

HOMELESSNESS

Somewhere to call home

BILL SWANNIE considers eviction controls in post-apartheid South Africa

An enduring legacy of apartheid laws in South Africa is the grossly unequal distribution of land ownership in the Republic to this day. Apartheid laws prevented black South Africans from owning land, and required their eviction from homes in 'whites only' urban areas. In Sowetown in Johannesburg, and District Six in Cape Town, homes were bulldozed and destroyed, often along with personal belongings.¹ Black South Africans, who make up approximately 90 per cent of the population, were forced to live in rural homelands or urban townships.

Since the seventeenth century, the traditional lands of native South Africans were stolen by Dutch and English colonists.² This forced millions of natives to the cities, where they were exploited as a source of cheap, expendable labour. Urban townships often overflowed, forcing many people to erect makeshift shacks on any available land. These shacks usually have no electricity, running water or proper sanitation.

Under the *Prevention of Illegal Squatting Act 1951*, occupation of land in contravention of apartheid laws was a criminal offence, and eviction orders were obtained simply by applying to an administrative official. These laws:

allowed evictions and forced removals that uprooted millions of black South Africans and left them politically, socially and economically marginalised, insecure and vulnerable.³

The new Constitution

Nelson Mandela's victory in South Africa's first democratic election, in April 1994, was an important symbolic event. However, even the commencement of the new Constitution in 1996 did not alleviate the dire living circumstance of the majority of black South Africans. Citing the *South African Yearbook*, the Constitutional Court stated that in 1997:

it was estimated that ... more than 8 million South Africans, that is, a fifth of the total population, lived in informal settlements on land which they neither owned nor had permission to occupy.⁴

The Constitution commits South Africa to the principles of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.⁵ Importantly, this involves acknowledging and redressing the 'injustices of [South Africa's] past',⁶ including a specific commitment to land reform.⁷

Section 25 of the Constitution requires the government to implement and achieve three aspects of land reform:

- restitution, or equitable redress, for land taken from a person or community 'as a result of past racially discriminatory laws or practices';⁸
- 'foster[ing] conditions which enable citizens to gain access to land on an equitable basis'.⁹ This involves improving the availability and affordability of land and

- housing for people on a low-income, primarily by building houses and providing housing subsidies; and
- improving security of tenure for those whose right to occupy their home or land is 'legally insecure as a result of past racially discriminatory laws or practices'.¹⁰

In relation to housing, section 26 of the Constitution provides:

- 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 realization 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.

The right to housing

The right to adequate housing derives from Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, which declares 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing'.¹¹ Adequate housing is 'of central importance for the enjoyment of all economic, social and cultural rights'¹² and is 'integrally linked to other human rights and to the fundamental principles on which the Covenant is premised'.¹³ The right to 'adequate' housing requires more than merely having a roof over one's head; it is the right to live somewhere in security, peace and dignity.¹⁴

Importantly in the South African context, Article 11(1) requires that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction'.¹⁵ 'Forced eviction' means 'the permanent or temporary removal against their will of individuals, families, and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal and other protection'.¹⁶ Forced evictions frequently violate other human rights, such as the right to life, to security of the person, to non-interference with privacy, family and the home, and the right to peaceful enjoyment of possessions.

The PIE Act

To fulfill its obligations under the Constitution and international law, the South African Parliament enacted the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* ('PIE Act') in 1998. This Act seeks to regulate the eviction of 'unlawful occupiers' from land in a fair manner, while recognising the right of land owners to apply to the court for an eviction order in appropriate circumstances.¹⁷ It was adopted with the 'manifest objective' of overcoming the injustices

REFERENCES

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2. Martin Meredith, *Diamonds, Gold and War: The Making of South Africa* (2007).
3. Van der Walt, above n 1, 373.
4. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), [7].
5. See section 1(a).
6. Preamble to the Constitution.
7. Section 25(4) & (8).
8. Section 25(7).
9. Section 25(5).
10. Section 25(6).
11. *International Covenant on Economic, Social and Cultural Rights*, Opened for signature 16 December 1966, GA Res 2200A, 21st sess, UN Doc A/6316, entered into force 3 January 1976.
12. UN ESCOR, 6th Session, General Comment 4, The right to adequate housing (Art 11(1)), (1991) [1].
13. *Ibid* [7].
14. *Ibid*.
15. *Ibid* [8].
16. UN ESCOR, 16th Session, General Comment 7, The right to adequate housing (Art 11.1): Forced Evictions (1997) [3].
17. Preamble to the Act.

of apartheid eviction laws, and 'ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation'.¹⁸

Building on the constitutional requirement for a court to consider 'all the relevant circumstances' before any eviction can take place, the PIE Act requires a court to consider whether it is 'just and equitable' to grant an eviction order, particularly considering 'the rights and needs of the elderly, children, disabled persons and households headed by women'.¹⁹ The court may determine a 'just and equitable date on which the unlawful occupier must vacate the land', and place 'reasonable conditions' on the eviction and the demolition or removal of buildings or structures on the land.²⁰

The PIE Act has been attacked as an arbitrary interference with property rights, prohibited by section 25(1) of the Constitution. In *City of Cape Town v Rudolph*,²¹ the Cape Town High Court found that the Act did interfere with property rights, as it prevented land owners from immediately evicting persons occupying their land. However, the court held that the interference was not 'arbitrary'; in fact the requirement for a court to consider 'all the relevant circumstances', and to order eviction only if it was 'just and equitable', was the 'antithesis of arbitrariness'.

The court noted that the Act's interference with property rights is limited in that it affects only one incident of ownership, that is, possession, and the interference is only for a 'limited time'. Given

the importance of having a secure home, and the 'calamitous' consequences of eviction on the lives of the persons concerned, the interference was regarded as justified.²²

Conclusion

Although the government has built and provided in excess of one million homes since 1994, the waiting list for subsidised housing continues to grow by around 178 000 each year. South Africa is currently facing an acute shortage of low-cost housing in urban areas.²³

Apartheid laws deprived black South Africans of property rights, and made their occupation of land allocated to whites a crime. Restoring equitable access to land and providing affordable housing to all are long-term projects. In the mean time, the PIE Act provides some security for people who are forced to occupy land they do not own. The Act particularly protects the most vulnerable members of society — the elderly, children, disabled persons and women — from forced eviction and homelessness.

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18. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), [11].

19. Sections 4(6) & (7).

20. Section 4(8), (9), (10), (11) & (12).

21. *City of Cape Town v Rudolph and Forty-Nine Others* 2003 (11) BCLR 1236 (C).

22. *Ibid* [32].

23. Steve Kahanovitz, *An Urban Slice of PIE: The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act in South Africa*, 3–4.

