procedure" to decide whether structures were 'homes' and therefore protected by PIE according to the City. This includes, observing: "the state of completion of the structure, whether the construction materials appear to be new, whether the structure contains

any furniture or belongings and whether the ground around the structure appears to be undisturbed".

With no court order, City officials are left with a large amount of discretionary power over poor and working class people. Indeed, Justice Gamble remarked how it was largely left up to a low ranking, relatively inexperienced, ALIU official to decide which structures would be destroyed and which would be spared.

The occupiers were entitled to the protections of PIE regardless of whether they had permission to be there or whether any structure had become a 'home' or not. According to PIE an eviction can only take place with a court order.

Justice Gamble therefore found the conduct of the City to be unconstitutional and unlawful. The City appealed the judgment. In June 2014, the Supreme Court of Appeal (SCA) upheld the City's appeal on procedural grounds, and sent the case back to the High Court to hear oral evidence. It is likely that the Constitutional Court will decide the matter.



Keep off the Land

**THE CAPE TOWN ANTI LAND INVASION UNITS:
BRUTAL POLICING WHILE
WE WAIT FOR HOUSING**

By Dustin Kramer and Zenande Booï

"The City, like other municipalities across South Africa, has developed institutions mandated to police land and informal settlements, through bypassing the protections of PIE. This provides municipal officials with large amounts of arbitrary and discretionary power over poor and working class people."



Photo: Tim Flack



Established in 2009, the Anti-land Invasion Unit (ALIU) is the main state institution used for policing urban land and slowing the growth of informal settlements through demolitions.

Information about this somewhat clandestine unit is often contradictory. City documents refer to the ALIU as one of several "specialised policing units to focus on specific priority crimes..."

The City's business plans also show that since at least 2010 there have been two separate units operating within the City – one in Human Settlements

headed by Stephen Hayward, the other within Law Enforcement, headed by Joseph Ross. It is unclear which department or directorate the ALIU is accountable to within the City.

"... only a minority of informal settlements are part of formal upgrading programmes."

In the City's appeal to the SCA in the Fischer case, it argued that land invasions are "a significant threat to the ordinary planning and development of land by the

City, as well as the execution of its housing programmes".

The ALIU protects land from poor and working class people, not for them. The City has openly stated that the unit is there to prevent "illegal shack building", on open land or in informal settlements far away from the city.

The policing of land in this manner is a result of the absence of proper plans for urban densification, housing close the city and informal settlement upgrading.

Existing housing developments, by the City's own admissions, are

not making a significant impact on the dire housing shortages facing the city. Cape Town, like South Africa's other large cities, is made up of roughly 20% informal households – a number that has continued to grow.

As shown in the City's Integrated Development Plans (IDP), only a minority of informal settlements are part of formal upgrading programmes. Housing developments tend to be on land far from the city's central areas where high-density housing could be developed.

The remaining majority of informal settlements, as the South African Human Rights

Commission has found, are mistakenly deemed 'temporary' by local government and remain in a policy vacuum. The result is an ongoing and haphazard attempt to control informal housing through policing, while the housing shortage continues.

The City, like other municipalities across South Africa, has developed institutions mandated to police land and informal settlements, through bypassing the protections of PIE. This provides municipal officials with large amounts of arbitrary and discretionary power over poor and working class people.

Until proper plans for land, housing, and informal settlement upgrading are developed, this form of policing will persist in Cape Town and other municipalities across the country.

The ALIU protects land from poor and working class people, not for them.



Photo: Tim Flack

Housing and Evictions

KNOW THE LAW, KNOW YOUR RIGHTS

By Michael Clark

THE RIGHT OF ACCESS TO ADEQUATE HOUSING IS THE MOST CONTESTED AND FREQUENTLY LITIGATED SOCIO-ECONOMIC RIGHT IN SOUTH AFRICA. THIS IS NOT A SURPRISE BECAUSE WE LIVE IN AN UNEQUAL SOCIETY. THE GOVERNMENT HAS COMMITTED TO GRADUALLY ENSURING THAT EVERYONE HAS ACCESS TO HOUSING THROUGH ITS DIFFERENT HOUSING PROGRAMMES, BUT MANY POOR HOUSEHOLDS REMAIN UNABLE TO ACCESS SOME FORM OF ADEQUATE HOUSING, OFTEN HAVING TO LIVE IN INFORMAL SETTLEMENTS AND INNER CITY "SLUM BUILDINGS" WHERE THEY ARE AT RISK OF EVICTION.

There are a few progressive court judgments that have significantly developed the right to housing, but this has not always changed things for communities. National and local government are failing to perform their constitutional duties. In fact, municipalities and property owners have struggled to come to grips with the shift in housing and eviction law brought about by the Constitution. For example, in cases where occupiers could become homeless as result of an eviction, alternative accommodation must be found and this often doesn't happen.

This article will track the development of the right to housing through the case law in South Africa, as well as to analyse the rights and obligations of unlawful occupiers, property owners and municipalities.

EVICTION UNDER APARTHEID

Before the Constitution was adopted in 1996, housing and property rights were governed by the common law. The common law allowed a property owner to evict occupiers by simply proving that they owned it and that the occupiers did not have permission or some other legal right to live on the property (for example a valid lease agreement). An owner could ask for an eviction order even if there were many people living on the property. The court was not interested in why the property was occupied or what would happen to people once they were evicted.

The eviction law did not mention race but because it was so easy to obtain an eviction order, (mostly white) owners helped the apartheid state to push the

majority black population into many small reserves of rural land where they could legally live without a permit.

An apartheid era law, the Prevention of Illegal Squatting Act 52 of 1951 (PISA), gave (mostly white) landowners and the government sweeping powers to evict and destroy the homes of unlawful occupiers. Property and eviction law under apartheid therefore did a lot of the work of racial segregation.

THE 1996 CONSTITUTION

When the Constitution came into effect in 1996, it gave some protection to unlawful occupiers because the Constitution included a right to housing. Section 26 of the Constitution has three parts: section 26(1) provides that "everyone" has a right of access to adequate

housing; section 26(2) obliges the government to take reasonable steps to gradually give everyone access to housing; and section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order that orders the eviction after considering "all the relevant circumstances".

PIE

In 1998, the first democratic Parliament passed the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE). PIE gave effect to section 26(3) of the Constitution's requirement that a court consider all the relevant circumstances before making an eviction order. PIE requires that the eviction of an unlawful occupier must be "just and equitable" after considering a range of factors.

SOME OF THE FACTORS A COURT WILL CONSIDER INCLUDE:

Are the occupiers vulnerable (the elderly, children and female-headed households)?

How long have the occupiers lived on the property?

Is there anywhere else that people can live?

Will the government provide alternative accommodation?

KNOW THE LAW

PE MUNICIPALITY

In PE Municipality, the Constitutional Court recognised that section 26(3) and PIE have greatly altered eviction law. In fact, section 26 and PIE have entirely reversed the position under the common law by requiring that unlawful occupiers be treated humanely with "dignity and respect" and not as "obnoxious social nuisances".

Most importantly, the Court found that the inclusion of the right to housing in the Constitution means that the "normal ownership rights" of property owners are now offset by the "equally relevant" right to housing and protection against eviction.

Over the years, the constitutional right to housing has been interpreted in various other important cases. These cases have developed this right, bringing about a major shift in housing and eviction law. This shift is characterised by new types of relationships between the different parties involved in housing and eviction cases that need to be balanced against one another. There are now a set of key principles that apply to evictions, which are discussed in more detail below.

GROOTBOOM

In Grootboom, the Constitutional Court decided that government must have a "reasonable" housing policy to give effect to the right to housing. This means that government must develop a

clear, well-thought out policy to plan as to how it will gradually give everyone access to housing.

The Court set out a number of requirements that a housing policy should adhere to in order to be "reasonable". The most important is the requirement that a reasonable housing policy should be able to respond to the needs of people in desperate situations, such as emergencies, or evictions, which might render people homeless.

Grootboom found that the government did not have a reasonable housing policy in place because it did not make provision for vulnerable people who were evicted and unable to find alternative shelter for themselves. The government had therefore not planned for people with "literally no access to land, no roof over their heads and who were living in ... crisis situations".

This, the Court found, meant that government had failed to design a housing policy that properly gave effect to the right to housing. Grootboom was important because it found that "at the very least" evictions had to be conducted "humanely", and established that government must plan for people who will become homeless if they were evicted.

MODDERKLIP BOERDERY

The South African courts have found that the government is under an obligation to provide temporary alternative accommodation to unlawful

KNOW THE LAW

Government must have a reasonable housing policy.

Government must provide for those in desperate need.

Will the government provide alternative accommodation?

occupiers who will become homeless as a result of an eviction. This means that if unlawful occupiers might become homeless, then the case is treated differently to all other cases of eviction.

This obligation was first flagged in the Supreme Court of Appeal (SCA) case of *Modderklip Boerdery*. In this case, 400 people were evicted from an informal settlement that had been built on land owned by the municipality. The people had nowhere else to go so they moved onto a piece of privately owned farm land.

The new settlement grew rapidly, and by the time the owner got an eviction order, there were 40,000 people living on the land. As a result of the significant number of occupiers, the owner was unable to afford to evict the occupiers by himself and applied to the court to force the government to evict the people on his behalf.

The SCA found that the eviction could not go ahead because it breached the "limited" right to housing that the unlawful

occupiers were able to realise themselves by building informal structures on the farm. The Court stated that the core issue in the case was that the government did not take any steps to provide temporary alternative accommodation to the unlawful occupiers who were "in desperate need".

Referring to *Grootboom*, the SCA stated that there was an obligation on the government to ensure that at the very least, evictions were "executed humanely". In the case of the occupiers before the court, it was clear that the eviction could not be humane without the government providing some form of alternative accommodation or land for the occupiers to live on.

In fact, if the occupiers were evicted, they would have had nowhere else to go, which would have led to them reoccupying the *Modderklip* land or occupying a vacant site elsewhere. Both of these options would have put the occupiers at risk of another eviction. According to the SCA, the best solution was for the government to allow the unlawful occupiers to stay on the *Modderklip* land until it could provide an alternative.

KNOW THE LAW

Government must provide alternative accommodation.

Evictions must be done humanely.

BLUE MOONLIGHT

In *Blue Moonlight*, the Constitutional Court was again faced with considering what government's must do to provide alternative accommodation. In this case, occupiers of a building in inner-city Johannesburg faced eviction by the new owner of the property.

The owner had bought the property because he or she wanted to evict the occupiers and redevelop the property for commercial use. The occupiers proved that they would become homeless because of the eviction and joined the City of Johannesburg to the eviction case so that the City would have to provide alternative accommodation.

The City, however, argued that its housing policy said that it was not required to provide alternative accommodation to occupiers evicted by private owners and that the only thing it had to do was ask the provincial government for emergency housing funding.

The issue at the core of *Blue Moonlight* was the constitutionality of the municipality's housing policy, which distinguished between people evicted by the municipality itself (usually from "bad buildings" in inner city Johannesburg) and people evicted by private property owners.

The policy said that those evicted by the City would be entitled to temporary accommodation if

the eviction would result in them becoming homelessness, but those evicted by private owners were not entitled to temporary accommodation.

The Court had to decide whether the distinction in the policy could be considered reasonable in the light of the *Grootboom* judgment. The Court found that the City's policy failed to recognise the desperate need for housing when people become homeless and that the policy failed to provide for the needs of people affected by evictions.

After all, it matters very little to an evicted occupier whether they were evicted by the government or by a private owner (*Blue Moonlight*, para 92). The Court therefore found that the City's policy was unreasonable, unconstitutional, and invalid. This confirmed the obligation on the government (in this case, the municipality) to provide alternative accommodation in cases where people are made homeless by a private eviction.

KNOW THE LAW

It doesn't matter who evicts you, you have to be given alternative accommodation if you will become homeless.

Local Government also has a responsibility to pay for alternative accommodation.

On the question of funding, the Constitutional Court emphasised that the Constitution requires national, provincial and local



government to gradually give effect to the right of access to adequate housing by cooperating with each other. This means that local government also has a responsibility for funding emergency accommodation for people who become homeless due to an eviction.

SKURWEPLAAS AND MOOIPLAATS

In two other Constitutional Court cases, *Skurweplaas* and *Mooiplaats*, these principles were expanded. Importantly, these cases made clear that even in cases where occupiers had not been living on the land for very long, alternative accommodation should be provided to the occupiers if they could become homeless as result of an

eviction. In *Mooiplaats*, the Court stated that although the short period of occupation might be a relevant consideration, a court would still be obliged to consider "all the relevant circumstances", including whether an eviction would lead to the occupiers becoming homeless.

OLIVIA ROAD

In *Olivia Road*, the Constitutional Court helped us to understand what "meaningful engagement" means in eviction cases. In *Olivia Road*, the Court gave an interim ruling ordering the occupiers and the municipality to meaningfully engage on all aspects related to the eviction and the provision of temporary shelter to those who need it.

Stating that the obligation to engage meaningfully flowed from section 26(2) of the Constitution, the Court clarified that meaningful engagement is an essential part of a reasonable government response to the housing programme.

When a municipality wants to evict occupiers and the eviction could lead to homelessness, the municipality must meaningfully engage with the occupiers regarding the eviction and/or alternative accommodation options.

The obligation to meaningfully engage provides some protection to unlawful occupiers facing evictions and has far-reaching consequences for government decision-making in eviction cases.



ABAHLALI

Despite the possible benefits of meaningful engagement, there is a risk that government officials and property owners could see meaningful engagement as “a purely procedural ‘box to tick’”.

In Abahlali the Constitutional Court stated that if engagement took place after a decision to evict had already been taken, the engagement could not be genuine or meaningful (Abahlali, paras 69 and 120; Chenwi and Tissington, Engaging Meaningfully, p. 21). The Court also found that proper engagement would include a comprehensive assessment of the needs of the affected community or group of occupiers.

SCHUBART PARK

In Schubart Park, the City of Tshwane evicted occupiers

from a building it owned and made a conditional offer to the occupiers, in terms of which residents who met certain criteria and agreed to certain terms, were offered temporary accommodation. The Constitutional Court criticised the City's pre-determined “top-down” approach and found that it was not an example of proper engagement. This means that there was not enough discussion before decisions were made.

Government has to engage with communities before a decision is made to evict. Government has to do assess all the needs of a community before evicting. Government can't make decisions and then make offers. They have to discuss things first.

THINKING ABOUT THE RIGHTS OF PRIVATE PROPERTY OWNERS

In Blue Moonlight, the Court confirmed that an owner's 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. The balancing of these rights mean that in cases where occupiers could become homeless as a result of an eviction, they acquire a temporary, limited right of occupation “which persists for as long as the state does not perform its obligations to provide temporary shelter”.

Depending on the circumstances, it is therefore possible for the right to adequate housing to temporarily limit the right to property. In these cases, courts will be required to weigh the conflicting rights against each other and strike an appropriate balance.

For example, in cases where occupiers could become homeless as a result of an eviction, their need for shelter may trump a property owner's commercial interests. In Blue Moonlight the Court concluded that owners may have to be “patient” while their ownership rights are temporarily limited in cases where evictions may lead to homelessness.

Although the limitation of ownership rights is usually temporary, in Modderklip the

SCA (and the Constitutional Court) alluded to the fact that the limitation of property rights may have a potentially permanent effect in instances where the government unreasonably fails or refuses to provide an alternative. The SCA, however, balanced these effects carefully by stating that this kind of permanent limitation may entitle the owner to compensation from the state, as was the case in Modderklip.

CONCLUSION

This article shows how the South African courts, and specifically the Constitutional Court and the SCA have contributed to the development of the right of access to housing. The case law has been crucial to expanding the legal protections granted to unlawful occupiers in relation to evictions. These protections include the obligation on all parties in eviction cases to meaningfully engage with one another and the government's obligation to provide alternative accommodation to evictees who would become homeless as result of an eviction.

The cases have also laid down principles on how to balance the often conflicting legal rights and interests of the different parties involved in eviction proceedings. As a result of these cases, housing and eviction law has undergone a significant shift. The legal system now protects the vulnerable and responds “humanely” to evictions.

The right to housing may temporarily limit the right to property.

Homelessness is more important to consider than commercial interests.

Government may be responsible for compensating private property owners where they do not provide alternative accommodation.



The Struggle for Land

Housing and Land Timeline in South Africa

1913 The Natives Land Act

7% of the total land of South Africa is apportioned as reserves for black people (being 67% of the population) with the majority of land allocated to the white minority.

1936 The Natives Land and Trust Act

Enlarges the reserve land allocated to the black population under the Act to about 13% of the total land of South Africa.

1950 The Group Areas Act

Assigns racial groups to different residential and commercial sections of urban areas. The Act results in the forced removals of millions of black people from "black spots" (such as District Six and Sophiatown) as an attempt to exclude non-whites from living in areas reserved for whites.

2009 "Abahlali"

Abahlali baseMjondolo Movement SA v Premier, KwaZulu-Natal - The pro-poor decision by the Court prevents the eviction of people targeted by KwaZulu Natal's Slums Act by finding that this Act is unconstitutional. This finding implies that other provinces cannot pass similar laws to eradicate slums and informal settlements without providing alternative appropriate housing.

2008 "Olivia Road"

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg - The Court develops the concept of "meaningful engagement" in eviction cases. If the state plans to remove or displace occupiers from their homes, municipalities must engage with occupiers regarding the eviction, and/or alternative accommodation options.

2010 "Joe Slovo"

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes - The Court emphasises the importance of meaningful engagement when determining whether a housing plan is reasonable and requires the state to consult with the occupiers about the details of their relocation, and obliges the state to assist them with moving their possessions.

2011 The National Development Plan 2030

report emphasizes that the government needs to play a larger role in spatial planning oversight.

2011 "Blue Moonlight"

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd - The constitutionality of the City's housing policy is questioned by the Court, as it did not provide alternative housing for people evicted by private property owners. The Court confirms that the right to adequate housing can temporarily limit the right to property.

1951 "PISA"

The Prevention of Illegal Squatting Act: The state and landowners are given the power to evict "unlawful occupiers" and demolish their homes without a court order.

2004 "Modderklip"

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd: The Supreme Court of Appeal confirmed that the government is obligated to provide alternative accommodation if eviction would result in unlawful occupiers being at the risk of becoming homeless.

2011 "Mooiplaats"

Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others - Provides that even if occupiers were on land for only a short period, that the court considering eviction must still consider all relevant circumstances, including where occupiers will go.

2014 "Fischer"

Fischer and Another v Persons and whose identities are to the applicants unknown: The Court rules that at question in this event is the occupancy status of informal structures which were demolished.

1992 The "Cities of Transition" Report

states that land and spatial segregation must be addressed to overcome apartheid legacy.

2000 "Grootboom"

Government of the Republic of South Africa v Grootboom: An obligation is placed on the state to develop a housing plan for people who might be evicted. The Emergency Housing Programme (EHP) was adopted in Chapter 12 of the 2004 National Housing Code to give effect to the requirements in Grootboom.

2011 "Skurweplaas"

Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd: In line with the Mooiplaats finding, the Constitutional Court establishes that alternative accommodations must be provided when evictions are ordered.

2014 "LUPA"

The Western Cape Land Use Planning Act: Announces planning legislation in the Western Cape to align urban and rural land planning with the Constitution and improve coordination between municipal spatial plans.

1996 The Constitution

covers land and housing rights in the Bill of Rights. Section 25 of the Constitution guarantees the right of property against arbitrary deprivation and empowers the state to expropriate land in order to bring about greater access to land. Section 26 of the Constitution provides that everyone has a right to adequate housing and places an obligation on the state to take reasonable steps toward the realisation of this right. This section further prohibits arbitrary evictions.

1998 "PIE"

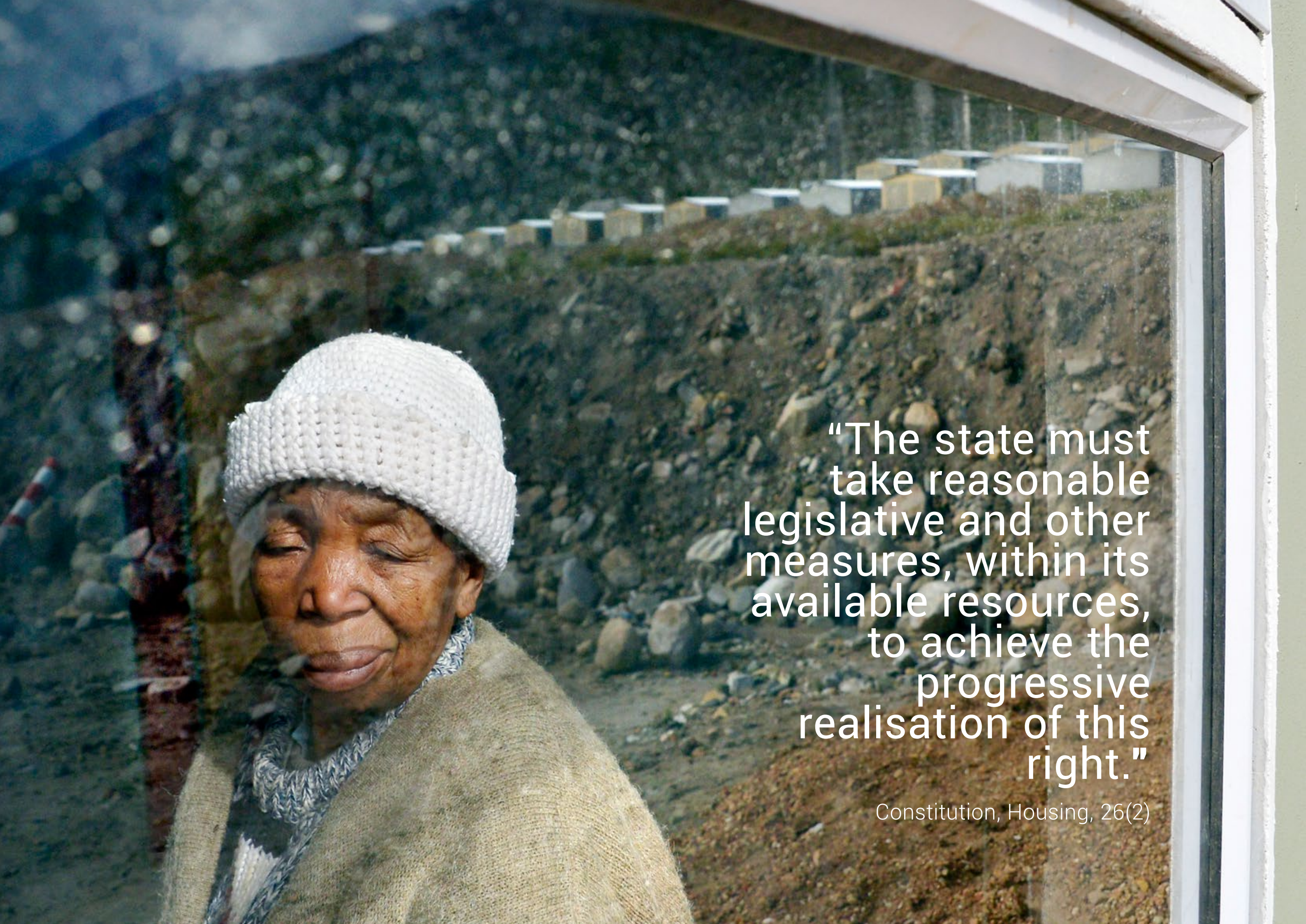
The Prevention of Illegal Eviction and Unlawful Occupation of Land Act seeks to protect the constitutional rights to property and housing in an evictions context by requiring that eviction orders may only be issued when it is just and equitable to do so after all the relevant circumstances have been considered.

2013 "Schubart Park"

Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality: The Constitutional Court rules that the evicting party (the City) must engage in good faith with occupiers, and not in a top-down fashion.

2013 "SPLUMA"

The Spatial Planning and Land Use Management Act: Provides guidance on spatial planning at municipal and provincial level.



"The state must
take reasonable
legislative and other
measures, within its
available resources,
to achieve the
progressive
realisation of this
right."

Constitution, Housing, 26(2)

Urban Land Justice

THE CASE FOR EXPROPRIATION

by Zackie Achmat

CAPE TOWN'S LINE OF RACE AND CLASS APARTHEID

Today, a line of mainly White suburbs can be drawn from Simonstown, the most southerly suburb to the most northern seaside suburb of Tableview. Since the 1960s, large-scale removals took place under the Group Areas Act from Simonstown to Claremont, Rondebosch and District Six. In traditionally affluent White suburbs fewer than 50 people live on a hectare of land with parks, roads, streetlights, a range of private and public amenities including the best schools, sport-grounds, parks, private.

"Expropriation ... is essential to ending class and race apartheid and to eradicate social inequality"

The majority of Cape Town's people (like the rest of South Africa) live in under-developed dormitory type houses, apartments and shacks. Manenberg, Khayelitsha, Hanover Park, Bishop Lavis, Atlantis and Nyanga among others are far from real economic opportunities. Illness,

unemployment, hunger, crime, poor quality education, the absence of dignified sanitation or sufficient water and high levels of alcoholism, drug abuse and gender-based violence - all lead to many people living brutal lives while struggling against the odds to make ends meet. Here, between 100 and 500 African and Coloured people share one hectare.

LAND JUSTICE AND THE LAW

Land justice can be attained if there is sufficient political will and organised, evidence-based mass struggle. This requires that advocates understand the Constitution and the decisions of our Courts in order to answer the question on the "right to property". City governments must urgently develop models for acquiring private land and building. Finally, a sustainable

"Integrating and densifying traditionally affluent suburbs and CBDs will assist with rapid economic development and growth"



There are **THREE** questions to answer in relation to the law and urban land justice:

- **Can** government expropriate private land, houses and buildings to integrate and densify cities in the public interest?
- **Does** government have a duty to use the property clause to ensure urban land justice, meaning giving every person an equal right to the city and the benefits of its economy?
- **Must** compensation for expropriation always be done at a market value and what if "property values" decline?

funding model can and must be developed for land acquisition and lastly, sustainable funding models for building homes on this land must be developed.

routes and work is the only way of ending spatial apartheid. Compensation, guaranteed by our Constitution should be calculated on the basis of need

integrating our cities will have enormous advantages. These include creating decent homes, work and small businesses, sustainable City services and

EXPROPRIATION

Expropriating a proportion of private land, buildings and homes in the City of Cape Town's CBD, central suburbs and across metros in South Africa is essential to ending class and race apartheid and to eradicate social inequality. Legal expropriation close to transport

and accumulated wealth in a just and equitable way.

In this way, integrating and densifying traditionally affluent suburbs and CBDs, which exclude poor and working class people, will assist with rapid economic development and growth in our cities. Socially

protecting the environment. How can this be done?

THE PROPERTY CLAUSE: AN INSTRUMENT FOR SOCIAL CHANGE AND TRANSFORMATION

The protection of property, as well as, the right of the state to expropriate or deprive people

of private property in the public interest are enshrined in the Constitution.

Reading the entire "property clause" shows that the Constitution demands that government must take private property into public ownership and in the public interest. It requires compensation to ensure equality and fairness. Land and property injustice can be remedied lawfully should government use existing laws to ensure decent housing and integrated cities.

The Constitutional Court has considered many aspects of the "property clause". How does the

Court see the "property clause"? Does it favour property-owners over the state? Research of its decisions demonstrate a resounding "no".

FNB AND HARKSEN

As early as 1997, in the case of Harksen, the Constitutional Court affirmed government's right to expropriate or deprive private property owners. Justice Richard Goldstone wrote on behalf of a unanimous court that:

"Expropriation (or compulsory acquisition as it is called in some

other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law."

However, under apartheid, the right to private property (except for Group Areas Act expropriations) was regarded as sacrosanct. The property clause in the Constitution changed that notion.

"An instrument for social change and transformation" are the words quoted by Justice Laurie Ackermann with approval to describe the property clause. In the 2001 Constitutional Court case, First National Bank against the Minister of Finance and the Commissioner of SARS. (FNB), he wrote:

"When considering the purpose and content of the property clause it is necessary . . . to move away from a static ... private-law... view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices ...'and control' of entrenched constitutional values."

The Constitutional Court held that even under segregation and apartheid, in the "pre-constitutional era", the law understood that "property should also serve the public good". The FNB case holds that the property clause does not stand

Reading the Constitution

- What has come to be known as "the property clause" has frequently been condemned by activists as "a sell-out" but most activists have rarely studied or even read it from beginning to end. Section 25 states:
- Property cannot be taken away except by a law that does not discriminate. It cannot be taken away on an arbitrary basis.
- Private property can only be taken into state ownership for a public purpose or in the public interest. When expropriating property, the state must compensate the owner on the basis of agreement or by going to Court for approval.
- The amount, timing, and how compensation is paid for private property must be just and equitable. It must consider a range of factors including. Compensation must reflect an equitable balance between the public interest and the interests of those affected.

on its own. Justice Ackermann (on behalf of a unanimous Constitutional Court) said that the property clause "must be construed as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution". He wrote:

"The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on "democratic values" and "fundamental human rights" but also on "social justice". Moreover the Bill of Rights places positive obligations on the state in regard to various social and economic rights."

In other words, the rights to equality, dignity, housing, safety, health and others – the need for "social justice" must be taken into account when interpreting the state's duties to expropriate property for a public purpose or in the public interest. If the state has a right and duty take reasonable and other measures,

within its available resources, to foster conditions "which enable citizens to gain access to land on an equitable basis", and the Constitution states that the property clause cannot be used to prevent "the state from taking legislative and other measures to achieve land, water and related reform", then why have our cities and suburbs not been integrated? The Constitutional Court has made a number of rulings on the right to housing and it has even had a case of compensation to a private owner for land occupation that promote the rights of people. Government has failed to ensure urban justice.

The FNB and Harksen cases showed that government has the power and duty to expropriate private property in the public interest. A key question is financing "lowering property values" and market value. Must government always pay market value when expropriating land?

MODDERKLIP

In the Modderklip case former Chief Justice Langa and the Constitutional Court recognised the "consequence of apartheid urban planning" which meant "that far too little land" was allocated and "too few houses" were built for Black people. The owners of Modderklip Boerdery offered the land to the state for sale so that the state could allow the 40 000 people who had settled there to stay. It refused. The Court challenged this decision.

"No acceptable reason has been proffered for the state's failure to assist Modderklip. The understandable desire to discourage "queue-jumping" does not explain or justify why Modderklip was left to carry the burden imposed on it to provide accommodation to such a large number of occupiers. No reasons have been given why Modderklip's offer for the state to purchase a portion of Modderklip's farm was not taken up and why no attempt was made to assist Modderklip to extricate itself."

The Court recognised that the state could use the Expropriation Act of 1975 to acquire land for urban development but it pointed out expropriation was not necessary in this case because the owners had offered to sell the land to the state. It is not necessary to decide, in this case, whether or not a court can order the expropriation of property.

"Now is the time to struggle for urban land justice"

KYALAMI RIDGE

The Constitution is clear. "Market value" is only one of at least five factors that must be taken into account when deciding compensation when land is expropriated.

A pensioner renting out a part of a house she lives in to make a living makes different use of property compared to a wealthy businessman with significant income and several properties. Public interest will suggest that she gets fair compensation to ensure a decent standard of living while the businessman can be constitutionally required to make a sacrifice in the public interest.

One of the biggest complaints of property-developers is that building housing for working-class people in middle- or upper-income suburbs will "lower property values". Is this a legal obstacle to expropriation?

After huge floods in Gauteng that left thousands of people from informal settlements homeless, the government decided to move people to a "transit camp" on

state land – a prison farm near an upper-class area called Kyalami Ridge. The residents objected that they were not consulted and took the government to court. The late Arthur Chaskalson, then President of the Constitutional Court, held the following: first, government had the right to use its own property in a way that it sees fit. Second, government had a duty to ensure that every person has access to adequate housing and that vulnerable people such as the Alexandra flood victims had a constitutional right to be housed. Last, the Court rejected the "property value" argument. Former Chief Justice Chaskalson wrote:

"The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing.

But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation



that government has to address the needs of homeless people, and its decision to use its own property for that purpose."

Clearly, the Kyalami Ridge case was about the use of state-owned land to house poor people next to very wealthy people. It was not a case related to private ownership, expropriation and property values.

However, the Constitution and the judgments of the courts are founded on the principle that everyone has a right to adequate

housing and that access to land is a fundamental right. Mobilise

Today, every activist and social movement can mobilise to ensure that government's intention to acquire urban land for housing is realised. This cannot happen without mass struggle.

Now is the time to educate ourselves and communities, explaining that government has the right and duty to acquire or expropriate private land for public housing. Now is also

the time to do further research to show that it is affordable and necessary to build public housing in the cities and traditionally White suburbs.

The country can no longer afford mass homelessness, unsustainable extension of infrastructure and environmental degradation through sprawling dormitory townships of the destitute.

Now is the time to struggle for urban land justice in Cape Town and all South African cities.

Balancing Restitution and Densification in District 6

By Lauren Frederic

When evaluating the strategic densification of Cape Town, South Africa, the case of District Six provides important insights. As land in District Six is currently being returned to previous residents through a long and complicated homecoming process, the government also has a mandate to address spatial segregation and race and class inequality. While consideration of District Six can be emotionally charged and legally complex, it also allows us to consider the

compatibility of restitution and densification efforts.

The evictions of District Six, a previously diverse and vibrant community, have become an iconic example of the devastating land use policies of apartheid government. Over nearly three decades, approximately 66,000 non-white residents were forcibly removed from District Six. This was part of a broader effort to force non-whites out of more central urban areas and into

government-built townships and informal settlements.

In 1994, the Land Restitution Act began the formal recognition process of those who were forcibly removed from their communities under the Apartheid government. It provides for two choices for those claimants: the return of land or "equitable redress." Land restitution is a critical component of the country's reconciliation effort and is one of several

mechanisms for meeting the economic and social needs of those who were hurt and humiliated by apartheid.

Identifying the proper level of densification in District Six has been contentious, with different stakeholders presenting arguments for low-density to high-density development. Previous residents have argued that low density, in the form of single family homes, would better capture the character of District

Six and the conditions which fostered strong community and families. Densification advocates believe that development can meet the needs of the city to house more people, while still meeting the neighborhood conditions preferred by previous residents.

Considering the challenges facing the dual pursuit of densification and restitution, it is possible that these processes can be used in concert to achieve both greater

economic opportunity and social mobility for those harmed under the Apartheid regime. Further, it is critical for all stakeholders involved in District Six to demonstrate that a successful process of reconciliation can be translated to other contexts. But given the experience of the last twenty years, where restitution has been slow and densification still faces a negative public perception, progress may continue to be disjointed and polarising.

Stop selling our land

JOINT SUBMISSION TO THE WESTERN CAPE MINISTRY OF TRANSPORT AND PUBLIC WORKS

Social Justice Coalition, Equal Education & Ndifuna Ukwazi

On 26 March 2014, Minister Carlisle, MEC for Transport and Public Works, held an 'investors' conference to "showcase the four investment opportunities that the department will be making available to interested private sector parties". The conference notice referred to several 'prime properties' that would be made available to investors. Interested parties were invited to submit expressions of interest by 17 April 2014.

According to the notice, the four properties include:

■ **Alfred Street Complex:** Situated in Alfred Street in the Prestwich Precinct. Linking the Cape Town CBD and the V&A Waterfront with an estimated total of 65 000 sq.m potential bulk available.

■ **Top Yard:** Is a part of the Government Motor Transport Precinct. Located in the CBD, less than 500 meters from

National Parliament and the Company Gardens, with an estimated total of 46 484 sq.m potential bulk available.

■ **Main Road Sea Point:** Is the site formerly known as the old Tafelberg Remedial High School. Located at 335 Main Road, Sea Point, approximately 3.5 kms from the CBD, consisting of two separate erven namely 1424 and 1675. With a total site area of 1.7054 hectares.

■ **Helen Bowden Nurses Home Site:** Situated in the Somerset Precinct. Neighbouring the V&A Waterfront and the Cape Town Stadium with an estimated total of 46 000 sq.m potential bulk available.

Severe shortage of land in Cape Town according to the City and Province

The City of Cape Town and the Provincial Government have regularly used the shortage of land in the city as a primary

response to questions regarding inadequate housing provision, land redistribution, service delivery, and urban densification.

In an open letter to President Jacob Zuma on 6 February 2014, Mayor Patricia De Lille requested 'urgent' assistance from National Government to release land for the purposes of housing provision. Mayor De Lille claimed that "one of the major challenges confronting the City is a shortage of suitable available land for housing."

The Mayor appealed to President Zuma to release land "given the urgency of the situation". She claimed that "we are at pains to emphasise the proactive steps that the City has taken in an attempt to release this land for housing, and have stated that the decision ultimately rests with national government".

The unavailability of land for housing has been used as the justification for several policies

and institutions, including the City's Anti-Land Invasion Unit - recently described by Justice Gamble in the Western Cape High Court as having conducted raids "reminiscent of the well-documented operations conducted by the apartheid government in the 1980s..." As the court papers show, 'raids' such as this are purportedly conducted, according to the City, to protect severely limited land for housing provision.

All spheres of government are obliged to take steps to reverse Apartheid spatial planning

The 2011 census shows that roughly 20% of households in the city are informal. It shows that 29 058 households have no access to any sanitation facilities, and 48 509 households use 'bucket latrines'.

Poor and working class communities living in these conditions are relegated to the outskirts of the city, many of which are over 30 kilometres away. While this is a direct result of Apartheid spatial planning, successive post-Apartheid administrations - local, provincial, and national - have entrenched this spatial logic of the city by refusing to take adequate measures to progressively realise the rights of poor and working class communities with respect to land, housing, and densification in South African cities.

The South African Constitution - in particular, Sections 152, 153, and 195 - require that municipal, provincial, and national government must perform their duties, always



prioritising the progressive realisation of the rights of the most vulnerable in society. This must be done through democratic and accountable government implemented in ways that are fair, equitable, and promote the dignity of all people.

The City of Cape Town's Spatial Development Framework - the primary long-term planning document adopted for the City - is emphatic of the need for densification with respect to the spatial development of Cape Town over the next twenty years.

Instead of promoting and encouraging the use of available land for the development of plans for mixed, affordable, and low-cost housing within Cape Town, the City and Province continue to entrench Apartheid-era planning. This is particularly worrying given that the City and Province repeatedly speak of the unavailability of land and refer to National Government as the sphere of government refusing to make land available closer to the

city's central areas.

The four properties being made available to private developers would provide a significant number of units as part of a broader plan for mixed housing in the city. Given the urgent need for this, and local and provincial government's insistence that land in the city is not available, it is disappointing that the Province has showcased this available land to private investors. This comes just months after the Province took further steps to approve the amendment of the urban edge in order to make the highly criticized Wescape project - a satellite city far outside of Cape Town - a reality.

We believe that the Province's actions with regard to these properties are unlawful in terms of the Constitution. The Province must halt this process and consult with local and national government with regard to using this land as part of a broader plan to deal adequately with the urgent spatial planning and housing needs of the city.

Low cost housing in the CBD

By Andrew Fleming

AFFORDABLE HOUSING IN CAPE TOWN'S CBD ISN'T JUST POSSIBLE, IT IS SOMETHING THAT SHOULD BE ACTIVELY PURSUED FOR THE BENEFIT OF AN INTEGRATED CITY AND A THRIVING LOCAL ECONOMY

Government and private developers say that the high price of land and input costs in the Central Business District (CBD) stops them from building affordable housing. This often stops them from exploring options for affordable housing development.

Sometimes, government can use incentives to encourage private developers to fulfill housing policy. In the case of low income housing there are few incentives to explore opportunities. As a result, Cape Town's CBD still does not have any integrated and affordable housing opportunities.

However, when investigated further, Cape Town's CBD provides a very good opportunity to turn this situation around. Affordable and inclusive housing is not only possible in the CBD,

but is necessary. It would help to reverse the history of spatial apartheid that has shaped our social and economic lives. On that basis alone, affordable and mixed income housing in the CBD must be a priority for all spheres of government and the private sector too.

Affordable housing in the CBD has significant economic benefits as well. People want to live closer to the places that they work. This has fueled the growth of other commercial centres around the Cape Town metro-region, such as Century City and Bellville. One of the most strategic and straightforward ways to maintain the CBD's economic draw would be the addition of affordable housing. This would not only bring in more people, but it would also help to enhance the local economy by offering more opportunities for more people.

EMPTY OFFICES

According to the South African Property Owner's Association's (SAPOA) latest Office Vacancy Report, published in July 2014: Cape Town's CBD has 1,012,642 square metres of total rentable office space. This is split across different property grades (Premium, A, B, and C grades). Premium is the highest quality property and price. C-grade is the lowest. 9% of offices overall are vacant or empty. But 25% of C-grade category has been vacant in the past 9 months. There is a chronic lack of demand for C-grade office space.

More and more people are buying houses in the CBD. At the same time, demand for residential properties in the CBD is rising. Between 2001 and 2011, the CBD's total population increased from 1,570 to 5,286 people.

According to the State of Cape Town Central City Report, every year more money is being spent on residential properties. The total amount spent increased from R115m in 2011 to R249m in 2013. In 2013 alone, there were a total of 163 residential unit sales in the CBD, at an average price of R1.428m each.

People have to compete for rental properties. There is a very high demand for rental properties.

VACANT OFFICE SPACE FOR HOUSING

The City of Cape Town's latest business location intelligence initiative, called ECAMP, shows that the CBD is in a strong phase of economic and infrastructural growth. There is a high demand for residential property. More people are buying and there is no enough rental houses. Together, the high demand for residential spaces, along with the high vacancy rates in the lower end of the office market, shows us the benefits of more affordable housing coming into the CBD - Property owners and developers are motivated to fill their buildings to get rent, and residents want to places to live in the CBD in order to be near to the CBDs economic and social benefits.

THE FACTS

In 2013, the average monthly rental rate in the CBD was:

Studio/bachelor: R4,739
1-Bd: R7,272
2-Bd: R12,896
3-Bd/penthouse: R14,000



Photo: Lisa Burnell

SOCIAL HOUSING MOVEMENT

The social housing movement is an example of a successful affordable development. Social housing provides well-managed and privately-developed rental housing for people and families who earn between R3500 and R8000 per month. It is funded through government grants and incentives. The private sector invests and manages the housing. Social housing could be built in Cape Town's CBD on land currently owned by the government and in various privately-owned buildings throughout the area. It would provide homes for nurses, police officers, and other public and private employees who earn regular salaries and want to live in the CBD.

The key is to merge these two demands in a way that will also have the effect of transforming Cape Town into a more racially and socioeconomically inclusive space.

Creating more residential units does not have to be as costly as you might think. Converting existing properties in homes is a cheap way to create affordable housing. Retrofitting existing C-grade buildings into affordable student housing, for instance, can be done relatively easily,

when you think that the walls of a building don't have to be changed dramatically for students. Students often share bathrooms and kitchens. For building owners, this would be a good way of using older buildings that have high vacancy rates while providing new opportunities for younger people especially.

INCENTIVES

An incentive called the Urban Development Zone (UDZ) tax rewards property owners and developers if they upgrade or build properties in some urban areas around the country, such as Cape Town's CBD.

This is a very good incentive to encourage developers to retrofit office into affordable units in the CBD. This benefits both residential and business tenants because the building is being used and improved.

STRATEGIC ZONING

Another strategy to have zoning requirements and incentives that require developers to include a percentage of affordable housing in their developments. In exchange they get some privileges. Cities like Toronto, Amsterdam, and more recently New York have all implemented creative zoning policies to encourage affordable and lower-income housing in central urban spaces.

TORONTO

Toronto Community Housing, the largest social housing provider in Canada, is addressing affordability in the city centre through the revitalization of downtown land and provision of rental housing. One example is Regent Park, where engagement with the community over four years has resulted in a revitalized neighborhood where rental housing for a diverse population blends incomes, use, and culture through proactive development policy.



Outside of Cape Town

BRINGING RESIDENTS CLOSER TO THE CITY CENTRE MAKES SENSE. BENEFITS TO AFFORDABLE HOUSING IN THE CBD INCLUDE RESIDENTS USE OF UNDERGROUND INFRASTRUCTURE (LIKE THE SEWAGE SYSTEMS) AT NIGHT WHILE WORKERS AND VISITORS USE IT DURING THE DAY SO IT MAKES BETTER USE OF EXISTING UNDERGROUND INFRASTRUCTURE RATHER THAN BUILDING NEW INFRASTRUCTURE REDUCING METRO-WIDE CARBON EMISSIONS BECAUSE LESS PEOPLE ARE USING CARS.

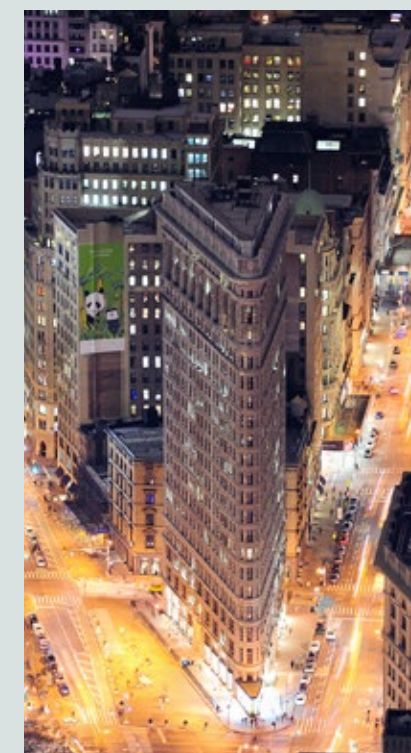
NEW YORK CITY

As America's most congested city, NYC does not have issues with low population density. However, it does have affordability issues, which its last two mayors have taken head-on. The city has required property developers to include affordable housing units in new projects in order to gain access to additional FAR (Floor Area Ratio). The City aims to create 200,000 new units of affordable housing in the next ten years.



JOHANNESBURG

Well-located affordable housing in Johannesburg's CBD has been at the heart of driving a more integrated urban space. Private companies such as the Johannesburg Social Housing Company (JOSHCO), supported by National Government grants and financial incentives, are converting vacant and unoccupied buildings into affordable rental housing with regular community programming and ongoing maintenance. High levels of demand and rental payments make these developments a success for the owners and tenants alike, bringing better housing into the realm of possibility for more people.



BOGOTÁ

Known around the world for its leadership in inclusive transportation and public infrastructure, Bogotá has recently taken inclusive development a step further by linking expanded transportation funding with the direct provision of lower-income, inner-city housing. By doing so, the city is helping residents gain better access to more jobs, services, and cultural offerings. This approach also shows innovation in bridging funding for additional infrastructure, which go a long way towards promoting an inclusive urban city.

Wescape: A new apartheid city?

MAYOR DE LILLE'S UTOPIAN PROJECT

By Rebecca Nelson
for Future Cape Town on 6 February 2014

DESPITE OPPOSITION FROM WITHIN THE CITY OF CAPE TOWN AND AGAINST INTERNATIONAL BEST PRACTICE URBAN PLANNING, MAYOR DE LILLE IS AGGRESSIVELY PURSUING A NEW "CITY" BEYOND ATLANTIS. ANTON BREDELL, MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING HAS RECENTLY EXPANDED THE URBAN EDGE



The edge of Cape Town has officially been pushed out to encompass lands on the Cape Farms area. This decision brings Cape Town one ominous step closer to the highly contested development, Wescape.

As a development Wescape addresses very pertinent and immediate ecological, social and economic sustainability issues that intend to alleviate Cape Town's 400,000 housing back log while providing access to equality and opportunity. Wescape also considers resilience to climate

change vulnerability but more importantly and in their own term, the development seeks to build a "self-sustaining community" in an "integrated and holistic development". The truth is however that this is simply a band aid solution to a long term, complex and multifaceted problem that centres around Cape Town's historical and future urban form.

Urbanisation is going to be a reality for around 3/4 of the world's population by 2050 with most of the growth occurring in the developing world.

According to Bhatta, "cities provide poor people with more opportunities and greater access to resources to transform their situation than rural areas". The growing global trend of cities in adapting to growth is through urban sprawl, mainly on city peripheries leading to unavoidable consequences such as insecurity of tenure, oil insecurity, lack of mobility and access to opportunity. The greatest consequence of urban sprawl is that while seeking to provide housing for an increasing population it inevitably encroaches on productive

farmland and native habitat at the cost of urban food security and local ecosystems. Sprawl in African cities is also often characterised by slums which are seen as polluted, unsafe and lacking basic services. It is true that tackling these issues are complex, multifaceted and costly, especially when having to address legacy apartheid fragmentation. Bhatta, like others in the urban development arena, believe however that it is very feasible to develop a city without sprawl. So is Wescape really addressing these issues?

The potential of the Wescape development in solving the housing needs of more than 200 thousand households by leap-frogging sprawl to 25km from the urban centre is shadowed by the fact that the development lies within the Koeberg 16km radius nuclear red zone, which if initiated will potentially require the evacuation of more than 800,000 people within 16 hours. Although it may still be too early with the development not scheduled for completion until 2035, the Wescape development also does not acknowledge who from the housing wait list will be receiving housing and where the new inhabitants will be relocated from. Any relocation often results in dislocation from community, social networks and support infrastructure. In addition, Cape Town like many cities around the world is facing multiple natural resource constraints and, according to a report from the City of Cape Town's Department of Economic and Human Development is

projected to run out of water by 2025. With a population of 3.7 million already feeling pressure from increasing fuel and energy costs, why are we not pressuring the city to look more closely at densification and optimisation of existing inhabited areas rather than increasing the urban edge?

The question is rather, are there more affordable, equitable and sustainable alternatives to increasing the city's edge to accommodate a new R140 billion development 25km from Cape Town?

The answer is a clear and resounding 'YES'. Not only are there according to Simon Nicks multitudes of transition spaces between our spatially fragmented suburbs that could be developed to, as Brett Petzer states "knit our city together" but there are several concept projects supporting development within the urban fringe such as the Greater Tygerberg Partnership's Voortrekker Road corridor development and the Two Rivers Urban Park Development that advocate density and mixed use development.

Comments from our network including that of Masters of City Planning student, Brett Petzer point out that "we should rather be renovating our institutions, our local democracy and our

citywide conversation so that we can house all Capetonians more equitably within our already ample boundaries". Walter Fiew, a young urbanist states that "Developments to the north of the city, many only aimed to be completed by 2050, will destroy any hope of building a more compact city in the short and medium term. It's high time we get serious about compacting and densifying the city, for this might be the only hope we have of building a more spatially just and equitable city where the poor and the rich have equal access to the opportunities the city offers.

Cape Town has one of the lowest densities in the world hence the clear opportunity to harness the multiple possibilities that come with increasing urban density such as walkability, accessibility, creating places of closeness, safety, healthy communities and better quality of life all the while providing much needed housing and places of business. Add integrated public transport, abundant green space in conjunction with water harvesting and conservation, renewable energy and local support for innovation and creative industries and you have a true sustainable community. Sadly our city falls short of delivering a suite of such integrated benefits focusing rather on fragmented solutions within a fragmented system. With no overhaul of the status-quo in sight, will Wescape really be able to live up to its promises within the current system?

Backyarders: Densification in a housing crisis

by Ivan Turok and Jackie Borel-Saladin

Government policy has been slow to recognise the rapid growth in backyard housing over the last decade. A quarter of a million households have responded to the intense pressure on urban land and peripheral sprawl by building makeshift structures in the backyards of formal township houses and council flats. Johannesburg has seen the biggest increase in backyard shacks, followed by Cape Town, Ekurhuleni and Tshwane.

At a time when RDP style housing programmes have been subject to growing criticism for creating sparse dormitory settlements far from jobs and services, many observers – including the Presidency and

South African Local Government Association – have argued that backyard dwellings may be a better response to the urban housing crisis.

In the context of severe housing shortages, extensive poverty and high land prices, there are some obvious advantages to backyard dwellings. Renting backyard space gives the tenants access to basic services shared with the landlord, and perhaps more privacy and security than in an informal settlement.

Many established townships are located closer to economic opportunities than informal settlements, so backyarders may have a better chance of earning an income.

They also have the flexibility to move very easily when their circumstances change.

Backyard shacks are also a source of rental income to cash-poor home-owners, such as new RDP housing beneficiaries.

They make more efficient use of urban land and raise population densities in the townships and RDP settlements, thereby improving the viability of public transport, social facilities and other public and private amenities.

These benefits need to be set against significant disadvantages. Overcrowded properties pose health risks and promote the spread of disease,

especially if the tenants can't access the services in the main house.

Living at very high densities in confined spaces and having to share taps, toilets and electricity contributes to frustration, conflict and abuse.

Crudely-built shacks can become a problem in neighbourhoods and discourage people from investing in and upgrading their properties. The capacity of municipal services in many townships is already overloaded, and further demands can strain infrastructure networks. The quality of services for the whole community suffers from more frequent breakdowns and blockages.

There is a better way forward than simply cramming more and more people into confined backyard spaces with improvised shelter. 'Building up' through two-, three- or four-storey housing would avoid families living in each other's pockets and free up some green space for people to breathe.

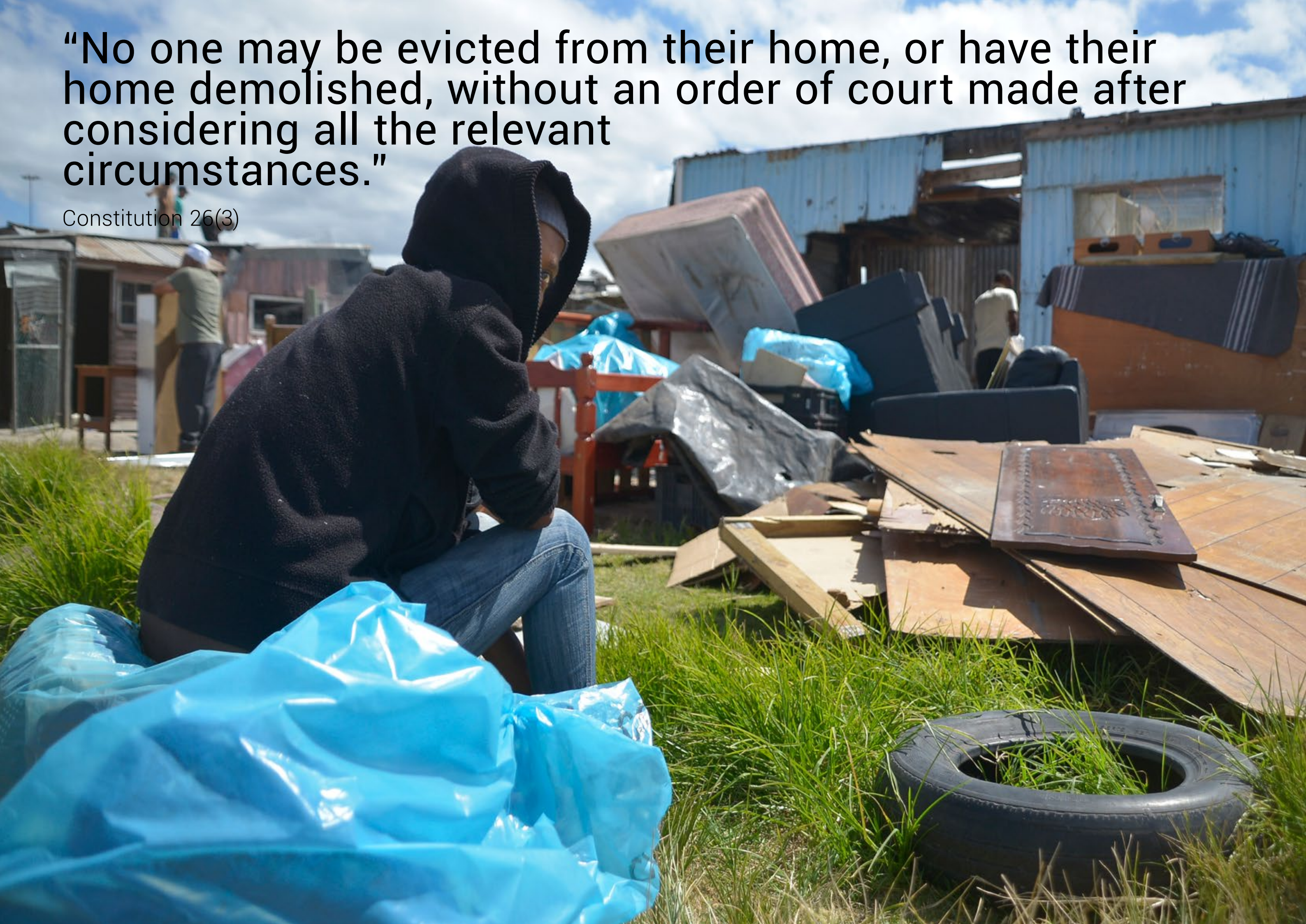
Positive policies would be needed to increase the capacity of municipal services to cope with the enlarged demands. Government would need to encourage low-cost building designs supported by cheap finance.

Basic regulations would also be required to set minimum standards and avoid exploitation.

With some creative thinking and purposeful action, the backyard phenomenon could just become a prototype solution to the country's urban housing crisis and suburban sprawl.

"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."

Constitution 26(3)



The Constitution, Property & Housing

25 PROPERTY

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital

improvement of the property; (e) and the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform,

and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that

property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

26 HOUSING

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) 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. No legislation may permit arbitrary evictions.

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