

**A CRITICAL ANALYSIS OF THE ENFORCEMENT OF THE RIGHT TO ACCESS  
TO ADEQUATE HOUSING IN SOUTH AFRICA**

By

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## DECLARATION

I, **Mudzielwana Takalani**, hereby declare that the work contained in this mini-dissertation submitted to the University of Limpopo for the degree of Masters of Law in Development and Management Law is my original work and has not been previously submitted for any degree at this or other University and that all material contained herein has been appropriately acknowledged.

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## LIST OF ABBREVIATIONS

<b>AB</b>	Administration of Bantu Affairs Act 45 of 1971
<b>ANC</b>	African National Congress.
<b>CALS</b>	Centre for Applied Legal Studies.
<b>HA</b>	Housing Act 107 of 1997
<b>ICESR</b>	International Covenant on Economic, Social, and Cultural Rights.
<b>IDP</b>	Integrated Development Plan.
<b>LRC</b>	Legal Resources Centre.
<b>NGOs</b>	Non-Government Organisations
<b>NHPC</b>	National Housing and Planning Commission.
<b>NPO</b>	Non-profit Organisations.
<b>PCCA</b>	Prevention and Combating of Corrupt Activities Act 12 of 2004.
<b>PHP</b>	People Housing Process.
<b>PIEA</b>	Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998.
<b>PISA</b>	Prevention of Illegal Squatting Act 51 of 1952
<b>RDP</b>	Reconstruction and Development Programme.



## **ABSTRACT**

The South African constitution 1996 provides for the fundamental human rights that must be enjoyed by all within its borders. This includes section 26 of the Constitution, which gives everyone the right to adequate housing regardless of economic status. Thus, more emphasis is placed on previously marginalised population groups. However, due to corruption, high inequality gap between the poor and rich, and limited financial resources, many people do not have adequate housing. This study examined how well the South African government is upholding this right. It will go into more detail about the potential outcomes of the constitutional framework, the judicial system, and other relevant institutions. This study further analyses the effectiveness of the South African government in promoting, implementation and fulfilling the right to adequate housing. Different laws, policies, legislation, and initiatives by the government to fulfil and protect people's right of access to adequate housing are reviewed and assessed. Also, the fulfilment of the adequate housing right is interrelated to other rights like water, electricity, food, education, and healthcare. The study examined the effectiveness of the execution of the need for affordable housing in South Africa.

## CHAPTER 1

### INTRODUCTION AND BACKGROUND OF THE STUDY

#### 1.1 Introduction

Twenty-nine years ago, South Africa became a democratic state that respect human rights as enshrined in its Constitution of 1996. Section 26 of the South African Constitution grants all living in the republic access to adequate housing.<sup>1</sup> Nearly three decades since this declaration was made, many people are still without adequate housing and live in shacks or makeshift structures. Moreover, more people are dependent on the state to provide housing. Although a significant number of people have benefited from the government-subsidized Housing Reconstruction and Development Program (RDP) since 1994, many are on a waiting list.<sup>2</sup>

There are several government programs that aim to honour the right to adequate housing for deserving individuals like the Reconstruction and Development Programme (RDP). This program focuses on ensuring universal access to water, electricity, sanitation, employment, housing, education, social security, quality health care, a healthy environment and adequate nutrition.<sup>3</sup> Secondly, the Integrated Development Plan (IDP) is a policy and strategic guideline for municipal governments. The plan guides municipalities on how to connect and manage multiple sectoral plans and planning processes to provide efficient service delivery. This includes providing and creating opportunities for people to access housing.<sup>4</sup> While these programmes are noble, providing access to housing that also give access to water, sanitation, education, electricity, healthcare, and shelter remains a mammoth task. Theoretical,

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<sup>1</sup> The Constitution of Republic of South Africa 1996(hereinafter the constitution), Section 26.

<sup>2</sup>NewzRoomAfrica. < <https://www.facebook.com/collenmashawanapage/videos/1661454234201398/>> accessed on 10 May 2022.

<sup>3</sup> Reconstruction and Development Programme Fund. Annual Financial Statements for The Year Ended 31 March 2013. < [www.treasury.gov.za](http://www.treasury.gov.za).> Accessed 10 May 2022.

<sup>4</sup> Harrison, P 'The genealogy of South Africa's Integrated Development Plan: Third World Planning Review' (2001) 23(2) *Research Gate* 183.

the right to adequate housing in South Africa is enforceable. However, the question arises on the degree of enforceability and implementation by the South African government. In spite huge budget allocation in the last decades, government housing schemes, are marred by maladministration, dishonesty, and poor-quality housing.<sup>5</sup>

South Africa is a member of regional and international organisations that uphold and protect human rights including provision of basic housing. For example, Article 25, Part 1 of the United Nations Universal Declaration of Human Rights states that all people are entitled to an adequate standard of living to support their own health and well-being and that of their families.<sup>6</sup> This implies that the South African government must put more effort in protecting and promoting the right to housing. Furthermore, South Africa is a member country to the International Covenant on Economic, Social, and Cultural Rights (ICESR). This convention advances social progress, and higher quality of living by reassuring confidence and hope in civil rights and utilising global mechanisms to that end.<sup>7</sup> Article 11 of the ICESR, member states must afford their citizens a way of life with sufficient food, clothing, and housing. These international conventions bind South Africa to take appropriate measures to ensure that its citizens have enough and readily available resources to realise adequate housing.

Case law in South Africa also shows that government is obliged and bound by the law and global agreements conventions to provide adequate housing to its people. For example, the *Government of the Republic of South Africa and Others v. Grootboom and Others*.<sup>8</sup> In this case, the residents of Wallaceden community applied to government for low-income housing and waited for a very long time. While waiting they squatted in a privately owned land. When the landowner evicted them, they had

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<sup>5</sup> South African Human Rights Commission 'Right to Adequate Housing' (2002) 55 < [report th\\_esr\\_chap\\_2.PDF \(sahrc.org.za\)](#)> accessed 10 May 2022.

<sup>6</sup> Article 25(1) of the Universal Declaration of Human Rights.

<sup>7</sup> ESCR-Net. 'Section 5: Background Information on the ICESCR' <[Section 5: Background Information on the ICESCR | ESCR-Net](#)> accessed on 11 May 2022.

<sup>8</sup> 2001 (1) SA 46 (CC). (Hereinafter referred to as Grootboom).

nowhere to go.<sup>9</sup> In court, residents claimed that their right to housing was violated. In addition, they claimed that their children's rights were also violated.<sup>10</sup> The court ruled that the state is obliged to fulfil and promote the right to housing. As such, occupants must be given alternative emergency accommodations. In addition, Yakub J also stated that the states are expected by law to make sure that a minimum standard of socio-economic rights is maintained. This includes the right to adequate housing.<sup>11</sup> Thus, denial of basic shelter and housing to citizens is in violation of the law.

The law recognizes the limitations on the state's ability to provide adequate housing. The state is obligated to show that they have tried to use all available resources such as land, funds, and materials to meet the basic requirements of the right.<sup>12</sup> Furthermore, the International Covenant on Economic, Social and Cultural Rights recognizes that many economic rights, such as the right to social security, health, and housing, are beyond the reach of many poor countries. For this reason, the state can only fulfil this right to the maximum extent to which resources are available.<sup>13</sup> Consistent with the right to housing, the International Covenant on Economic, Social, and Cultural Rights encourages member states to deal with the constraints of unemployment, inequality, and poverty to ensure the realisation of economic, social, and cultural rights. ICESCR further states that the conditions for meaningful enjoyment of the right to housing as follows:

*Affordability:* Member states must set costs that are proportional to one's income level. Majority of homeless people are low-income earners; hence, accommodation price adjustments are necessary to match their income level. The Home Loan and Mortgage

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<sup>9</sup> Ibid, para 8.

<sup>10</sup> Ibid, para 15.

<sup>11</sup> Ibid, para 30.

<sup>12</sup> Ibid.

<sup>13</sup> Article 22 of the International Covenant on Economic, Social and Cultural Rights.

Disclosure Act<sup>14</sup> regulates lending practices<sup>15</sup> by encouraging financial institutions to ensure that their home loans are affordable to the majority to enable adequate houses for all. The mobilization of housing credit is a big part of the national housing policy.

*Accessibility:* The covenant states the right to access accommodation with emphasis on the poor or marginalised groups of society. <sup>16</sup>

*Habitability:* Habitability refers to compliance with safety and health standards of a shelter.<sup>17</sup> A habitable shelter or house is the one that is not risky to one's health, protects from different weather elements, and comfortability. The right to appropriate housing, safety and health are strongly strong related. Literature shows that a harmless habitat and a healthy environment are required for living a peaceful and sustainable life.<sup>18</sup> In South Africa, the right to housing refer to "the establishment and maintenance of habitable, stable and sustainable public and private residential environment"<sup>19</sup> as ruled in the Grootboom case.

*Availability of Services and infrastructure:* The state is expected to provide houses that have accessible basic services such as water, sanitation, electricity, health care and other governmental institutions that deal with housing access. In terms of sanitation, a house must also be in a place where there is an official waste collection service provider to keep the area clean and maintain a pleasant and sanitary environment for

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<sup>14</sup> No.63 of 2000.

<sup>15</sup>Moja T, Chairperson of the Disclosure Board.< [Implementation of Home Loan and Mortgage Disclosure Act 63, 2000: Departmental briefing; Rental Housing Amendment Bill: deliberations continued | PMG](#)> 04 February 2014. Accessed on 11 May 2022.

<sup>16</sup> Springer Open, Fig. 2: <[Realization of the key aspects of the right to adequate housing in affordable housing programs in Egypt | Journal of Engineering and Applied Science | Full Text \(springeropen.com\)](#)> accessed on 09 April 2022.

<sup>17</sup> Charles Correa Foundation. The Right to adequate housing: what is the right to adequate housing. UN Habitat, Fact sheet 21. (2020)< [WHAT IS THE RIGHT TO ADEQUATE HOUSING? \(charlescorreafoundation.org\)](#)> accessed on 11 May 2022.

<sup>18</sup> Ibid.

<sup>19</sup> Grootboom case, para 48. This was defined on the Housing Act.

the occupants.<sup>20</sup> In the case of Grootboom, the court said a house must have accessible land, the right utilities, like water and sewage removal, and funding for all of these costs.<sup>21</sup>

*Cultural adequacy:* An adequate house must be in an environment that respects and caters for cultural identity and expression. Section 30 of the Constitution guarantees everybody the right to use their preferred language and participate in their preferred cultural life. Section 31 of the Constitution strengthens this Section by stating that no one's right to cultural enjoyment can be taken away. Houses must be in a place which accommodate everyone's culture, a place where other people's cultures will not be segregated. Culture may include customs and practices of a particular community.

The Constitution and the ICESR show some differences in the interpretations of Section 26 of the Constitution. Firstly, the Covenant provides for a right to adequate housing, whereas Section 26 provides for the right of access to adequate housing. Secondly, the Covenant obliges member states to take appropriate steps to ensure access to adequate housing, whereas the South African Constitution obliges the state to take reasonable legislative and other measures.<sup>22</sup> Reasonable measures include enacting legislation that govern enforcement of the right to adequate housing. Furthermore, measures maybe in the form of organisations and programmes that assist the government in promoting access to adequate housing. Recently, the United Nation Committee on Economic, Social and Cultural Rights reported that South Africa is general doing well in the implementation of the right to housing.<sup>23</sup> However, there is a significant large population with no adequate housing.<sup>24</sup> The UN Committee on

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<sup>20</sup> In South Africa, the official waste management service providers are employed in the municipal or provincial sphere. These service providers will be ensuring that the environment is clean and safe for habitability of people.

<sup>21</sup> Grootboom case, para 35.

<sup>22</sup> Ibid, para 28.

<sup>23</sup> UN Committee on Economic, Social and Cultural Rights publishes, Argentina, Cape Verde, Germany, Mali, South Africa, and Turkmenistan. Economic, Social and Cultural Rights Committee publishes reports. United Nations Human Rights office of the High Commissioner, October 2018.

<sup>24</sup> The state must protect, promote, and fulfil the right to housing.

Economic, Social and Cultural Rights further emphasise that the right to housing, water, health, food, and education requires the state to respect, fulfil and protect these rights.

The Constitution of South Africa grants all citizens the right to adequate housing. Hence, the government must plan, and promote the housing sector's development objectives. The previously disadvantaged population groups should be prioritised. According to Section 165 of the Constitution, the judiciary has the authority to order all persons including municipal officials in charge of the allocation of housing, branches of government and the executive, to make resources and measures available for the execution of the right to adequate housing.<sup>25</sup> The quality of the building materials forms an important part of the adequate housing that is suitable for people to live in.

The obligation to respect the right to housing requires that the state takes proactive measures to prevent rights from being infringed by both state and private stakeholders.<sup>26</sup> Thus, the state is expected to intentional put measures, policies and funding in place to provide for the development of decent accommodation for citizens.<sup>27</sup> It is thus, the state's responsibility to take steps to ensure realisation of adequate housing for people. <sup>28</sup> In line with meeting the conditions of adequate housing, the courts, National Department of Human Settlement and the Rental Housing Tribunal should involve the affected communities or people in the values of open and participatory democracy. <sup>29</sup>This principle is grounded on the belief that, "nothing for us without us". Thus, programmes for building houses should involve the community in various decision making to get what they desire and have dignity.

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<sup>25</sup> Mashiane k, Odeku K,' A critical legal perspective on the context and content of the right to access to adequate housing in South Africa' (2020) 93.

<sup>26</sup> Ibid.

<sup>27</sup> Panel of Constitutional Experts and Technical Committee 4 Memorandum. 'Section 7: "The State Must Respect, Protect, Promote and Fulfil the Rights in This Bill of Rights" (1996) 1.

<sup>28</sup> Ibid.

<sup>29</sup> Section 39(1)(a) of the Constitution.

Once people have access to adequate housing, they need to be protected from arbitrary eviction.<sup>30</sup> Under the Prevention of Illegal Eviction and Unlawful Occupation Act <sup>31</sup>(PIE). This Act prohibits eviction without a court order and also provides the procedure to be followed when effecting an eviction. Huchzermeyer states that there are fair procedures to be taken into consideration when dealing with eviction.<sup>32</sup>

## **1.2 History and background to the right to housing**

### 1.2.1 Pre-1994 Housing in South Africa

It is important to always take into consideration the historical background of access to land and property in discussing the right of access to adequate housing in South Africa. Pre- 1994, black and indigenous people were excluded from enjoying the right to adequate housing or land.<sup>33</sup> Apartheid era enforced housing segregation where black and white people lived separately. The apartheid government, illegal took land from the indigenous black people. This was made possible by the lack of written laws and title deeds.<sup>34</sup> In 1910, the Union of South Africa introduced legislation such as the Native Land Act 27 of 1913. As a result, the black and indigenous people were disposed of their land and tribal separated and put in homelands without enough land and development. Most did not have access to clean water, electricity, food, healthcare, education, and adequate housing.<sup>35</sup>

The parliamentary supremacy of the apartheid era made it clear that the country belonged to the whites and no other groups. As such, non-white people could not own land nor buy it in the white areas. Equally, whites were not allowed to buy the land in

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<sup>30</sup> Section 26(3) of the Constitution.

<sup>31</sup> 19 of 1998.

<sup>32</sup> Huchzermeyer M, 'Pounding at the Tip of the Iceberg: The Dominant Politics of Informal Settlement Eradication in South Africa' (2010) *Politikon*, 37,138.

<sup>33</sup> Myeni, S.L & Okem, A 'Introduction: Setting the scene: An overview of government subsidised housing in South Africa' (2020) 1-11.

<sup>34</sup> South African History Online' The Arrival of Jan Van Riebeeck in the Cape' (2015).

<sup>35</sup> Ibid.



the reserved areas where black lived.<sup>36</sup> The NLA limited land ownership to black people at 13% despite them being the majority population. Section 1(1) of NLA prevented Africans from owning land in areas designated for whites including reserves, locations, and vast farms owned by individuals or groups of Africans at the time. The NLA further included provisions that were intended to limit the ability of squatters and sharecroppers to continue to work on white-owned farms.<sup>37</sup>

Prior to 1920, no legislation existed on the right to housing. In August 1920, the first Housing Act<sup>38</sup> came to pass allowing public funds to be loaned for the construction of housing units. The HA established an endowment from which municipalities could lend money at a low level of interest rate than would otherwise be available to support housing construction. As a result, a system of housing subsidies was established.<sup>39</sup> In 1923, the Native Urban Areas Act 21 of 1923 was enacted with the main purpose of improving living conditions for natives in or near urban areas. It also aimed to improve native affairs administration, allow for the registration, and better control of native service contracts in specific areas, and regulate native entry and residence in such areas. Native Urban Areas Act in Section 1(2) states that a house cannot be built until the Minister is satisfied with the location, condition of the saved land, title, the general layout and format of the area or local town, as well as the condition, nature, and aspects of the structure. Additionally, Section 2(2) further provides that no building may be removed without the consent of the Minister. The Act took away the freedom from people on what they can do with their property. Moreover, the Act confined the entry and duration of stay of black South Africans in the 'white' cities. Black South Africans without sources of income and habitually unemployed were not allowed to

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<sup>36</sup> Chanock, M *'The Making of South African Legal Culture'*, 1902-1936: Fear, Favour, and Prejudice (Cambridge: Cambridge University Press, 2001) 365.

<sup>37</sup> Section 6 and 7 of the Natives' Land Act No.27 of 1913.

<sup>38</sup> Act 35 of 1920.

<sup>39</sup> Mabin, A 'A Century of South African Housing Acts 1920–2020' (2020) 453.

stay in certain areas. The local authorities and police officers were obliged to deport them.<sup>40</sup>

A decade later, the Native Urban Areas Amendment Act 25 of 1930 was introduced and further restricted the movement of black farm workers into the cities. More African labour was needed to work in the white owned farms. Black people were allowed to enter the places where only whites stayed for the purposes of offering services such as gardening, kitchen work, babysitting and cleaning houses.<sup>41</sup> Similarly, the Black Urban Areas Amendment Act 35 of 1945 prevented black South Africans from claiming permanent residence in the urban areas. Furthermore, The Consolidation Act 25 of 1945 time restricted the time of movement. Black South Africans had no more than 72 hours to be out of their reserve unless there is a justifiable reason for such stay. For example, if one was born there, worked there for more than 10 years, or had lawfully resided in the area for more than 15 years.<sup>42</sup>

The Housing Act 49 of 1944 was introduced in light of local government neglecting funds utilisation in fear of establishing a permanent native community or relaxing the extremely stringent regulations applicable to locations.<sup>43</sup> Resultantly, the government urged local authorities to get to credit offices by presenting the Housing Emergency Powers Act 45 of 1995<sup>44</sup> which seeks to enact legislation to govern emergency response programs. Among the emergency programs was the Emergency Housing Program. The program was designed to be a responsive, flexible, and quick scheme that addresses homelessness, hazardous living conditions, and the temporary or permanent relocation of vulnerable people or communities.<sup>45</sup> The revised Housing Act

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<sup>40</sup> Section 17(1) of the Native Urban Areas Act 21 of 1923.

<sup>41</sup> Pienaar J.M, 'The housing crisis in South Africa: Will the plethora of policies and legislation have a positive effect?' (2002) 17 SAPR/PL 336 at 338.

<sup>43</sup> Morris, P 'A History of Black Housing in South Africa: South Africa Foundation: Johannesburg, 1981' (2002) 17 SAPR/PL 336.

<sup>44</sup> Ibid.

<sup>45</sup> The Housing Development Agency. Implementation of Emergency Housing. (2012) 9.

included a provision for a National Housing and Planning Commission (NHPC) and provided another financial reason for lodging credits to local government specialists. Section 21(1)(p) of the Housing (Emergency Powers) Act granted unrivalled authority to the newly formed commission to complete a lodging plan in which specialists failed to do so. Despite these measures, the growing population made it hard for NHPC to fulfil housing needs.<sup>46</sup>

In comparison, the apartheid legislation neglected black people as low-income earners who could not afford an appropriate house or to pay an economic rent. More so, blacks were occupants that had no security of tenure for their lands.<sup>47</sup> On the other hand, non-whites that worked as gardeners, and maids had their houses subsidized by the local government as they could not afford to pay for their own house nor rent due to low earnings.<sup>48</sup> The Group Areas Act 41 of 1950<sup>49</sup> further divided African people into ethnic groups and in accordance with their home languages. Even though ethnic groups consisted of up to 80% of the population, they were still given only 13% of the South African land.<sup>50</sup>

The growing black population meant this group did not have enough land and houses. Consequently, these areas became overcrowded and people-built backyard shacks for shelter. This meant unlawfully occupation of land and property. In response, the government introduced the Prevention of Illegal Squatting Act 51 of 1952 (PISA). Section 1(a) of the PISA prohibited people from entering land or buildings without a legal reason or residing there without permission from the owner.<sup>51</sup> Magistrates were also given the power to evict vagrants from urban areas, demolish their homes, and

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<sup>46</sup> Hellman, E 'Handbook on Race Relations in South Africa' (Oxford University Press: London, 1949).

<sup>47</sup> Ibid.248- 249.

<sup>48</sup> Ibid.

<sup>49</sup> This Act was later consolidated by Act No. 36 of 1966. This Act complemented the Native Trust and Land Act of 1936 and the Black Land Act of 1913.

<sup>50</sup> Rutsch, P *Group Areas, South African Human Rights Yearbook*. (1990)139.

<sup>51</sup> Vivienne, B 'The Effect of Institutional Racism on Student Family Circumstances: A Human Capabilities Perspective' (2010) *South African Journal of Psychology*, 40(4) 496.

relocate them to a determined location. This shows that the apartheid government did not want overcrowding but at the same time denied enough land to blacks to build houses.

The 1950s saw the government providing accommodation for black people that worked for whites<sup>52</sup> Promotion of Bantu<sup>53</sup> Self-Government Act 46 of 1959 gave self-governance to black people and Transkei homeland became the first ever homeland to be granted self-government. Initial, the government focused on economic and social development. Later, it was figured out that there is a need to improve housing status for all to achieve broad development. Local governments in black communities required permission from the Department of Bantu Administration and Development prior to launching any housing project for black people.<sup>54</sup> Suitability and adequacy were the main factors checked prior to the approval by the department. Moreover, only essential housing such as a family house and that could not be provided for in native or black only areas.<sup>55</sup>

In 1971, the Administration of Bantu Affairs Act 45 of 1971 (ABA Act) was enacted. The Act ABA Act established Bantu authorities and dealt with the administration of urban black regions. Moreover, the ABA Act established command over Administration Boards. This effectively meant blacks were now self-governing however the urban where majority of black people were moving into for better socio-economic amenities were regulated. A decade later, the 1983 Constitution<sup>56</sup> brought with it the local black government to make the conditions for black people better. The apartheid government introduced the local black government to reduce the unrest and boycotts that were

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<sup>52</sup> Smit, P et al 'Urbanisation in the homelands' in Smith (ed) Living Under Apartheid London: George, Allen, and Unwin, (1982) 96.

<sup>53</sup> Bantu is an African word which refers to different black ethnic groups. The Promotion of Bantu Self-Government Act of 1959 renamed the reserves "homelands," or Bantustans, where only certain ethnic groups were allowed to live.

<sup>54</sup> General Circular 27 of 1967.

<sup>55</sup> Sesinyi, EP 'The Enforcement of The Right of Access to Adequate Housing in South Africa: A Lesson for Lesotho'. University Of Fort Hare (2017) 64.

<sup>56</sup> South African Constitution Act 110 of 1983.

taking place. Despite, these legal provisions in the Administration of Bantu Affairs and the Constitution, the Housing Act through Administrative Boards took away powers from Black Authorities to implement housing schemes.<sup>57</sup>

Black people in the rural areas organised and formed organisations that encouraged boycotting lack of adequate housing and better services.<sup>58</sup> The African National Congress (ANC) also encouraged protests against a lack of services and poor access to land and housing. Furthermore, the ANC in 1955 drafted a Freedom Charter which provided that “the people of South Africa shall have equal treatment and access to housing”.<sup>59</sup>

In 1992, Public Housing Forum was set nationally to facilitate the implementation of new non-racial housing development policies and strategies in South Africa. The White Paper on Housing, General Notice 1376 of 1994 provided that the National Housing Forum of 1992, is central in laying the groundwork for a national housing consensus. The government had a National Housing Goal to increase the state budget by 5% to meet housing needs. The case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and others*<sup>60</sup> pointed out that the structure of apartheid left black townships and rural areas underdeveloped.<sup>61</sup> The council explained that the state should produce a plan for the building houses and facilitate its delivery. Consequently, the Housing Arrangements Act 155 of 1993 was implemented. Its goal was to ensure the provision of housing while a comprehensive and integrated housing strategy is developed. This gave birth to the Housing Act 107 of 1997.

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<sup>57</sup> Mabin, A ‘A Century of South African Housing Acts 1920–2020’ (2020) *Urban Forum* 31, 457.

<sup>58</sup> Note 57 above, 67.

<sup>59</sup> Adopted at the Congress of the People at Kliptown, Johannesburg, on 25th and 26th June 1955.

<sup>60</sup> (CCT7/98) [1998] ZACC 17.

<sup>61</sup> *Ibid*, para 2.

### 1.2.2 The right to access adequate housing in South Africa Post-1994

The dawn of democracy in 1994, enabled black South Africans to enjoy equal rights as stated in Section 9 of the 1996 Constitution which provides that everyone is equal before the law, therefore everyone must be treated equally without discrimination.<sup>62</sup> The government of post-1994 promised people equality and freedom including access to adequate houses, water, and electricity. Since democracy and commitment to provide housing, to date there is a significant number of South Africans that do not have proper and appropriate housing, water, land, electricity, education, and health care services. The legacy of apartheid still haunts South Africa as there are still many people who live in shacks with no proper adequate housing.

In the case of *Grootboom*<sup>63</sup>, the court stated that “the differences between city and rural communities will also determine the needs and opportunities for the enjoyment of the right to housing, furthermore, the distinction will rely upon the financial and social history of the country”.<sup>64</sup> The principle of affirmative action says that resources including housing must be allocated firstly to the previously disadvantaged groups. These are mostly people in rural and township areas. Affirmative action aims to hasten the development of an effective and fair open space, as well as to cultivate an environment that empowers and supports previously disadvantaged groups to reach their full potential.<sup>65</sup>

The democratic government protects and elevates the right to adequate housing and also prevents arbitrary removals of individuals.<sup>66</sup> This is supported by the principles of human dignity, equality, and the advancement of human rights as enshrined in the

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<sup>62</sup> The Constitution of Republic of South Africa 1996. (Hereinafter the constitution).

<sup>63</sup> Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC).

<sup>64</sup> Ibid para 32.

<sup>65</sup> White Paper. Affirmative Action in the Public Service Department of Public Service and Administration March 1998 GENERAL NOTICE 564 OF 1998.

<sup>66</sup> Section 26 of the constitution.

Constitution.<sup>67</sup> Article 11 of the International Covenant on Economic, Social, and Cultural Rights obligates the state to take reasonable measures to realise the right to housing.<sup>68</sup> The Department of Human Settlement in South Africa is responsible for identifying and designating land for housing developments. In addition, the government should ensure that the department has adequate resources needed for promoting housing plans and developments.

### **1.3 Problem statement**

Many residents in townships and rural areas lack suitable housing. As a result, many live in the shacks which are unfit for human habitation. Some people are homeless. Most of the people in the communities are waiting for the government to provide them and their families with proper houses. The government takes long and has been slow in the construction and provision of housing to many people across South Africa. For instance, Irene Grootboom, who is among the residents took the government to court to fight their right to access to appropriate accommodation, passed away without a home, and living in a shack.<sup>69</sup> This indicates that despite the constitutional obligation to provide adequate housing to marginalized people, the government lags in fulfilling, this right. Also, some of the housing provided by the government did not meet the criteria for suitable housing. For instance, these houses are poorly constructed, far away from economic opportunities and does not have adequate amenities.<sup>70</sup> Furthermore, corruption and poor service delivery are also reported in the provision of adequate housing. Reportedly, some public servants responsible allocate state subsidised houses to themselves and thereafter sell them.

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<sup>67</sup> Section 1(a) of the constitution.

<sup>68</sup> International Covenant on Economic, Social and Cultural Rights of 1966, resolution 2200A (XXI) of 16 December 1966, Article 11.

<sup>69</sup> Willis, T 'Grootboom case was a disaster' (2009) < [Grootboom case was a disaster - Willis \(iol.co.za\)](https://www.iol.co.za/news/south-africa/grootboom-case-was-a-disaster-2009-08-04)> accessed on 04 August 2022.

<sup>70</sup> Ibid.

## **1.4 Aims and Objectives**

### **1.4.1 Main aim**

The study analyses and reviews the effectiveness of the South African government in administering, implementing, and fulfilling the right to adequate housing.

### **1.4.2 Specific objectives**

- To ascertain the state's responsibility in protecting the right to access adequate housing.
- To assess the effectiveness of the government's measures, statutes, and policies to make sure that the right to adequate housing is realised and fulfilled.

## **1.5 Research questions**

- i. What is the effectiveness of the policies, regulations and laws used by the government to fulfil the right to adequate housing?
- ii. Upon violation of the right to adequate housing, is the state providing effective remedies?
- iii. Are the state subsidised houses meeting the criteria of adequacy?

## **1.6 Scope and limitation of the study**

This study focused on the lack of adequate housing in South Africa where people reside in intolerable and inhumane environments.

## **1.7 Research methodology**

This study is desktop based and it reviews literature on the effectiveness of the government to provide adequate housing. Legislative framework, policies, books, journal articles, online sources, case laws, dissertations, and thesis are reviewed in this analysis.

## **1.8 Literature review**

Access to adequate housing is a basic need in South Africa, therefore all citizens should have adequate housing. Ngwenya states that this can only be fulfilled upon the



availability of the right human, finance, and resources.<sup>71</sup> However, land availability and scarcity remain a problem in South Africa. This is further worsened by the country's rapid population growth making it increasingly difficult to fulfil the housing provision to many people. According to Ngwenya, the government needs new inventive methods and use of technology to deliver housing to people on time. <sup>72</sup> For instance, the government may hire private or public companies.

Mashiane and Odeku said that the right to adequate housing to be completely fulfilled, people must live in a dignified, safe, and comfortable environment.<sup>73</sup> A safe environment is where people are free of pollution, and there are basic human needs such as electricity, roads, and healthcare. Chenwi emphasises that a house must be of good quality with proper sanitation facilities. <sup>74</sup>

Mongezi showed that in South Africa RDP houses are located in areas where there are no prospects of industrial development.<sup>75</sup> This has negative effects on their socio-economic wellbeing. Furthermore, lack of development planning by the government limits investment opportunities for these areas further perpetuating unemployment and underdevelopment. Mongezi showed that old black townships are better developed and with vast economic opportunities compared to RDP houses.<sup>76</sup> Also, residents have turned RDP houses into squatting areas and people crammed into one house, resulting in an unpleasant living environment.

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<sup>71</sup> Ngwenya, NT 'The implementation of the South Africa's Housing Policy in the Local Sphere: A Case Study of Mamelodi and Diepkloof' (2016) 105. University of Pretoria.

<sup>72</sup> Ibid, 113.

<sup>73</sup> Note 25 above.

<sup>74</sup> Chenwi, L 'The right to adequate housing in the African regional human rights system: Convergence or divergence between the African Commission and South African approaches, Law, Democracy & Development' (2013) 23.

<sup>75</sup> Mongezi, N 'Protection of A Substantive Right of Access to Adequate Housing' (2019) 37. University of Pretoria.

<sup>76</sup> Ibid.

Sesinyi, states that economic and social rights in South Africa are justifiable.<sup>77</sup> This means they should be upheld given any reasonable review of national and international jurisprudence.<sup>78</sup> Moreover, Sesinyi clarifies that a person's right to housing does not entitle people to request that the government furnish him with a house. Rather, it emphasizes the government's responsibilities in gradually realising this right. Thus, people cannot entirely depend on the state to build houses for them. In dealing with lack of housing involving marginalised group of people or communities, the courts have tried to ensure that their right to housing is recognised and fulfilled. Failure to realise or consider the housing development policies, risks the efficiency and implementation of constitutional obligations.

The constitutional transformation allows for a shift away from politically sanctioned racial segregation strategies and regulations to a democratic system which protect and enforce everyone's right to housing. Albertyn and Davis, state that real transformation constitutes an attainment of socio-economic fairness and individual welfare by abolishing Apartheid laws.<sup>79</sup> According to Hodgson, transformative constitutionalism requires a shift of focus away from the legislation and legal system a focus toward the people of South Africa.<sup>80</sup> This demonstrates the need for apparatuses to protect the right to adequate housing. More importantly, historical segregation policies must be considered when balancing the rights of property owners and distributing houses to those who do not have houses or are poor.

Tissington stated that there is no doubt that if interpreted and implemented correctly, South African housing policy may be able to fulfil the constitutional vision of housing provision.<sup>81</sup> Thus, there is a need to ensure that responsible bodies for housing

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<sup>77</sup> Note 59 above.

<sup>78</sup> Note 58 above, 210.

<sup>79</sup> Albertyn, C and Davis, D 'Legal realism, transformation, and the legacy of Dugard', SAJHR, (2010), 203.

<sup>80</sup> Hodgson, T.F 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy', Acta Juridica, (2015), 1999.

<sup>81</sup> Note 6 above.

delivery do so in a proper and timely manner. Potts says housing cannot be isolated from inequity and abject poverty as this makes the problem unsolvable.<sup>82</sup> Furthermore, Potts alludes that the gap between housing costs and earnings is widening in South Africa and globally.<sup>83</sup> In South Africa, housing cannot be isolated from inequality and abject poverty due to the past apartheid laws that marginalised people. Apartheid laws produced a high level of poverty, and the government is still struggling to fill the void. Myeni and Okem state that the government must adopt innovative human settlement and habitation pattern restructuring to correct past injustices.<sup>84</sup>

## **1.9 The significance of the study**

The study provides more information and raises awareness about the right to access adequate housing in South Africa. Moreover, the study results are useful in giving insights into the application of the existing housing laws and regulations in South Africa. This study will also be useful in knowledge generation and for researchers, practitioners, and policy makers in terms of learning more about and understand the implementation of the right to adequate housing.

## **1.10 Definition of key concepts**

### **1.10.1 Adequate housing**

A house is a safe and strong structure which protects its residents from weather elements or natural disasters such as heat, cold, floods and other kinds of threats to human life and health.<sup>85</sup> A house is characterised by facilities for working and sleeping to meet needs of the family. An adequate house must always have sufficient water, electricity, and sanitary services. The occupants or members of the families must be comfortable and able to exercise their right to privacy. A satisfactory house, according

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<sup>82</sup> Potts, D 'Broken cities: Inside the global housing crises', London: Zed (2020).

<sup>83</sup> Ibid.

<sup>84</sup> Myeni, S.L & Okem, A' Introduction: Setting the scene: An overview of government subsidised housing in South Africa' (2020) 1-11.

<sup>91</sup> Characteristics Of An Adequate House <[Characteristics Of An Adequate House \(expertscolumn.com\)](https://www.expertscolumn.com)> accessed on 16 May 2022.

to the National Housing Code of 2009, should have a “base floor area of 40 square meters, two rooms, a separate restroom with a toilet facility, shower, hand bowl, combined living and kitchen space with a wash bowl, and a prepared board electrical establishment with power supply”.<sup>86</sup>

#### 1.10.2 Transformative constitutionalism

Transformative constitutionalism is a "long-term project" in which the constitution is established, interpreted, and applied to the extent that a country's political and social institutions are democratically transformed.<sup>87</sup> Transformative Constitutionalism seeks to effect social change through the legal system, rather than revolution.

#### 1.10.3 Enforcement of the right to adequate housing

Enforcement means compelling the delivery of housing based on policies, legislation, constitution, national, international, and regional international laws.

### 1.11 Conclusion

In comparing the right of access to adequate housing before and post-apartheid, it can be concluded that the democratic government has made significant inroads to in providing policies and laws that caters for everyone in South Africa with the emphasis on the previously disadvantaged group of people. However, a lot has to change as many South Africans in poverty still lack access to decent housing. To address this problem, the government needs enough land for housing development structures.

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<sup>86</sup> South African Human Rights Commission. 'The right to adequate housing Fact Sheet' (2020)

<sup>87</sup> Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146.

## CHAPTER 2

### THE RIGHT TO ACCESS TO ADEQUATE HOUSING IN SOUTH AFRICA

#### 2.1 Introduction

The right to housing cannot be seen or interpreted only as a structure with four walls and a roof. Every human being has a right to live in a peaceful place where they are secure and other rights are also protected.<sup>88</sup> The right to housing is correlated to other fundamental human rights, like access to water, health care, and electricity, which are safeguarded and provided for in the Constitution and other international Covenants.<sup>89</sup> According to the CESCR "adequate housing" is defined as "housing that is habitable, accessible and a house in which the occupant has legal protection to remain, affordable, and sufficiently close to a school, healthcare facilities, and employment."

The majority of people in South Africa who do not have adequate housing are poor people. The right to adequate housing and other human rights should apply to everyone equally regardless of their location or background. Mubangizi stated that "the right to adequate housing is a critical basic life necessity that has a significant bearing on the lives of the poor". To defend this practical right, sensible apparatuses for the execution and enforcement of these rights should exist.<sup>90</sup>

#### 2.2 Reasonableness test

The state must take appropriate measures to realise the need for housing within its available resources. The court uses the appropriate test to determine whether this

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<sup>88</sup> Commission for Economic, Social and Cultural Rights. General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant). Office of the High Commissioner for Human Rights. (1991) 7

<sup>89</sup> Ibid.

<sup>90</sup> Mubangizi, JC 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing', 2 Afr. J. Legal Stud. 130, 146 (2008), 131.

right has been fulfilled in accordance with Section 26 of the Constitution.<sup>91</sup> In the Grootboom case, the court set a precedent by establishing the most suitable test to measure the advancement of an individual's right to housing.<sup>92</sup> This was a groundbreaking decision, as it had never been done before. It is necessary to consider whether the actions taken by the state are sufficient to meet the needs of meeting this right.<sup>93</sup> The state must implement laws, policies, and other measures. More so, the state is forced to work to achieve the desired result, and the appropriate policies and programs of the manager must go with legal plans.<sup>94</sup> In other words, when it comes to enforcing the right to a fair house, the court should not only rely on the legal procedures but also must ensure the action after the investigation. The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights has shown that most cases in South Africa, the lack of adequate housing is a displacement problem.<sup>95</sup> Therefore, it is guaranteed that the state has a legal responsibility to solve the problems of the network to release the amount and guarantee access to the house after the eviction.<sup>96</sup> The state can do this by ensuring that it helps evicted individuals without adequate funds or resources to find an alternative home. This can be accomplished by providing them with temporary shelter until they are able to secure an alternative place to stay.

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<sup>91</sup> Lange, P 'The reasonableness approach of the South African Constitutional Court: making the constitutional right of access to housing "real" or effectively meaningless?' (2018) <<http://hdl.handle.net/11427/29738>> accessed 04 August 2022.

<sup>92</sup> Brian, G 'The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) *Human Rights Law Review* 1(2), 280.

<sup>93</sup> Grootboom, para 41.

<sup>94</sup> *Ibid*, para 42.

<sup>95</sup> Porter, B 'Implementing the Right to Adequate Housing Under the National Housing Strategy Act: The International Human Rights Framework' (2021) 56.

<sup>96</sup> *ibid*.

The following principles of reasonableness emerged from the Grootboom case:

- The circumstances of the claimants or the affected communities. The court said the responses to obstacles faced by claimants, programs, policies, or legislations must be assessed through the perspective of the claimants' experience.<sup>97</sup> In other words, public involvement is a first step in guaranteeing that the rights of the affected individuals are fully protected. Public involvement ensures that people submit their requests and needs.
- Reasonability should be assessed based on human rights values. That is the dignity of the person.<sup>98</sup> The Constitution guarantees everyone's dignity and equality. However, for many people, this is a distant dream and living in unbearable places.<sup>99</sup> Thus, failure to fulfil the right to housing violates the constitutional rights of individuals to human dignity.<sup>100</sup>
- Housing programs must provide special attention to the needs of the helpless and marginalized people. Also, there should be a direct interaction with those groups' needs and rights.<sup>101</sup> The past injustices must always be considered in delivering this right.
- Racism and other forms of discrimination must be considered.<sup>102</sup> To ensure reasonableness, inequality must be addressed in the context of the transformative constitutionalism. South Africa has a unique history whereby the black majority were treated unfairly and did not have access to adequate housing or land.
- Each organ of the state must perform its function and assist other units in developing coordinated plan.<sup>103</sup> The national sphere of government must

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid, 59.

<sup>99</sup> Grootboom, para 2.

<sup>100</sup> Ibid, para 83.

<sup>101</sup> Ibid, 59.

<sup>102</sup> Ibid, 60.

<sup>103</sup> Ibid, 61.

ensure that the laws, programs, policies, and plans are sufficient to fulfil the Section 26 obligations of the State,<sup>104</sup> on service delivery. The local government has a direct involvement with the affected members of the community. Thus, it must ensure public participation and allow community members to voice their concerns.

- Housing policies and programs adopted by the government must adapt to the changing needs and circumstances of the affected community.<sup>105</sup> Thus, a report must be available showing records of citizens concern and steps taken to address them.

### **2.3 Interrelation between the right to housing and other human rights**

The right to adequate housing is closely connected to other human rights. When implementing this right, it is important to guarantee that other protected human rights are respected, such as those related to family and personal life, freedom of movement, assembly and association, health, and development. This means that the right to housing should be provided without compromising any of these other rights.

#### **2.3.1 The right to clean environment.**

According to Section 25 of the Constitution “everyone has a right to safe and healthy environment”. The right to housing is dependent on, and is affected by, environmental circumstances. A house must be situated in a safe environment that does not pose a threat to the right to safety and health. Additionally, it should be noted that those in poverty are more likely to experience the negative effects of climate change, hence the location of houses and its quality protect them from these weather elements.<sup>106</sup> The state is therefore required to identify dangerous environments where people reside and take necessary steps to correct this. A community representative should work with government to identify those in need of adequate housing. In addition, the

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<sup>104</sup> Grootboom, para 40.

<sup>105</sup> Note 7 above, 61.

<sup>106</sup> Knox, J 'Right to Adequate Housing: Report on adequate housing'(2009)< [right to adequate housing | Environment Rights \(environment-rights.org\)](#)> accessed 19 July 2022.



government must assess potential environmental effects on the proposed projects and policies. This includes potential consequences for the exercise of other human rights<sup>107</sup> such as pollution, overpopulation, and natural disasters.

### 2.3.2 Natural rights

Humans have the right to life, liberty, health, and property.<sup>108</sup> The right to appropriate houses implies that people have a right to property and this right is naturally acquired from birth.<sup>109</sup> These natural rights are inviolable and inalienable. The right to life is safeguarded by Article 2 of the Human Rights Act.<sup>110</sup> This means that the state should take the needed steps to guard life by putting laws to keep everyone safe.

### 2.3.3 Children's rights

The right to secure housing affect children's rights. Children are vulnerable and need to be protected and taken care of.<sup>111</sup> Firstly, child protection requires an adequate house. Absence, of a decent house, may result in children being mistreated and neglected. An inadequate housing exposes children to an environment that lacks moral and material security. Moreover, a child without a home is discouraged from life necessities like focusing on school or being innovative. This has negative effect on their future. Housing development should not only promote people's right to adequate housing, but it should enhance safety and health of the children in the community.<sup>112</sup>

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<sup>107</sup> Ibid, Principle 8 of the Framework Principles on Human Rights and The Environment.

<sup>108</sup> Harding, A 'Natural Law and Natural Rights'. (1955) Dallas, Southern Methodist University Press. 35.

<sup>109</sup> Ibid.

<sup>110</sup> Article 2 of the Human Right Act 1998.

<sup>111</sup> Ibid.

<sup>112</sup> National Conference on Homelessness Council to Homeless Persons Address by Chris Sidoti, Human Rights Commissioner. Human Rights and Equal Opportunity Commission, Sydney, September 1996.

The government is expected by law to protect the rights of children regardless of resource scarcity.<sup>113</sup>

## 2.4 Transformative constitutionalism

In the adoption of the 1996 Constitution, the South African government sought to transform both the state and society that grants all citizens fundamental rights and freedoms.<sup>114</sup> The preamble of the Constitution explicitly expresses the characteristics of the transformative constitutionalism. Its aim is to overcome the injustices of the past, encourage open democracy and public participation while fulfilling every person's rights. The transformation is thus a social and economic advancement.<sup>115</sup> While Pieterse provides that transformative constitutionalism "mandates the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships, and the fostering of a culture of justification for every exercise of public power".<sup>116</sup> Justice Langa acknowledges that there is no single accepted definition of transformative constitutionalism.<sup>117</sup> Currently, South Africa is faced with an unequal and inadequate access to housing, healthcare, food, water, electricity, and education. In the case of *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>118</sup> it stated that an increase in the level of unemployment, inadequate healthcare, housing, food, and inequality, makes it difficult to fulfil the characteristics or the aims of the transformative constitutionalism.<sup>119</sup>

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<sup>113</sup> Viviers, A 'The Implementation and Enforcement of Human Rights' (2001) <[The implementation and enforcement of human rights \(cyc-net.org\)](#)> accessed 23 July 2022.

<sup>114</sup> Teshome, M 'Transformative Constitutionalism in South Africa' (2011) <[https://www.researchgate.net/publication/260460449\\_Transformative\\_Constitutionalism\\_in\\_South\\_Africa](https://www.researchgate.net/publication/260460449_Transformative_Constitutionalism_in_South_Africa)> accessed 9 July 2022.

<sup>115</sup> Langa P, 'Transformative Constitutionalism', 17 Stellenbosch L. (2006), 353.

<sup>116</sup> Pieterse, M 'What do we mean when we talk about transformative constitutionalism?' SAPR/PI, (2005) Vol. 20 155,156, 159.

<sup>117</sup> Note 113 above, 351.

<sup>118</sup> 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC).

<sup>119</sup> Ibid, para8.

Case law also shows that the property owners cannot violate the rights of individuals. For instance, the case of *Van Rooyen v Stoltz*,<sup>120</sup> two women borrowed money to pay for their houses. Over time, they could no longer afford to pay leading to their houses being sold. The two women said that their right to housing has been infringed. Resultantly, the constitutional court developed rules that governs the property sale, particularly with respect to immovable property. The court considered the historical and socioeconomic context, as well as the importance of housing security of tenure.<sup>121</sup> The court demonstrated that access to adequate housing must encompass everyone, including the previously disadvantaged or vulnerable groups.

In the case of *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty)Ltd*<sup>122</sup> the court had to decide on either to prioritise the right to property ownership or the obligation of the state to provide housing. In this case, many residents left an overcrowded town in Johannesburg east and illegally occupied a nearby land with the thinking that it belonged to the municipality. However, the land belonged to the Modderklip farm. As a result, the landowner filed an eviction application under the Prevention of Illegal Eviction Act to have people vacate the property. The court granted the owner the right to evict occupants. The occupiers were given only two months to leave the premises. There were over 4000 illegal occupiers and disobeyed the eviction order.<sup>123</sup> As such, the landowner approached various government bodies like the Presidency and Department of Housing to compel them to take necessary steps in removing unlawful occupation of the land.<sup>124</sup> The Supreme Court of Appeal ruled that the government is under constitutional duty to guard, respect, and fulfil the Bill of Rights.<sup>125</sup> Therefore the state must ensure that they protect the rights of the property owner and that of the

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<sup>120</sup> 2005 2 SA 140 (CC).

<sup>121</sup> Ibid, para 34.

<sup>122</sup> (CCT20/04) [2005] ZACC 5.

<sup>123</sup> Ibid, para 8.

<sup>124</sup> Ibid, para 6 and 31.

<sup>125</sup> Section 7(2) of the Constitution.

occupiers. The constitutional court said the state has a duty to assist the landowner in enforcing his rights.<sup>126</sup> This ruling did not take into account Section 7(2) of the constitution which alludes to the state's duty to protect its citizens' rights from unlawful interference. While property rights are recognized and protected, it does not mean unfair treatment of poor or marginalized members of society. Thus, it is necessary for owners and the court to be compassionate and patient in enforcing property rights against the homeless or the poor.<sup>127</sup>

## **2.5 Meaningful engagement**

The doctrine of meaningful engagement is one of the principles of fair democracy. This doctrine potentially empowers and improves public administration through incorporating local knowledge into decision-making.<sup>128</sup> Section 2(1)a of the Housing Act <sup>129</sup> provides that “the state must intimately engage the affected communities in delivering housing development”. Moreover, local government including the municipality should act in good faith in understanding the welfare of the affected individuals. Thus, the affected communities must elect a representative or committee to represent them through information dissemination to the community and government in a clear and respectful manner. <sup>130</sup> Also, the representatives are encouraged ensure that the community and everyone's needs, and concerns are heard and considered. The participation of community member must be fair, it must not discriminate based on gender, socioeconomic status, or disability. Furthermore,

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<sup>126</sup> Note 116 above, para 48.

<sup>127</sup> Van der Walt 'The state's duty to protect property owner's vs the state's duty to provide housing: Thoughts on the Modderklip case' forthcoming 2005 SAJHR. 159.

<sup>128</sup> Williams, LA 'The Right to Housing in South Africa: An Evolving Jurisprudence' (2014) 827.

<sup>129</sup> 107 of 1997.

<sup>130</sup> Muller, G 'Conceptualising "Meaningful Engagement" As a Deliberative Democratic Partnership' (2011) Stellenbosch Law Review. 755.

women must be treated equally with males, and their ideas or contributions must be equal considered in the discussions.<sup>131</sup>

The rights of persons facing eviction are protected under Section 26(3). This Section also states that the court should take into consideration all pertinent factors or circumstances prior granting an eviction order. Thus, an eviction order cannot be granted if the person's rights of dignity and housing are violated. The principle of meaningful engagement means, there must be a meaningful communication with the individuals to be impacted by an eviction application. A chance must be afforded to them to express their needs and the detrimental effects that will result from an eviction. The main goal of the meaningful engagement is to resolve the conflict that arises when private evictions or any house crises occurs between property rights and housing rights. It is also a helpful tool for coming up with original resolutions and identifying the unique community needs.<sup>132</sup> Additionally, other courts have concluded that this is critical in the development of informal settlements. In the case between *Port Elizabeth Municipality v 68 individuals, including 23 minors Occupiers*<sup>133</sup> who occupied privately owned land, the court decided that the parties are encouraged and required to talk to each other in an initiative-taking and honest effort to find mutually acceptable solutions. Engaging with each other openly is a respectful and successful way to reach a lasting agreement between all parties involved.<sup>134</sup>

In another case, the *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* the city of Johannesburg applied to evict over 400 residents in the inner-city buildings on the grounds that they

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<sup>131</sup> Turin TC, Chowdhury N, et al. Meaningful and Deep Community Engagement Efforts For Pragmatic Research And Beyond: Engaging With An Immigrant/Racialised Community On Equitable Access To Care.(2021) *BMJ Global Health* 6, 3.

<sup>132</sup> Knipe, P 'Roundtable Discussion on Meaningful Engagement: Challenges in the Realisation of the Right to Adequate Housing in South Africa' (2019) ESR REVIEW 02, Vol. 20. 28.

<sup>133</sup> (1) SA 217 (CC) (2005).

<sup>134</sup> Ibid, para 39.

were unsafe and unhealthy.<sup>135</sup> The eviction was granted on the condition that the City offers an alternative housing for the people to be evicted.<sup>136</sup> The Constitutional Court clarified the necessity of meaningful engagement and consultation with occupiers prior to conducting evictions.<sup>137</sup> Meaning engagements and consultations help the courts to determine whether it is justifiable to issue an eviction order.<sup>138</sup> All parties involved in any situation must act in a reasonable manner, and it is not acceptable for any party to make requests that cannot be fulfilled or are unreasonable, while disregarding the rights of those who are in a vulnerable position.<sup>139</sup> Meaningful engagement changes how the government approaches housing development projects. Firstly, it is essential to think about the advantages that the proposed building will bring. Secondly, it is essential to identify the resources required to enhance the quality of life for those living in poverty. Lastly, it is important to consider the expenses and the type of practices that should be adopted.<sup>140</sup>

## **2.6 Conclusion**

An adequate house must not only be seen as adequate on the surface. The resources used must be of high quality to accommodate people and their needs to last them their entire lives. A reasonable test is used to determine whether a house is adequate and if an eviction should be granted. It is important that when providing the housing and ordering an eviction, people must be treated equally, and the principle of transformative constitutionalism must be upheld. Also, reviewed literature shows that transformation of the right to adequate housing and other constitutional rights can only be achieved through meaningful engagement with rights holders. This is based on the principle that impacted individuals know and understand what they desire and their

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<sup>135</sup> 2008 3 SA 208 (CC) para 1.

<sup>136</sup> *ibid*, para 43.

<sup>137</sup> *Ibid*, para 30.

<sup>138</sup> *Ibid*, para 18.

<sup>139</sup> *Ibid*, para 19.

<sup>140</sup> Note 139 above, 5.

goals as a community. Therefore, the state is obliged to allow the community to voice their concerns, rethink and restructure the housing policies and programs to best fit the desires of the rights holders.

## CHAPTER 3

### INSTITUTIONS RESPONSIBLE FOR THE ENFORCEMENT OF THE RIGHT TO ACCESS TO ADEQUATE HOUSING IN SOUTH AFRICA

#### 3.1 Introduction

Housing contributes to economic development. It influences employment, savings, investment, and labour productivity; hence its governance is critical. Good governance requires, transparency, accountability, respect for human rights, public participation, and most importantly competent governmental institutions.<sup>141</sup> Institutions assigned with executing the right to housing are required to act and carry out their duties in accordance with the constitution. The judiciary, chapter 9 institutions, non-profit organisations, and the Department of Human Settlement are answerable for enforcing the right to housing.

#### 3.2 The judiciary

Courts are responsible for upholding the right to appropriate housing, and the Constitutional Court in South Africa has provided its judgments to help inform the implementation of the judiciary in regards to the right to decent housing and other human rights. The Constitution grants the courts power to render judgements that are both fair and equitable, based on the Bill of Rights.<sup>142</sup> However, courts are restricted in enforcing the separation of powers. Therefore, the courts are careful to prevent the entry into the territory of other branches of government.<sup>143</sup>

Most South Africans without adequate housing live in slums and face eviction. The court orders the state to adopt appropriate laws and additional measures to meet the

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<sup>141</sup> Note 97 above, 5.

<sup>142</sup> Section 39(2) of the Constitution.

<sup>143</sup> Tchawouo, M 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' PER (2017) 2.



need for adequate housing.<sup>144</sup> The preservation of the right to adequate housing has been well-argued in situations where eviction is threatened. However, the "reasonableness" method is used to evaluate the constitutionality of the state's programs in fulfilling the promises to meet socio-economic needs.<sup>145</sup>

The court in the case of *Grootboom* also ruled that the state is not the only institution responsible or obliged to achieve the right to adequate housing.<sup>146</sup> Other institutions like financial institutions through the legislation can provide additional means of access to adequate housing.<sup>147</sup> Additionally, the court defined the right to adequate housing as an inalienable constitutional right. Therefore, it is necessary to consider the resources of the state needed for the construction of houses.

In *Port Elizabeth Municipality v Various Occupiers*, Section 6 of the PIEA states that "an organ of State may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction," served as the foundation for the application.<sup>148</sup> The defendants expressed their readiness to leave the premises if they were provided with a different land to occupy.<sup>149</sup> The municipality refused to give occupants an alternative land or a place to live. The municipality said that offering an alternative land gives impression of special treatment of occupants.<sup>150</sup> The court ruled that the provisions of both Section 26 of the Bill of Rights and the PIEA must be interpreted within the context of their constitutional frameworks. Also, rehabilitative and reformatory resolutions of these provisions must be considered to arrive at a "just and equitable decision" in

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<sup>144</sup> Note 139 above.

<sup>145</sup> *Grootboom*. Para 44.

<sup>146</sup> *Grootboom*, para 46.

<sup>147</sup> Nengome, R 'The right to access adequate housing, fair lending and the role of financial institutions' (2005) University of South Africa, 43

<sup>148</sup> Note 132 above, para 25.

<sup>149</sup> *Ibid*, para 2.

<sup>150</sup> *Ibid*, para 3.

eviction cases, given the history of prejudicial removal practices in the past.<sup>151</sup> The Constitutional Court concluded that municipalities hold equal accountability to occupants and property owners in eviction proceedings.<sup>152</sup> Furthermore, the court pointed out that unlike private landowners, municipalities had specific duties under Section 26 of the Constitution.<sup>153</sup> These rights must be weighed against the "fairness and justice" of granting an eviction order under Section 6 of the PIEA. It should be noted that the relevant circumstances listed in Section 6 of the PIEA are not a complete list.<sup>154</sup> Some of the factors to consider when evicting occupants are the duration of occupation as well as the extent and level of engagement that took place in reaching an equitable solution. The court stated that "it would not ordinarily be just and equitable to order eviction if proper discussions and or mediation had not been attempted."<sup>155</sup> In addition, the court held that eviction is not "fair and just" if the land is not required to be used immediately by the landowner or the municipality.

The applicants in *Jaftha v Schoeman and Others and Van Rooyen v Stoltz and Others*<sup>156</sup> were evicted in the execution of a court judgment on account of judgment debts. According to Section 66(1)(a) of the Judiciary Act 32 of 1994, their homes were attached for lack of immovable property to settle the judgment debts.<sup>157</sup> The petitioners further argued that if the Court's opinion is accepted, Section 66(1) (a) would allow for the development of a process by which people can be unjustly deprived of their rights their homes.<sup>158</sup> The applicant also said that the same clause is allowed for the sale of properties that cannot be the judgment debtor's house, for small and large debts. The applicants also claimed that the same section allowed for the sale of immovable

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<sup>151</sup> Ibid, para 8,9,10.

<sup>152</sup> Ibid, para 61.

<sup>153</sup> Ibid, para 56.

<sup>154</sup> Ibid, para 30.

<sup>155</sup> Ibid, para 43.

<sup>156</sup> (8617/01) [2003] ZAWCHC 26.

<sup>157</sup> Ibid, para 3 and 7.

<sup>158</sup> Ibid, para 32.

property, which could be the judgment debtor's residence, for minor debts and at large expense.<sup>159</sup> The question has been raised as to whether the attachment of movable property to the establishment of state-established housing violates the right to adequate housing.<sup>160</sup> The court concluded that the right to access to decent housing referred to in Article 26(1) is different from the right to decent housing found in international treaties.<sup>161</sup> The court illustrated that, "the right to access adequate housing entails more than just walls; it requires available land, appropriate services, such as provision of water and removal of sewerage."<sup>162</sup> The court decided that Section 26(1) and (2) should be read together in order to fully understand the scope of the right and to show that the state, as well as other organizations and individuals, have positive and negative roles.<sup>163</sup>

Alexandra Township residents were displaced by severe flooding in *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*.<sup>164</sup> In response, the state created a temporary accommodation in a transit camp on state-owned land.<sup>165</sup> Until an alternative housing was made available.<sup>166</sup> The plan was executed without consulting neighbouring residents.<sup>167</sup> As a result, the community filed a lawsuit, asking the Supreme Court to stop the Ministry of Public Works and the contractor from building the camp.<sup>168</sup> The association claimed that the government's move was not justified by any laws. In addition, the association argued that the

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid, para 41.

<sup>161</sup> Ibid, para 31.

<sup>162</sup> Ibid, para 35.

<sup>163</sup> Ibid, para 38.

<sup>164</sup> (CCT 55/00) [2001] ZACC 19.

<sup>165</sup> Ibid, para 8.

<sup>166</sup> Ibid, para 6.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid, para 8.

construction of the camps violates town planning scheme,<sup>169</sup> as well as land and environmental laws and on top of that, local authority was not consulted. The court ruled that the national government was responsible for sufficient laws, policies, programs, and strategies that would ensure access to adequate housing, as per Section 26(2) of the Constitution.<sup>170</sup> This validates the importance of following the laws and regulations to ensure that everyone has access to adequate housing. Also, the judiciary is duty bound to oversee the enforcement of laws and regulations.

The local government sought an interdict in the case of *City of Johannesburg v Rand Properties (Pty) Ltd and others*<sup>171</sup> to compel occupants to vacate the building for their safety and that of others.<sup>172</sup> The issues were that occupants needed an emergency housing, the buildings in question were in appalling, and abject condition, and there were fire and health risks.<sup>173</sup> In addition, most of the residents are very poor, unemployed, and have no fixed income. In addition, majority of the residents were extremely poor, lacked formal employment, and had no stable income.<sup>174</sup> The main problem raised was that the City of Johannesburg is prohibited from using its power to order people to vacate their homes without first providing them with suitable housing.<sup>175</sup> Another concern was whether such alternative housing had to be located within the city limits. The Supreme Court of Appeal (SCA) ruled that the City can order the evacuation of people from dangerous structures without an ability to provide alternative housing.<sup>176</sup> However, the SCA also said in evicting tenants, the City is constitutionally obliged to offer at least minimal shelter to those without alternative

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<sup>169</sup> Ibid, para 89.

<sup>170</sup> Ibid, para 39.

<sup>171</sup> 2007 SCA (RSA)

<sup>172</sup> Ibid, para 1.

<sup>173</sup> Ibid, para 2.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid, para 4.

<sup>176</sup> Ibid, para 68.

housing.<sup>177</sup> It further ruled that the accommodation provide by the City should be in an area preferred area by residents which was in the inner city. <sup>178</sup>

In *President of the Republic of South Africa and Others v. Modderklip Boerdery (Pty) Ltd and Others*,<sup>179</sup> the Johannesburg High Court ordered an eviction of 400 people who occupied private land owned by Modderklip Boerdery (Pty) Ltd. Residents, moved to this property due to land shortage, and overcrowding in the Chris Hani Informal settlement.<sup>180</sup> However, the residents did not leave the house within two months set by the court. During this time, the number of occupants grew to over 18 000 occupants.<sup>181</sup> The landowner attempted to obtain state assistance in the Transvaal Provincial Division to execute the eviction order. At the time, eviction was estimated to cost around R2.2 million arising from the need of outside contractors.<sup>182</sup> The landowner resisted spending this amount. The Transvaal Provincial Division ruled that the state had violated both its constitutional obligations of providing the rights to sufficient housing for occupants and its duty to the landowner of property rights.<sup>183</sup> As a result, the government was compelled to develop a comprehensive detailed plan to put an end to the occupation of the land. The Constitutional Court did not consider it necessary to rule on any of the statements of the state. It concluded that it was unfair to require a private company (Modderklip) to fulfil the state's obligation to provide housing for the occupiers.<sup>184</sup> However, according to Section 5 of the PIE Act, Modderklip did not meet the essential requirements for an urgent eviction order.<sup>185</sup> The court determined that Modderklip's claim is being denied of its right to land

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<sup>177</sup> Ibid, para 64.

<sup>178</sup> Ibid, para 67.

<sup>179</sup> (CCT20/04) [2005] ZACC 5.

<sup>180</sup> Ibid, para 3.

<sup>181</sup> Ibid, para 6.

<sup>182</sup> Ibid, para 8.

<sup>183</sup> Ibid, para 16.

<sup>184</sup> Ibid, para 45.

<sup>185</sup> Ibid, para 30.

ownership.<sup>186</sup> Thus, the company was "prudent and reasonable in the circumstances" and it could not be held accountable for its actions since they made attempts to involve the state.<sup>187</sup>

Eviction cases differ hence it is necessary to treat each case on its merit. The case of *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another*<sup>188</sup> highlights this reality. The court ruled that the circumstances of illegal occupiers, both individually and collectively, are also different. Hence, it is important to request specific information from the city regarding each case. Decisions in this case and others by the courts confirm that a one-size-fits-all approach cannot be applied to eviction cases. The rulings on this case and others by the courts proves that a one-size-fits-all approach to eviction cases is not only impractical but also unacceptable.<sup>189</sup> The City's irregular joining of this matter was raised as the main concern initial. For example, Section 4 of PIEA was brought up on behalf of the city and this was said to be improper for a respondent to join the city as a co-respondent. The City argued that a joinder was granted permission on the grounds that their issue of formed part of the opposing application.<sup>190</sup> The judgment stated that the City is obliged to make necessary arrangements to provide housing or alternative shelter for potential homelessness. Additionally, the court ruled the City should address the unique circumstances of individuals likely to be evicted as opposed to mere providing a general report on its housing policy.<sup>191</sup> Failure to give occupants an alternative accommodation and failure to evict the same violates the constitutional rights of the occupiers and a property owner, respectively.<sup>192</sup> As such, the City of Johannesburg

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<sup>186</sup> Ibid, para 31.

<sup>187</sup> Ibid, para 38.

<sup>188</sup> (2006/11442) [2008] ZAGPHC 275.

<sup>189</sup> Ibid, para 64.

<sup>190</sup> Ibid, para 3.

<sup>191</sup> Ibid, para 63.

<sup>192</sup> Ibid, para 42.

was ordered to either find an alternative housing for the residents of Saratoga Avenue or pay their rent elsewhere.<sup>193</sup>

The case of *City of Cape Town v Neville Rudolph and Others*<sup>194</sup> revolved around the occupation of land under the ownership of the City of Cape Town. The respondents were from Valhalla Park, an area owned by the city. Some respondents were found to be on the city's waiting list for up to ten years. Due to overcrowding and unaffordability, residents moved to vacant land owned by the city. Additionally, the respondents filed a counterclaim on the grounds that the city's housing policies and programs lacked their legal and constitutional rights to exercise their right to adequate housing.<sup>195</sup> Moreover, residents further argued that the City failed to consider past rulings like the case of Grootboom residents. In making a judgement, the court acknowledged that the housing situation had gotten worse despite the Grootboom judgment.

The Accelerated Managed Land Settlement Program was cited by the Constitutional Court in the Grootboom decision to illustrate the nature a housing program that could help those in need. The City had not implemented a similar program <sup>196</sup> thus, the City did not fail to meet its legal obligation to provide appropriate housing, as outlined in the Grootboom ruling. The Court concluded that the City's housing policies were not constitutional. Therefore, the court instructed the city to adhere to these responsibilities and submit a report within 4 months outlining the steps it has taken to address the situation. Furthermore, the City was expected to show new upcoming policies and programs to be implemented in this regard.<sup>197</sup>

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<sup>193</sup> Ibid, para 66.

<sup>194</sup> (11) BCLR 1236 (C) (2003).

<sup>195</sup> Mahomed, A 'Grootboom and its impact on evictions: Neville Rudolph and others v City of Cape Town' in the ESR Review Vol 4 No 3 September 2003, 2.

<sup>196</sup> Ibid.

<sup>197</sup> Grootboom, para 40.

### 3.3 Chapter 9 institutions

Some institutions that support the human rights are established by Chapter 9 of the 1996 Constitution.<sup>198</sup> According to Article 181 of the Constitution, these institutions have the power to fulfil the need for proper housing and other needs. While most Chapter 9 agencies are important to the protection and promotion of human rights, the South African Human Rights Commission, and the Public Protector are the two main bodies for advancing human rights.

#### 3.3.1 South African Human Rights Commission

Monitoring and promoting human rights are mandated activities for this Commission. The commission is responsible for ensuring that all people in South Africa, especially those deprived of their human rights, have access to economic and social rights. This includes the poor, vulnerable, and socially marginalized groups. Section 184 of the Constitution describes the duties of the Commission to promote respect, protection, development, and fulfilment of human rights. In addition, it is intended to monitor and evaluate their implementation in the Republic.<sup>199</sup>

In addition, Section 184(3) of the Constitution requires state agencies to report to the Human Rights Commission annually on the steps taken to meet socio-economic needs such as housing and another among other factors.<sup>200</sup> Since its inception, the Human Rights Commission has worked in many areas related to the right to access housing. The commission reported on the ownership of commercial buildings in 2004 and it was proposed that a fund be established to purchase large land for commercial buildings.<sup>201</sup> Statistics South Africa Census of 2011 reported that 70% of households

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<sup>198</sup> Section 181 – 194 of the Constitution.

<sup>199</sup> Mitra, E 'Using Structural Interdicts and The South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights In South Africa' (2008), *New York University Law Review*, 83(5), 1599.

<sup>200</sup> Mubangizi, JC 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006), *African Journal Legal Studies*, 1, 7.

<sup>201</sup> South Africa Human Rights Commission, 'The Right of Access to Adequate Housing' (2004) 5th Economic and Social Rights Report Series, 2002/2003 Financial Year.



had access to sanitation and 85% of households had access to water that meets those standards.<sup>202</sup> Nonetheless, the National Development Plan report notes that apart from notably progress made to realise these rights, its implementation has been marred by corruption and lack of innovation. As result, the housing units are characterised by poor quality units; poor residential environments; uniformity and monotonous settlements on the urban edge that lack necessary social facilities and supportive infrastructure.<sup>203</sup>

The 2014/2015 report, show that the city of Johannesburg is responsible for 181 informal settlements. However, only 15 informal settlements are prioritized due to lack of basic services namely, water and sanitation, refuse removal, electricity, and roads. The eThekweni Municipality estimates that there are 595 informal settlements with approximately more than 100 000 households.<sup>204</sup> The limited resources make it difficult for the municipality to provide adequate services or housing to the settlements.<sup>205</sup> eThekweni Municipality said more funding would help to build more houses. Studies by the Poverty and Inequality Institute, show that housing programs like through the Upgrading of Informal Settlement Program are not being implemented at scale due to spending and procurement challenges.<sup>206</sup>

Also, the Commission is mandated to request annual reports from the relevant state organs on the steps taken towards enforcing the right to housing and other rights like health care, food and water, social security, education, and the environment. Households headed by women, black South Africans, those with low level of

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<sup>202</sup> The South African Human Rights Commission Investigative Hearing: po Access to Housing, Local Governance and Service Delivery. (2015) <[Access to Justice & Adequate Housing \(sahrc.org.za\)](https://www.sahrc.org.za)> accessed 25 September 2022.

<sup>203</sup> The National Development Plan 2030: Our future – make it work, 268.

<sup>204</sup> Zainul Dawood, 'Informal settlement expansion in eThekweni impacts service delivery to ratepayers' (2022) <<https://www.iol.co.za/dailynews/news/kwazulu-natal/informal-settlement-expansion-in-ethekweni-impacts-service-delivery-to-ratepayers-b248f033-0367-45b9-8e9d-a153f076dde0>> accessed 3 July 2023.

<sup>205</sup> Note 96 above, 44.

<sup>206</sup> Ibid.

education, unemployed, and large families, consistently have the highest rates of poverty.<sup>207</sup> 269 complaints about inadequate housing were received and approved by the Commission during the 2019–2020 financial year.<sup>208</sup>

### 3.3.2 Public protector

The Office of the Public Protector falls under the Chapter 9 institutions of South Africa. It is not part of the executive, and a sphere of government, hence it does not adhere to separation of powers. Unlike, the Human Rights Commission, the Office of the Public Protector has an indirect role however not insignificant role.<sup>209</sup> This office has three main responsibilities under Article 182 of the Constitution. This involves investigating improper practices in public administration, reporting such practices, and taking appropriate corrective actions. In performing its duties, the Public Protector defends and upholds the human rights emanating from the state's wrongdoing and poor public administration. This includes the right of access to housing. The Public Protector Act 23 of 1994 states that the office should investigate matters and defend the public from improper conduct by a public servant, and corruption.<sup>210</sup> It is also mandated to investigate, any act or omission by a public servant leading to improper or unlawful enrichment and violation of constitutional rights. The office has the power to look into and file a report on any government officials working on housing projects and programs that act in an illegal manner or violate people's rights.<sup>211</sup>

Two residents filed complaints against the Steve Tshwete Local Municipality. The residents claimed to have been assigned low-cost subsidy housing and had failed to

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<sup>207</sup> Annual Trends Analysis Report (2019-2020) < [SAHRC TAR 2019-2020\\_FINAL.pdf](#) > accessed 28 December 2022.

<sup>208</sup> Ibid, 36.

<sup>209</sup> Mubangizi, JC 'Protecting Human Rights amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing' (2008) *African Journal of Legal Studies*, 144.

<sup>210</sup> Tchawouo Mbiada CJ, 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' *PER / PELJ*, 20 (2017) 14.

<sup>211</sup> Ibid, 24.

get their title deeds from the Municipality. The Municipality alleged that another person had already registered in one of the complainants' names without them knowing.<sup>212</sup> Upon this realisation, the Public Protector wrote a letter to the municipal officials to investigate the issues brought by the complaints.<sup>213</sup> It emerged that the name of the complainant appeared in the list forwarded a service provider called Sisonke Development Planner. The service provider was hired to register housing beneficiaries by the Municipality. Furthermore, it was revealed that the service provider had not only registered the petitioner's registrations but also all the other residents of the low-income houses in the area.<sup>214</sup> The Public Protector concluded that the Steve Tshwete Local Municipality had neglected its duties to assist the applicants to obtain their title deeds in a timely manner. In addition, the Office of the Public Protector said that the citizen did not speak to the Department of Local Government and the houses of inappropriate conditions. The Public Protector further said that the Mayor of the City will work to register the petitioner's registration form and implement the Mayor's Committee's opinion. In addition, the Public Protector advised the Municipal Manager to help those who receive low-income housing to obtain registration documents in a timely manner.<sup>215</sup>

### **3.4 Other institutions that may enforce the right to adequate housing**

#### **3.4.1 Non-Profit Organisations**

A strong network of civil society organisations exists in South Africa and is crucial to the safeguard of human rights. Non-Profit Organisations (NPOs) have had a unique role in South African history, and their methods of operation have evolved over time in response to the emergence of democratic institutions and a new political and constitutional order. It is important to take this history into account when considering the role of NPOs in South Africa. Also, emerging new challenges forced NPOs to

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<sup>212</sup> Public Protector's Annual Report No 3 of 2010/11 dated 14 June 2010.

<sup>213</sup> Note 218 above, 18.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid, 19.

modify their methods of operation.<sup>216</sup> These organisations frequently engage in information gathering, evaluation, and dissemination as well as advocacy for the victims of human rights abuses. They also promote solidarity between those who have been illtreated and those whose rights have been infringed, they further foster the promotion and implementation of local humanitarian principles.<sup>217</sup> These institutions are allowed to litigate cases on behalf of individuals that are unable to do so for themselves. They also assist marginalized communities or individuals to apply for housing. The next sections discussed NPOs that help the poor realise their human rights.

a) *Legal Resources Centre (LRC)*

The LRC is dedicated to advancing the needs of the underprivileged. The LRC concentrated on putting an end to apartheid and advancing democracy before 1994. Following the end of apartheid, LRC reorganized to focus on constitutional law, real estate, housing, and development.<sup>218</sup> Regarding the right to decent housing, the LRC represented Irene Grootboom and 900 other people in the Grootboom case. The Constitutional Court not only found the involvement of the LRC in the decision but also accepted their opinion that the public housing project was inappropriate and that the rights of Section 26 of the Constitution were not met.<sup>219</sup>

b) *Socio-Economic Rights Institute of South Africa.*

This organisation is devoted to the safeguarding and advancement of human rights. Its primary goal is to promote socio-economic rights in poor communities and to help poor and disadvantaged people achieve a decent standard of living.<sup>220</sup> Since 1996, the organisation was tasked with conducting a review of South Africa's housing

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<sup>216</sup> Note 201 above, 145.

<sup>217</sup> Abdullahi, ANM 'Human Rights Protection in Africa: Towards Effective Mechanisms' (1996) 3 East African Journal of Peace and Human Rights 1, 27.

<sup>218</sup> Andrews, P et al 'The South African Constitution as a mechanism for redressing poverty' Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation (Ohio University Press, Athens 2006) 186.

<sup>219</sup> Note 121 above, 146.

<sup>220</sup> [Socio-Economic Rights Institute of South Africa \(SERI\) | Popular Education South Africa](#)

policy.<sup>221</sup> It also helps to promote good public governance by educating local communities about their rights and how government processes work, allowing them to take part in such processes and hold the government accountable for their actions.

#### c) *Centre for Applied Legal Studies*

The Centre for Applied Legal Studies (CALs) is a non-profit organization dedicated to the preservation of democracy, justice, equality, and peace. It is also committed to dealing with and undoing the injustices of the past, such as oppression and discrimination, by ensuring that everyone access their human rights. To achieve this, CALs works to increase public awareness of human rights and ensure that people living in vulnerable communities can exercise their human rights. CALs works to achieve these goals by autonomous research, advocacy for policy change, and public interest advocacy in areas such as housing, health, education, water, sanitation, health care and gender roles. The team works to achieve its goals by using a variety of methods, such as conducting in-depth studies and writing, as well as providing analysis and briefing. In addition, they teach and provide general education and training, collect, and distribute data and publications, and provide legal advice and advocacy. In addition, they are involved in policy development, law implementation, conflict resolution, as well as institutional development and coordination.

#### 3.4.2 The Department of Human Settlement

The Department of Human Services is responsible for working with counties and municipalities to create and support sustainable housing development over the long term.<sup>222</sup> Section 3 of Housing Act is the basis for this requirement. The department is obliged to set broad housing delivery goals on a national level. It does this by establishing national policies and standards, providing funding to provinces and municipalities. It is expected that provinces and municipalities will be monitored in terms of both financial and non-financial performance in regard to providing the right to housing. The department fulfils its duties by not only strengthening the capacity of

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<sup>221</sup> [Socio-Economic Rights Institute of South Africa \(seri-sa.org\)](http://seri-sa.org)

<sup>222</sup> Human Settlements (2022) < [Human settlements | South African Government \(www.gov.za\)](http://www.gov.za)> accessed 25 September 2022.

municipalities and provinces, but also by engaging in consultation with all stakeholders involved in the housing delivery process.<sup>223</sup>

The Department emphasises four areas in the medium term. These are to; Promote integrated human settlement development, modernize informal settlements, and offer affordable rental housing as well as low-interest housing financing.<sup>224</sup> Another mandate of the department is to support and promote local small and medium-sized businesses to widen employment opportunities. Businesses in the supply and manufacturing businesses are main focus. The department focuses on the growth and approval of suppliers and manufacturers of building materials to fulfil its mandate. In addition, the department uses unemployed graduates trained through the Human Settlements program.<sup>225</sup>

### **3.5 Conclusion**

The review of cases shows that the courts always attempt to ensure that the right to adequate housing is enforced by various rulings. In cases of eviction, the courts have always taken reasonable and equitable decisions through allowing people to find alternative housing prior to eviction or and compelling the government to provide an alternative shelter for them. In addition, the institutions help the government to enforce the right to adequate housing. These institutions can also be recognized as regulatory agencies through advising government on how to enforce people's rights.

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<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

## CHAPTER 4

### POLICIES AND LAW IMPLEMENTED SINCE 1994 BY THE GOVERNMENT TO PROVIDE FOR THE RIGHT TO ADEQUATE HOUSING

#### 4.1 Introduction

Discriminatory laws and policies were discarded in 1994 when South Africa gained democracy. These are captured in the 1996 Constitution, that is the supreme law of the country. The new laws and policies that caters for everyone's human rights that includes the right to adequate housing. Majority of these laws seek to redress and mend the historical injustices. Section 9 of the Constitution provides that everyone must be treated fairly and equally. In this chapter South African laws and cases relating to the right to housing is reviewed.

#### 4.2 Housing Act 107 of 1997

The Housing Act is a significant legislation that lays out the guidelines for providing housing in South Africa. It eliminates all housing discrimination laws and structures, repeals all housing discrimination legislation, and establishes a new, non-racial system for enforcing housing rights.<sup>226</sup> Moreover, the Housing Act lays out the powers and responsibilities for various government spheres of in relation to enforcing the right to housing. Also, the guidelines on how government departments should work together are provided.<sup>227</sup> The following are the roles and responsibilities of the three organs of government:

##### *a) National government*

The Housing Act instructs the minister to establish national standards and norms for housing development and set national goals for housing delivery. Additionally, the

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<sup>226</sup> Nevondwe, L and Odeku, KO 'Challenges of Housing Delivery in South Africa: Lessons Learnt from Jurisprudence' (2012) African Journal of Business Management Vol.6 (45) 11338.

<sup>227</sup> McLean, K 'Housing Provision Through Co-Operative Government in Post-Apartheid South Africa' (2003). 164- 165.

minister is tasked with monitoring the performance of the national, provincial, and local governments as well as help provinces establish their administrative capacity.<sup>228</sup> In the Housing Act, also the national housing code is established, and it is binding on provincial and local governments.<sup>229</sup>

*b) Provincial government*

The creation of a multi-year plan is a requirement for all provincial governments, along with the production of a provincial housing policy, ensuring the adoption of provincial laws, strengthening municipal capacity, coordinating housing development across the province, and assisting municipalities in carrying out their duties.<sup>224</sup>

*c) Local government*

The government of the local area is responsible for making sure that people who live there have access to appropriate housing through their municipalities. In addition, the municipality must ensure that basic services and infrastructure are available, as well as that health and safety standards are met. Also, the Housing Act provides that housing delivery goals should be established, and land made available for housing development by the municipality.

The Act allowed local governments to participate in housing development. The government altered the "procurement regime" in 1998 to allow municipalities to begin developing low-cost housing projects.<sup>230</sup> This represents a departure from the National Housing Forum's public-private partnership strategy and a move toward a more state-driven strategy. The director general of the Department of Housing, described this paradigm shift as "a fundamental departure." However, local government is still faced with difficulties of providing subsidised housing. Part of the

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<sup>228</sup> Section 3 of the Housing Act.

<sup>229</sup> Section 4 of the Housing Act.

<sup>230</sup> Charlton, S. & Kihato, C 'Reaching the poor? An analysis of the influences on the evolution of South Africa's housing programme' (2006) 263.



challenges includes lack of access to infrastructure and housing development funding, skills to manage housing development, failure to build adequate number of houses and coordinate housing development due to limited resources.<sup>231</sup>

In 2001, the Housing Act was amended.<sup>232</sup> The amendment abolished the South African Housing Development Board and Provincial Housing Development Boards, by establishing the advisory panels. The amendment also resolved on the policy for procurement in housing development. It also published a lists of national housing programs and national institutions. Also, the amendment specified the making of the National Housing Code that binds all spheres of government and provided for the establishment of advisory panels.

In the case of *Abdul v Williams and Others*,<sup>233</sup> the respondents entered into a written sale agreement with the appellant. The property was sold to the appellant for R50 000 and this sum was paid in its entirety.<sup>234</sup> However, the property could not be registered in the appellant's name. The primary cause for the transfer of the property into the respondents' names being endorsed with restrictive conditions was due to Sections 10 A and B of the Housing Amendment Act 4 of 2001. This Sections states that the house cannot be sold until an 8-year period has lapsed and there must be a written consent from the Provincial Housing Department.<sup>235</sup> The court ruled the property sale agreement was null and invalid from the start since it violated Section 10A restricting provisions of the HA. Section 2(1)(a) of the HA states that "national, provincial, and local spheres of government must give priority to the needs of the poor in respect to housing development".<sup>236</sup> This is the first of the general principles promoted by the

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<sup>231</sup> Pottie, D 'Housing the Nation: The Politics of Low-Cost Housing Policy in South Africa Since 1994' (2003) *Politeia* Vol. 22 (1), 133.

<sup>232</sup> The Housing Amendment Act 4 of 2001.

<sup>233</sup> (CA227/2018) [2019] ZAECGHC 103.

<sup>234</sup> *Ibid*, para 3.

<sup>235</sup> *Ibid*, para 4.

<sup>236</sup> Section 2(1)(a) of Housing Act 107 of 1997.

Housing Act.<sup>237</sup> The court decided that under Section 10A of the HA, the signing of a lease agreement under the state-subsidized properties constitutes the alienation of that property.

### **4.3. Social Housing Act 16 of 2008 (SHA)**

The SHA seeks to ensure the long-term sustainability of housing by setting out the obligations of national, regional, and local governments in regard to social housing. Additionally, the SHA provides for the establishment of the Social Housing Regulatory Authority, which will be responsible for monitoring all social housing that has been or is currently receiving public funding.

Section 2(1)(i)(iii) of the Social SHA sets to create, grow, and uphold socially and economically viable communities in all spheres of government and prevent housing overcrowding. In relation to realising this mandate, government falls short of preventing overcrowding in many informal communities. This has had adverse impact on human rights like the right to health and clean environment. One of the major challenges is that the government consistently fail to provide adequate houses to cater for all people living in overcrowded areas. Trade unions in South Africa suggest a public housing organisation be created to establish its own formal rental stock.<sup>238</sup>

The initial post-apartheid housing policy does not include a rental housing program. Backyard dwellings are seen as a temporary solution that would vanish once people had access to affordable housing. Lemanski showed that more than 20% of people in South Africans reside in rented backyard dwellings.<sup>239</sup>

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<sup>237</sup> *ibid*, para 18.

<sup>238</sup> Note 220 above, 266.

<sup>239</sup> Lemanski, C 'Augmented Informality: South Africa's Backyard Dwellings as A By-Product of Formal Housing Policies' The South African Housing Foundation. International Conference, Exhibition and Housing Awards. 11-14 October 2009. Cape Town, South Africa 4.

#### 4.4 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

The PIEA repealed the Prevention of Illegal Squatting Act 52 of 1951. It bars unlawful evictions and establishes procedures to be followed in evicting illegal occupants. The PIEA is grounded on the belief that evictions and demolitions of homes jeopardizes the enjoyment of constitutional rights like the right to access to housing, dignity, security, privacy, and health. General Comment No. 7 on forced evictions states that "vulnerable individuals and groups, such as women, people with disabilities, the elderly, and frequently children, are also adversely affected by eviction."<sup>240</sup> The PIEA prescribes that before evicting anyone, a landowner must inform the illegal occupants through a written notice at least 14 days in advance. After the 14 days, the landowner may evict the occupiers. An organ of state may issue an eviction order to remove unauthorized occupants from state-owned property. However, the organ of state must ensure that when evicting someone, the order must serve the interests of justice or the person's health and safety. Also, an alternative housing must be made available for those who are vulnerable and unemployed.<sup>241</sup> PIEA requires the court to take into account the circumstances of the people being evicted, especially the vulnerable communities, before issuing an eviction order. Thus, the eviction must be carried out fairly and in accordance with this law. Furthermore, the court is required by PIEA to give special consideration to disabled children and older adults for their protection in deciding to grant an eviction order. The court demonstrated this in the Grootboom case. In the case of *Dwele v Phalatse and others*<sup>242</sup>, the court referred to Section 4(7) of the PIEA. The Section provides that "an eviction order may be granted only if it is just and equitable to do so".<sup>243</sup> This means an investigation must be conducted to ensure that the discretion of granting an eviction order is exercised

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<sup>240</sup> Rapelang, T 'An Evaluation of The Right To "Access to Adequate Housing" In Joe Morolong Local Municipality, South Africa' (2013) University of Free State, 58.

<sup>241</sup> Mashiane, K & Odeku, K.O 'Transformative Interventions Fostering the right to access to Adequate Housing in South Africa' (2021) African Journal of Development Studies, 272.

<sup>242</sup> (11112/15) [2017] ZAGPJHC 146 (7 June 2017).

<sup>243</sup> Van Wyk, J 'The Role of Local Government in Evictions' (2011) *Potchefstroom Electronic Law Journal* 14(3), 66.

properly. The relevant circumstances that must be considered includes the acquisition of land for the resettlement of legal residents with particular attention to the needs and interests of vulnerable groups of people.

There are many cases where the state has,<sup>244</sup> evicted people from their residence without a court order and left with no homes or shelter. This does not comply with the requirements for the PIEA and Section 21 of the Constitution. In South Africa, many people in the rural dweller do not know laws outlined in the PIEA regarding eviction. More so, many do not know their right to freedom of movement and shelter. Hence, in such circumstances it is easier to evict them without following proper procedures.

In the case of *Ndlovu v. Ngcobo (1) SA 46 (CC) (2001) and Bekker and Another v Jika*,<sup>245</sup> the court ruled that the applicant did not satisfy the requirements for their application regarding the urgent relief sought by the applicant in line with Section 5 of the PIEA after considering the cumulative factors listed in PIEA. The court did not intend for occupants to have their protection against arbitrary evictions taken away. Additionally, the court determined that PIEA's provisions originate from the Bill of Rights, specifically Section 26(3) of the Constitution that forbids arbitrary evictions. In this case, the procedural protections stipulated in the PIEA did not constitute an "arbitrary" taking of property. Although, the applicants said they had access to common law remedies, the court ruled that this undermines the PIE's ultimate intention which is to protect.

#### **4.5 National Housing Development Agency Act 23 of 2008**

The National Housing Development Agency Act 23 of 2008 (NHDA) was passed with the following objectives: "to create the Housing Development Agency, to outline its duties and authority, and to address issues related thereto". The NHDA was enacted to address the delays in identifying, acquiring, assembling, and releasing state-owned

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<sup>244</sup> Freedom of movement and residence.

<sup>245</sup> (1) SA 113 (SCA) (2003).

and private land to provide adequate housing for low-income earners.<sup>246</sup> As a result, the establishment of the NHDA is meant to speed up the processes of housing development.<sup>247</sup> Section 3(4)(h) of the HA provides that the Minister may create and fund national institutions for the development of housing and oversee the performance of their duties. Moreover, the NHDA has a responsibility to oversee and assess the budget granted for the construction of housing on the land chosen and purchased after consulting with the appropriate owners. In South Africa, access to land is a major problem. Majority of the land is privately owned, and it is very expensive for the government to use for housing.<sup>248</sup> As the custodian of the land, the state can expropriate land for public use. Due to past injustices and land grabs, most people who do not have access to adequate housing are previously disadvantaged. This means that their interests must be prioritized so that the state can redress past injustices. With the help of the NHDA, housing development will speed up and will be achieved.

#### **4.6 People Housing Process 1998**

The People Housing Process program was listed as one of the White Paper on Housing's seven strategies in 1994 and formally launched 1998. The program aims to promote self-help by the poor in order to address some of the shortcomings of the housing assistance program and the needs of poor groups and low-income families who are denied housing loans and loans through private financial institutions.<sup>249</sup>

The PHP was employed as a tool to facilitate the creation of opportunities for communities to bring together their resources and provide labour to construct homes.<sup>250</sup> The process is to encourage the community or the beneficiary to help in the

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<sup>246</sup> Preamble of the National Housing Development Agency Act

<sup>247</sup> Ibid.

<sup>248</sup> Note 223 above, 276.

<sup>249</sup> Miraftab, R 'The perils of participatory discourse: Housing policy in post-apartheid South Africa' (2003) *Journal of Planning Education & Research*, Vol. 22, 226-239. 233.

<sup>250</sup> Landman, K & Napier, M 'Waiting for a house or building your own? Reconsidering state provision aided and unaided self-help in South Africa' (2010). *Habitat International*, 34(4), 305.

building process. This is known as "sweat equity", which is designed to help people access a portion of the capital invested in a high-end building. With the help of the extension of the government, this collaboration allowed the PHP method to consider the idea that people build their own houses using subsidized materials. The level of owner-built participation in PHP varied depending on the region. In some areas, owners were able to construct their own homes with the help of local governments and provinces. This was made possible due to the contextual nature of PHP.<sup>251</sup> Local contractors were trained from within communities under the auspices of the PHP in other cases. Also, some contractors were later hired by the owner to build the house.<sup>252</sup> The Peoples Housing Process planned to collaborate with housing-related Non-Governmental Organisations to assist communities in designing and implementing their own housing settlements working with beneficiary labours themselves in equity to save costs and at the same time ensuring that everyone has an adequate housing.<sup>253</sup> In 2008 this process was replaced by the Enhanced People's Housing Process. The restrictive definition of 'self-build' houses involving 'sweat equity' donations rather than the use of contractors informed the amendment of the process. This was because Non-Governmental Organisations objected to this undertaking. Non-Governmental Organisations stated this undertaking must be centred on a communal, "community-based decision-making process that considers housing in the context of other social needs and community interests."<sup>254</sup>

#### **4.7 Integrated Development Plan**

The Integrated Development Plan (IDP) is a comprehensive plan for a particular region that outlines a development plan for a period of five years. It seeks to integrate the efforts of local government and higher levels of government to create better quality of

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<sup>251</sup> Juan. J 'What Contributions Can Housing Co-Operatives Make to Managing the South African Housing Crisis?' (2011) University of Stellenbosch, 14.

<sup>252</sup> Ibid.

<sup>253</sup>Note 113 above, 5.

<sup>254</sup> Himlin, R 'People's Housing Process: Enhanced!' NGO Pulse, 2008.

life of all citizens in the area.<sup>255</sup> Municipalities rely on the IDP as a key planning tool. This tool is used to guide and inform planning, budgeting, management, and decision-making processes. A municipality's housing planning is summarized in the housing sector plan, which should be included in the five-year IDP and reviewed on an annual basis. This sector plan mandates that municipalities identify housing needs and demands across all income levels, create connections between housing delivery, bargain for well-located land, and plan transportation and spatial reorganisation.<sup>256</sup> The most crucial requirement is for these procedures to be transparent.<sup>257</sup> However, the municipalities are still finding it difficult to implement their sector plans due to limited funding from national and provincial sector departments. Another challenge is that the departments lack the capabilities and knowledge to carry out their duties and assist other government spheres like municipalities.

The White Paper<sup>258</sup> provided that when planning land use for infrastructural or economic development, the land must be used wisely. The foundation and main aims of the system must be based on principles and standards that are intended to achieve sustainability, with impartiality, justice, and good governance in spatial planning and use of the land management. Municipalities are obliged to strictly apply these principles and norms in their planning authorities. Failure to implement the planning process, the Minister can intervene to rescue the decision-making process. This can be done through, requiring a review or in extreme instances, the minister can make decision.<sup>259</sup>

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<sup>255</sup> Integrated Development plans <[Integrated Development Planning \(tshwane.gov.za\)](https://www.tshwane.gov.za)> accessed on 01 October 2022.

<sup>256</sup>Thapelo, PT 'Community Participation: Reality and Rhetoric in The Development and Implementation of The Integrated Development Plan (IDP) Within Municipalities of South Africa' (2016), *Journal of Public Administration* 51(4), 715.

<sup>257</sup> Tomlinson, R 'Managing the risk in housing delivery: Local government in South Africa' (2011). *Habitat International*, Vol. 35 (3), 419-425. 422.

<sup>258</sup> Spatial Planning and Land Use Management White Paper. South African government <[www.gov.za](http://www.gov.za)> accessed on 01 October 2022.

<sup>259</sup> Ibid.

Development plans assist in addressing the issues affecting the marginalised communities or people. It also further assists the spheres of state in proposing effective plans. The White Paper also emphasized that when distributing land or planning Land use, the state must always consider the history of the country. Housing policy needs to address the issue of residential segregation and create opportunities for those who are less fortunate to benefit from the economic growth of the country. This can be done by finding ways to reduce the segregation and make sure that everyone has access to the same resources.

The democratic government of South Africa adopted a developmental strategy for local government in order to eliminate the remnants of the past. This demands that local government, uses the IDP, to commit to encouraging community participation. This is achieved by identifying sustainable approaches to addressing social, economic, and material needs and enhancing their quality of life of the affected individuals or communities. A study on the importance of community participation in the IDP process in Govan Mbeki town found that the community only participated in the first of the five stages of the IDP. This includes identifying needs. The study concluded that the municipality limits the impact of community participation on IDPs by not creating an environment that enables community participation.<sup>260</sup>

#### **4.8 The Development Facilitation Act 67 of 1995 (DFA)**

The DFA was established as a measure to speed up the land development programmes across the country. It also provides for the general principles governing land development in the Republic. The DFA is also aimed at mending the disputes in respect of land development projects to ensure speedy development in rural areas as well as in urban areas. Section 3 of the DFA provides for principles that govern the

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<sup>260</sup> Tshabalala, E.L and Lombard, A 'Community participation in the Integrated Development Plan: a case study of Govan Mbeki Municipality' (2009) <[Community participation in the Integrated Development Plan: a case study of Govan Mbeki Municipality | Journal of Public Administration \(journals.co.za\)](http://journals.co.za)> accessed on 28 December 2022."



development in the country.<sup>261</sup> It states that established policies by the state must be able to provide for rural and urban land development and these policies must further discourage the illegal use or occupation of land.<sup>262</sup> Land must be used in a way that will not deprive other people of their right to housing or property. People must always understand that the right to own land or property<sup>263</sup> is also the right to have access to housing. These two rights cannot be read or discussed separately.

#### **4.9 Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA)**

The PCCA was enacted to prevent unlawful activities like corruption, maladministration, nepotism and bribery in the governmental institutions of South Africa like in.<sup>264</sup> The PCCA requires anyone listed in the PCCA to report corrupt transactions, suspected conduct, or commission of unlawful activities.<sup>265</sup> In PCCA, corruption is defined as "Anyone who accepts any reward from another person, or who offers or provides any reward to another person in an effort to persuade the recipient to behave in a way that amounts to the unlawful or irregular performance of any duties."<sup>266</sup> In the case where a person is unable to provide a service, the act of offering to perform a corrupt service constitutes corruption. Moreover, the PCCA forbids six categories of corruption in addition to restoring the common-law offense of bribery and facilitating the prosecution of other types of corruption.<sup>267</sup>

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<sup>261</sup> Odeku, K 'The Intrinsic Role of The Development Facilitation Act in Accelerating the Delivery of Land Development to The Black Majority in Post-Apartheid South Africa' (2021) *Journal of Legal, Ethical and Regulatory Issues*, 241), 3.

<sup>262</sup> Ibid, section 3(1)(b) of the Development Facilitation Act.

<sup>263</sup> "Section 25 of the constitution. This section provides that no one may be deprived of their right to property. This simply means that when it comes to housing, no one must be denied the right to access adequate housing because it is their human right.

<sup>264</sup> Note 225 above. 278.

<sup>265</sup> Ibid.

<sup>266</sup> Snyman, C.R 'Criminal Law'(2008) (Fifth Edition) Durban: Lexis Nexis, page 411.

<sup>267</sup> Promoting Professional Ethics 'Summary Of The Prevention And Combating Of Corrupt Activities Act No 12 Of 2004' (2011) < [IMPERATIVES FOR CRIME PREVENTION AND ETHICAL CONDUCT \(proethics.co.za\)](http://proethics.co.za)> accessed 13 October 2022.

Some of the corrupt activities include allocating houses to those who do not qualify and selling RDP houses to qualifying individuals. Poor continue to lack houses due to corruption as such they end up living in a public or private land unlawfully. Corruption causes people to doubt the legitimacy of the government's commitment to providing free housing. Section 3 of the PCCA, states that it is corrupt for a public official to directly or indirectly give or receive any benefits or to abuse their position of authority to grant unauthorized access to a house. Thus, public officials must act in a manner that benefits individuals as they are obliged to ensure that people's rights are protected and promoted. In 2010, more than a thousand government employees were arrested for misusing subsidized housing funds for their own profit.<sup>268</sup> This demonstrated that public officials are improperly and illegally advancing their own interests rather than the interests of the public.

#### **4.10 Reconstruction and Development Programme**

In 1994, the ANC recognized the need to implement a policy that would aid in the realization of everyone's right to housing in South Africa. The RDP seeks to address the needs of previously disadvantaged groups by the apartheid regime. This program aims to meet the basic needs of South African citizens. All other socioeconomic rights that an individual is entitled to are included in basic needs. As previously stated, the right to housing cannot be interpreted, rather it should be supported by these other socioeconomic or human rights.

In delivering RDP housing, the government has disregarded one of the RDP's core principles of fostering integrated development. The implementation of the RDP programme housing without other basic services as they considered not entitlements, and where the private sector is principally relied on to generate jobs, is ineffective.<sup>269</sup> There are also many government failures in delivering this programme. The plan in the White Paper to build over one million low-cost housing has failed. This shows that the IDP is not used in an effective way. The main challenge in the programme is

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<sup>268</sup> Manomano, T et al 'Housing Problems and Housing Programmes in South Africa: a literature review.'(2016) Vol 7, Journal of Sociology and Social Anthropology. 113.

<sup>269</sup> The National Home Builders Registration Council (NHBRC).2010.

corruption. Reportedly, there are cases where people own more than one of RDP houses while some are granted houses even though they do not need them. This is evident when those awarded houses sell them to the marginalised and in need of houses. This proves that the awarding of RDP houses is done without proper investigation on the merits of the people applying. Building houses for people is critical for strengthening the economy in terms of infrastructural and environmental development. More so, it changes people's lives and boosts their human dignity.

In the case of *Dwele v Phalatse and Others*,<sup>270</sup> the applicant asserted they acquired the property from the owner in a written agreement in 2014. In 2015 the property was registered into their name at the Johannesburg Deeds Office. The respondent refuted this and said she is the legal owner and has lived there for more than 43 years. The report showed the respondent had previously held the title to the property, as supported by the respondent's claim.<sup>271</sup> Moreover, the report revealed that the respondent later lost the title to property to the Bank. The first respondent said they never applied for a loan from the Bank or have never registered for a bond over the property in the bank. The first respondent further denied selling the property to any of the parties listed in the report. This happened despite the fact that the first respondent questions the veracity of the report while also relying on it.

It was claimed that the Title Deed to an immovable piece of property, as stated in *R v. Nhlanhla* 1960 (3) SA 568, is the best proof of ownership. The applicant requested that the court issue the respondent with an eviction order after the court established that the house belongs to applicant.<sup>272</sup> The court found that the consequences of an eviction order for the people living in the property are usually very serious, and there is a risk that they could become homeless, even if only for a short period, if they do not have enough time to arrange their move. The applicant's temporary hardship cannot compare to what the respondents may experience soon. Even though it is difficult to lose a home after 43 years, more time is needed to make the transition

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<sup>270</sup> (11112/15) [2017] ZAGPJHC 146.

<sup>271</sup> Ibid, para 6.

<sup>272</sup> Ibid, para 19.

easier and ensure that the relocation is done in a timely manner. Given the circumstances, the court decided to grant the respondent three months to find an alternative accommodation.<sup>273</sup>

#### **4.11 Conclusion**

The analysis of the legislation, institutions, and cases demonstrates that most citizens lack access to decent housing due to regulations being implemented in a disorderly manner. The South African Human Rights Commission also notes that the country's housing policies demonstrate a commitment to upholding its constitutional duties, and that they have evolved to provide more acceptable and sustainable adequate housing. Even though South Africa has well-structured policies, there is still a gap between policy and implementation. Proactive action must be taken to reroute the programs so they can accomplish their goals. The country's housing initiatives which are designed to help the poor and needy are badly impacted by major flaws like corruption and poor management. Taking preventative measures against corruption, selecting the best candidates for the job, and publicly disclosing the financial and resource usage of these projects will likely be quite effective.

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<sup>273</sup> Ibid, para 27.

## **CHAPTER 5**

### **CONCLUSION AND RECCOMENDATIONS**

#### **5.1 Conclusion**

This study's findings clearly show that, while some components of the right to adequate housing have been realized, others have not. Chapter 1 of this study shows that apart from the right to adequate housing being recognized globally, millions of individuals are homeless or live in substandard housing. It also emerges that government-provided housing does not always provide all the necessary components for adequate housing. Chapter 2 further shows that those houses are of poor quality, located in remote places far from economic amenities, and with inadequate or non-quality infrastructure, this is all because of slow housing deliveries and maladministration. Chapter 3 further demonstrates that, despite the efforts of numerous institutions, the government still fail to uphold peoples' right to adequate housing. The inference made from Chapter 4 is that laws and policies can be effective if implemented in a manner that will protect and promote the rights of everyone in South Africa. The findings from numerous journals, articles, legislative materials, and policy materials showed that housing is a significant component of people's lives and that having access to better services and infrastructure enhances most people's quality of life and develops the country.

## 5.2 Recommendations

5.2.1 South Africans must be informed of their rights and how they are to be enforced. This is typically accomplished through information and awareness campaigns. These are crucial instruments in ensuring that all citizens are aware of and knowledgeable about their rights. Section 32 of the Constitution clearly provides that “everyone has the right to access to information”. This includes the information about their right to adequate housing. Many people in the rural or townships still lack access to adequate housing because they do not fully know and understand about their right to housing.

5.2.2 The government must strategize. The process of creating and putting into place a local housing strategy is necessary for the development of housing. Firstly, a plan includes overviews on how to set up a procedure for creating a successful local housing strategy. This includes information on what a local housing strategy is and how to create one and guidelines for successful community engagement. The IDP also assist municipalities to determine the needs of the community. Secondly, enough funds must be allocated for housing. Funds could be locally generated income or identified from other potential funding sources for affordable housing. Lastly, in developing local housing policies and allocating resources for competing community priorities, a balance must be struck between encouraging homeownership and increasing the supply of adequate as well as affordable housing.<sup>274</sup>

5.2.3 The courts take a decision based on the legislative measure, the Constitution, and other laws. Courts could establish follow up procedures to ensure that the responsible authorities have indeed built houses when it has been decided that the plaintiff’s right to adequate housing must be enforced.

5.2.4 The impacted community must participate in the development of housing in their area. Most of state subsidized houses in South Africa are built through the RDP. Hence, the government should improve the effectiveness of this programme by encouraging public engagement. When the community is involved in the RDP programme, empowers them and to assist them in acquiring more skills. All stakeholders must be involved including women must participate.

5.2.5 The materials used to build houses must first be assessed to determine if they are fit to build an adequate house. It is recommended that once a house is built, inspection be prioritised prior to occupation.

5.2.6 It is advised that anyone found performing the work below standard should be held personally accountable by being required to either fix the problem or reimburse the money spent on the irregular services. As a result, the culture of impunity and maladministration will reduce, service providers and government officials who are responsible for delivering housing services will act in accordance with the laws and enhance accountability.

5.2.7 To protect residents from arbitrary evictions, upon acquiring a stand or a house owner must be advised to get a title deed at their nearest Deeds Office so that their houses will be registered under their names.

5.2.8 Every new housing project or a proposed housing development must consider social amenities. The status quo of social amenities and an implementation strategy should be included in the housing plans. Social amenities must be considered in any new housing development or housing project. The housing plans should include a strategy for implementation as well as the current state of social amenities. The development plans of other sector departments should be in accordance with the plans that the municipalities have. Municipalities must work with other sector departments to create sustainable human settlements.

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<sup>274</sup> “NYU Forum Centre ‘What is a Local Housing Strategy and Why is it Important’ (2022) < [What is a local housing strategy and why is it important - Local Housing Solutions](#)> accessed 17 October 2022.”

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