LEGISLATIVE AND JUDICIAL RESPONSES TO INFORMAL SETTLEMENTS IN SOUTH AFRICA: A SILVER BULLET?

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1 Introduction

Informal settlements are a common feature of developing countries; sometimes referred to as "slums", "squatter settlements" or "shanty towns". The question of whether slums and informal settlements are the same has been raised by the South African Constitutional Court, but the majority of the Court found the distinction between slums and informal settlements to be untenable.[1] This article therefore uses slums and informal settlements interchangeably. It should be noted further that many still regard the term "slum" as derogatory and its usage has negative associations.[2] However, its use in this article should not be guided by the contention that it is derogatory.

There are various definitions of informal settlements or slums. The definition of informal settlements is context-specific and "slum" is a relative concept. However, they are generally comprised of communities or individuals housed in self-constructed shelters on land that they do not have legal claim to or occupy illegally. According to the United Nations Human Settlements Programme ("UN-Habitat"), informal settlements or slums are characterised by substandard housing or illegal and inadequate building structures, lack of basic services, overcrowding and high density, poverty and social exclusion, insecure tenure (residential status), and minimum settlement size.[3] As observed by Gilbert, "slum" is used to describe bad shelter – anything from a house to a large settlement that is substandard and occupied by the poor.[4] This article adopts the restricted definition of informal settlements provided by Huchzermeyer and Karam – "settlements of the urban poor that have developed through unauthorised occupation".[5]

The number of people living in slums has increased over the years. UN-Habitat worldwide estimates show that in 2001, 924 million people lived in slums, representing about 32% of the world's urban population, most of

1 *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC), discussed subsequently

2 The negative associations are discussed in A Gilbert "The Return of the Slum: Does Language Matter" (2007) 31 *IJURR* 697 701-702

3 UN-Habitat *The Challenge of Slums: Global Report on Human Settlements* (2003) 11-12

4 Gilbert (2007) *IJURR* 699

5 M Huchzermeyer & A Karam "The Continuing Challenge of Informal Settlements: An Introduction" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 1 3

them in developing regions.[6] The number increased to an estimated one billion people, about one sixth of the human population, in 2005.[7] In 2010, the figure stood at 827 million – thus a decline – but is expected to grow to 889 million by 2020.[8]

The growth of informal settlements (or slums) has been an issue of concern for many, with international initiatives increasingly focusing on informal settlements, particularly the need to improve the living conditions in these settlements. The adoption of the Millennium Development Goal ("MDG") 7 – specifically Target 7D – for instance, is illustrative of the global concern over the increase in informal settlements.[9] International development agencies have placed the challenge of informal settlements as a priority. A number of standards exist at the international and national levels on dealing with the challenge of informal settlements. At the national level, many governments are paying greater attention to informal settlements. They have attempted to "upgrade" or "eradicate" informal settlements, which has not come without its own challenges, as seen in the case of South Africa below. Slum upgrading has been seen as a strategy for improving living conditions for the urban poor[10] but whether this goal is achieved would depend on the effectiveness of any slum upgrading initiative or project. UN-Habitat reported in 2008 that despite efforts to improve the lives of slum dwellers, the progress made has not been enough to counter the growth of informal settlements.[11]

This article examines the challenge of dealing with informal settlements, with particular focus on South Africa. The paper first looks at international initiatives and standards on dealing with informal settlements. An introduction to informal settlements in South Africa is then provided. South African legislative and judicial responses to informal settlements are subsequently considered. In dealing with the judicial responses, a case study approach is adopted. The South African Constitutional Court has dealt with informal settlement upgrades in two recent cases, which represent significant strides in the current constitutional, legislative and judicial construction and implementation of housing policy in South Africa.[12] These cases are

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6 UN-Habitat *The Challenge of Slums* xxv

7 UN-Habitat *Slum Upgrading Facility (SUF) Handbook 1* (2006) 2 See also J Nijman "Against the Odds; Slums Rehabilitation in Neoliberal Mumbai" (2008) 25 *Cities* 73-85

8 UN-Habitat *State of the World's Cities 2010-2011: Bridging the Urban Divide – Overview and Key Findings* (2010) 8-9

9 The MDGs are eight international development goals (and 21 quantifiable targets measured by 60 indicators) that UN member states and international organisations have commitment to achieving by 2015 See United Nations "Millennium Development Goals" (2010) <http://www un org/millenniumgoals> (accessed 21-11-2012)

10 S Gulyani & EM Bassett "Retrieving the Baby from the Bathwater: Slum Upgrading in Sub-Saharan Africa" (2007) 25 *Environment and Planning C: Government and Policy* 486 488

11 UN-Habitat *State of the World's Cities 2010-2011* 33

12 The scope of this paper is limited to the two housing rights cases that reflect some significant strides However, it is worth noting the case of *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) The case related to the upgrading of informal settlements, and though it was not explicitly a housing rights case, dealt with issues that impact on the enjoyment of the right to adequate housing Apart from being a step backwards in the Constitutional Court's socio-economic rights jurisprudence, the case also reflects how government drags its feet in relation to making decisions on the upgrading of informal settlements, while the poor wallow in desperate conditions without access to basic services such as sanitation

considered against the background of key principles established in previous housing rights jurisprudence. The paper then concludes with recommendations on dealing with informal settlements while respecting the rights of those involved, particularly housing rights and the right to dignity.

2 International standards

A consideration of international initiatives and standards on dealing with the challenges of informal settlements is important in the assessment of whether the South African approach is in line with these standards. The Constitution of the Republic of South Africa, 1996 ("the Constitution")[13] and subsequently the courts[14] underscore the importance of seeking guidance from international and foreign laws, both binding and non-binding, as they provide a framework within which the rights in the Constitution can be evaluated and understood.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[15] guarantees the right to adequate housing as a component of the right to an adequate standard of living.[16] In interpreting this right, the United Nations ("UN") Committee on Economic, Social and Cultural Rights ("CESCR"), recognises informal settlements as one of the forms of tenure security. The obligation of states is to "take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups".[17] Other rights are also relevant in the realisation of the right to adequate housing. These rights mutually reinforce one another, thus reflecting the interdependency of rights.[18]

Furthermore, with regard to informal settlements, states have committed themselves under the Habitat Agenda to "[p]romoting, where appropriate, the upgrading of informal settlements and urban slums as an expedient measure and pragmatic solution to the urban shelter deficit".[19] The Habitat Agenda provides a comprehensive set of recommendations as to suitable policies to contribute to the realisation of the right to adequate housing. South Africa is a signatory to the Habitat Agenda. States are further required to develop appropriate systems and simplify land registration procedures so as to facilitate the regularisation of informal settlements;[20] and to carry out tenure regularisation in informal settlements aimed at achieving the minimum level of legal recognition necessary for the provision of basic services.[21] Also,

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13 Ss 39 and 233 of the Constitution

14 See, for example, *S v Makwanyaye* 1995 3 SA 391 (CC) para 35; and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26

15 International Covenant on Economic, Social and Cultural Rights (1966) UN Doc A/6316

16 Art 11(1) of the ICESCR

17 UN CESCR *General Comment No 4: Right to Adequate Housing* (1991) UN Doc E/1992/23 para 8(a)

18 This interdependency is illustrated in United Nations *Fact Sheet 21: The Human Right to Adequate Housing* <http://www unhcr org/refworld/docid/479477400 html> (accessed 28-06-2012)

19 Art 43(h) of the Second UN Conference on Human Settlements (Habitat II) *The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action* (1996) ("Habitat Agenda")

20 Art 76(j)

21 Art 141(i)

Agenda 21 on activities to be undertaken in promoting sustainable human settlement development requires all countries to, as appropriate, support the shelter efforts of the urban and rural poor, the unemployed and no-income group.[22]

Furthermore, the MDGs speak to dealing with the challenge of informal settlements, among other things. Goal 7.D (originally known as Target 11) aims to significantly improve the lives of at least 100 million slum dwellers by the year 2020.[23] Also of relevance to the target is Goal 7.C (originally known as Target 10), which aims to reduce by half the proportion of people without sustainable access to safe drinking water.[24] This target represents just over 10% of the estimated global slum population and is the minimum that states should aim for. UN Habitat reported in 2010 that governments have collectively exceeded Goal 7.D by at least 2.2 times, as between 2000 and 2010, 227 million people have moved out of slums.[25] However, looking at specific countries, they have not been able to half their slum population. South Africa for instance reported in 2010 that achieving the target in relation to the proportion of urban population living in slums is "unlikely".[26] Also, the numbers of slum dwellers in developing world has not declined. UN Habitat thus concluded that despite the progress made, the efforts have neither been "satisfactory nor adequate".[27]

Using the MDGs as a useful basis for South African target setting, the Upgrading of Informal Settlements Programme (discussed below) projected that "informal settlements will continue to grow at 4% per annum in line with existing urbanisation trends but that this will slow to 3% after 2010".[28] It thus estimated that about 2.9 million households would need to be upgraded over a period of fifteen years, setting a target for the upgrading of approximately 193,000 households per annum over a period of fifteen years.[29] However, South Africa's compliance or response to MDG 7D has been seen as based on a misunderstanding of this commitment. MDG 7D was first proposed in the *Cities without Slums* action plan, developed in 1999.[30] The action plan contains specific actions and concrete targets to improve the living conditions of the most vulnerable and marginalised urban residents in the world. Huchzermeyer has observed that Goal 7D does not correlate in the slightest with the slogan of achieving cities without slums; and that South Africa's response to its commitment to the MDGs is informed by the compelling *Cities without Slums* slogan, rather than by the actual MDG target of significantly improving the lives of 10% of slum dwellers by 2020, resulting in a misunderstanding of

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22 Art 7(9)(c) of UN Conference on Environment and Development *Agenda 21* (1992)

23 United Nations "Goal 7: Ensure Environmental Sustainability" (2010) <http://www un org/millenniumgoals/environ shtml> (accessed 21-11-2012)

24 United Nations "Goal 7: Ensure Environmental Sustainability" (2010)

25 UN-Habitat *State of the World's Cities 2010-2011* 6-7

26 Republic of South Africa *Millennium Development Goals Country Report 2010* (2010) 86, 136

27 UN-Habitat *State of the World's Cities 2010-2011* 8

28 Department of Human Settlements *National Housing Code – Chapter 13: Upgrading of Informal Settlements* (2004) 4 Chapter 13 is now contained in Part 3 of the revised National Housing Code (2009)

29 Department of Human Settlements *Upgrading of Informal Settlements* (2004) 4

30 United Nations *Millennium Declaration* (2000) UN Doc A/RES/55/2

the proper approach to give effect to this commitment.[31] Following a visit to South Africa in 2007, the former UN Special Rapporteur on adequate housing noted:

> "[T]here may have been a misunderstanding as to how to respect international commitments, such as the [MDGs], that may have led to efforts being directed to the eradication of slums rather than the improvement of the lives of slum dwellers."[32]

UN-Habitat, responsible for monitoring the implementation and progress towards the meeting of Goal 7D, produced a report in 2003 that is instructive. The report highlights standards to be considered by national governments, municipal authorities, civil society organisations ("CSO"s) and international organisations concerned with improving the lives of slum dwellers. It identified "participatory slum upgrading programmes that include urban poverty reduction objectives as the current best practice", and that the poor should be involved in the formulation and implementation of policies on informal settlements.[33] The report notes the successful approaches to dealing with informal settlements to include self-help and in-situ upgrading, and enabling and rights-based policies.[34] It lists unsuccessful approaches such as evictions, benign neglect and involuntary resettlements, adding that "[s]quatter evictions have created more misery than they have prevented".[35] The report also contains a number of recommendations, urging that urban development policies should more vigorously address poverty and the issue of livelihoods of slum dwellers.[36] Based on experience accumulated for decades, UN-Habitat urges that "in-situ upgrading is more effective than resettlement of slums dwellers and should be the norm in most slum-upgrading projects and programmes" and that "[r]elocation or involuntary resettlement of slum dwellers should, as far as possible, be avoided".[37]

Another relevant international standard is the *Basic Principles and Guidelines on Development-Based Evictions and Displacement* ("Basic Principles and Guidelines") developed under the auspices of the former UN Special Rapporteur on adequate housing.[38] The Basic Principles and Guidelines are of particular significance as they deal with development-based evictions planned in order to serve the public good, such as those linked to measures associated with urban renewal, slum upgrades, housing renovation and city beautification.[39] They also deal with the quality of housing to be provided in the aftermath of development-based evictions, thereby giving important

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[31] M Huchzermeyer "Housing in Informal Settlements: A Disjuncture between Policy and Implementation" in J Hofmeyr (ed) *Risk and Opportunity* (2008) 94-101

[32] M Kothari *Mission to South Africa*: *Report of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2008) UN Doc A/HRC/7/16/Add 3 para 49

[33] UN-Habitat *The Challenge of Slums* vii, xxvii, 132

[34] xxvi

[35] xxvi, 104

[36] xxvii, xxviii

[37] xxviii

[38] Contained in M Kothari *Report of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2007) UN Doc A/HRC/4/18 Annex 1 ("*Basic Principles and Guidelines*")

[39] Kothari *Basic Principles and Guidelines* para 8

content to the right to adequate housing in these circumstances.[40] The Basic Principles and Guidelines set out the standards with which re-housing in the aftermath of development-based evictions must comply, including the right to resettlement and alternative land of better or equal quality.[41] Relocation sites must fulfil the criteria for adequate housing according to international human rights law.[42] Furthermore, affected persons, groups or communities should not suffer human rights violations, and their right to the continuous improvement of living conditions should not be infringed.[43] The Basic Principles and Guidelines further provide that alternative housing be situated as close as possible to the original place of residence and source of livelihood of those evicted.[44] Moreover, the state is required to provide all necessary amenities, services and economic opportunities at the proposed site;[45] and the time and financial cost required to travel to and from the place of work or to access essential services should not place excessive demands on the budgets of poor households.[46]

The subsequent paragraphs consider the policy and courts' responses to informal settlements in South Africa. The aim is to highlight the government and courts' approaches and assess if they are in line with international standards.

3 Informal settlements in South Africa

The continued presence and growth of informal settlements with little or no access to services and infrastructure is a common feature in South Africa, most of which are situated in the biggest cities in the country. Citing a 2006 State of the Cities report, Development Action Group noted in 2007 that 2.4 million households live in informal settlements in the country.[47] UN-Habitat has also stated that for every ten urban homes, three are slum households.[48] The Department of Human Settlements' 2009 estimates stood at 1,675,000 households living in freestanding informal settlements and 525,000 households residing in backyards, farms and communal land.[49] The government's 2011 estimates stood at 2,700 informal settlements, with approximately 1.2 million households living in them.[50] It is, however, believed that these figures could be higher.[51] The reasons why these settlements are formed and why people live

40 Paras 52-58
41 Para 16
42 Para 55; see also UN CESCR *General Comment 4* para 8
43 Kothari *Basic Principles and Guidelines* para 43
44 Para 56(d)
45 Para 56(e)
46 Para 56(f)
47 Development Action Group "Development Action Group's Informal Settlement Upgrading Programme" (2007) *DAG* <http://www dag org za/docs/programmes/informaldoc pdf> (accessed 28-06-2012)
48 UN-Habitat *State of the World's Cities 2010-2011* 41
49 Department of Human Settlements *Written Submission to the South African Human Rights Commission during the Public Hearings on the Millennium Development Goals and the Realization of Socio-Economic Rights in South Africa* (2009) 2-3
50 JG Zuma *State of the Nation Address by the President of the Republic of South Africa* (2011) <http://www pmg org za/print/25072> (accessed 28-06-2012)
51 K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policies, Programmes and Practice* (2011) 37

in them vary. Some have noted that the mushrooming of informal settlements is a result of the slow delivery of state-subsided low-cost housing.[52] Others have cited "economic growth in cities" as a contributing factor to "rapid urbanization leading to high levels of informality".[53] It should be noted that apart from the "traditional" informal settlements, South Africa also has what has been referred to by UN-Habitat as "housing-turned-slum". These are Hostels that were built as predominantly single-sex accommodation to house and control (usually) male workers who were employed by institutions such as the railways, municipality or large industrial employers. The Hostels have become inadequate due to gross overcrowding and a high intensity of use, and a lack of maintenance.[54]

Notwithstanding, these informal settlements are a manifestation of poverty, social and economic exclusion, social inequality, marginalisation and discrimination. Most households in informal settlements are poor and vulnerable, with generally low incomes, resulting in severe social problems such as crime, drugs, alcoholism, domestic violence, community conflict and dependence on welfare.[55] In addition, due to the conditions of socio-economic vulnerability in these settlements, HIV prevalence and AIDS impact are particularly severe.[56] Many of the households in informal settlements do not meet the criteria for housing subsidies.[57]

3 1 Policy responses to informal settlements

The Constitution guarantees to everyone the right of access to adequate housing.[58] The state is obliged to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".[59] The Constitution also prohibits arbitrary evictions of people from their homes without an order of court made after considering all relevant circumstances, and also prohibits legislation that permits arbitrary evictions.[60] Crucial to realising the right to adequate housing, as mentioned above, are the rights to equality and dignity, both guaranteed in the Constitution.[61] These rights mutually reinforce one another, thus reflecting the interdependency of rights.

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[52] M Huchzermeyer, A Karam, IL Stemela, N Siliga & S Frazenburg "Policy, Data and Civil Society: Reflections on South African Challenges through an International Review" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 19-40; A Skuse & T Cousins "Spaces of Resistance: Informal Settlement, Communication and Community Organisation in a Cape Town Township" (2007) 44 *Urban Studies* 979-995, which examines the struggle for urban permanency in an informal settlement in Cape Town

[53] Development Action Group *Informal Settlement Upgrading Programme* (2007) 1

[54] UN-Habitat *The Challenge of Slums* 81

[55] W Smit "Understanding the Complexities of Informal Settlements: Insights from Cape Town" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 103 111, 114

[56] C Ambert "An HIV and AIDS Lens for Informal Settlement Policy and Practice in South Africa" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 146-164

[57] Smit "Understanding the Complexities of Informal Settlements" in *Informal Settlements: A Perpetual Challenge?* 109

[58] S 26 of the Constitution

[59] S 26(2)

[60] S 26(3)

[61] Ss 9 and 10, respectively

The South African government, in giving effect to the constitutional guarantees above has committed itself to providing low-cost housing to the poor. However, though the government's housing programme "is estimated to have delivered 2.8 million houses providing shelter to over 13.5 million people",[62] access to housing remains a major problem, based on the estimated inadequate housing (backlog and need). The estimates in 2010 place the figure at 2,100,000 (2.1 million units) for low estimate of need for adequate shelter and 2,195,000 (2.2 million units) for the high estimate of need, which include 1,214,236 million in informal settlements and 590,194 in informal dwellings in backyard.[63] The figures are thus still higher than the figures in 1994, which stood at 1.5 million. The backlog is cleared at a rate of 10% per year, and with urbanisation, continued economic and population growth and new household formation, among other things, it will take decades to clear the backlog.[64] Household formations continue at about 3% (that is 350,000 households) per year.[65]

The consequence of such a huge backlog has been the recognition of informal housing by the poor as a more affordable and immediately accessible solution to the housing deficit.[66] The government has responded to the rapid growth of informal settlements through, among other things, the development and implementation of programmes to "eradicate" these settlements. The government's current goal is to upgrade 400,000 homes in informal settlements by 2014.[67] The question, however, is whether the programmes adopted are a straightforward solution that will have extreme effectiveness in dealing with the enormous housing challenge. An examination of the key programmes and the subsequent cases that have come before the courts shows otherwise.

In 2004, the government adopted the *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* ("BNG").[68] The programme aims to accelerate the delivery of houses as a key strategy for poverty alleviation.[69] The government recognised that existing housing programmes would not secure the upgrading of informal settlements.[70] The BNG thus calls for a paradigm shift, requiring the government to redirect and enhance existing mechanisms to move towards more responsive and effective

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62 Republic of South Africa *Millennium Development Goals Country Report 2010* 95

63 See South African Government Information *Annexure A – For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life* (2010) 5 <http://www info gov za/view/DownloadFileAction?id=135746> (accessed 28-06-2012)

64 T Sexwale *Address by the Minister of Human Settlements on the Occasion of the Human Settlements Budget Vote, National Assembly, Cape Town* (2010) <http://www info gov za/speeches/2010/10042116151001 htm> (accessed 28-06-2012)

65 South African Government Information *Annexure A – For Outcome 8 Delivery Agreements* 5

66 Huchzermeyer et al "Policy, Data and Civil Society" in *Informal Settlements: A Perpetual Challenge?* 19

67 Zuma *State of the Nation Address*; South African Government Information *Annexure A – For Outcome 8 Delivery Agreements* 9, 14

68 Department of Human Settlements *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004) <http://www capegateway gov za/Text/2007/10/bng pdf> (accessed 28-06-2012)

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housing delivery.[71] The government has committed itself, under the BNG, to ensuring the availability of adequate housing to all. One of the objectives of the policy is the creation of well-managed housing projects involving the upgrading or redevelopment of informal settlements – "progressive informal settlement eradication" – and the reversal of the conditions that many South Africans live under in these settlements.[72] The government has thus chosen the terminology "eradication" which could be problematic and subject to misinterpretation. It has recently emphasised that "upgrading does not detract from government's long-term objective of eradicating slums".[73] However, the emphasis on eradication could be misunderstood to mean a blanket mandate to remove shacks without solutions that eradicate poverty, remove vulnerability and promote inclusion.[74]

In response to the BNG and to facilitate the structured upgrading of informal settlements, the government adopted the *Upgrading of Informal Settlements Programme* ("UISP").[75] The definition/characteristics of informal settlements identified under the programme include informality and illegality, poverty and vulnerability, and social stress and crime.[76] The programme recognises the government's primary housing objective, which is to undertake housing development as defined in the Housing Act 107 of 1997.[77] It aims at, among other objectives, restoring dignity to the urban poor.[78] The programme supports the progressive eradication of informal settlements so as to address poverty by, among other things, enhancing tenure security, promoting healthy and secure living environments, empowerment and social and economic integration (inclusion).[79] Grants will be made to municipalities for the purpose of undertaking projects aimed at the upgrading of whole settlements. The USIP envisages the upgrading to take a phased development approach,[80] and to take place through "in-situ" upgrading in desired locations and the relocation of households on a voluntary and

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73 Sexwale *Human Settlements Budget Vote*

74 M Huchzermeyer "The New Instrument for Upgrading Informal Settlements in South Africa: Contributions and Constraints" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 41 44

75 Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004)

76 10-11

77 S 1 of the Housing Act defines housing development as "the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to – (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply"

78 Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 5, 8, 15, 46

79 Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 5; Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 13

80 The programme envisages a four-phase process: application; project initiation; project implementation; and consolidation subsidy phase (see Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 12-19) "[C]ommunity participation, supply of basic services and security for all residents" is the focus of phases 1-3 (see Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 27)

cooperative basis where development is not possible or desirable.[81] The USIP also envisages a "holistic development approach with minimum disruption or distortion of existing fragile community networks and support structures",[82] and encourages engagement between local authorities and residents living within informal settlements.[83]

Similar to UN-Habitat's recommendation, the UISP refers to in-situ upgrading, with roll-over upgrading being the exception.[84] In-situ upgrade would more likely respond to the vulnerability and poverty and lead to social inclusion than relocation, which results in socio-economic disruption.[85] The UISP also states that relocation must take place at a location as close as possible to the existing settlement and within the context of a community approved relocation strategy.[86] However, as seen in the *Joe Slovo* case discussed subsequently, the government decided to relocate a large and settled community to a place that is far from the existing settlement and livelihood opportunities. In addition, the food-support allocation provided for in the programme is problematic as food parcels and food vouchers have reportedly been used to "buy" instant support that does not make long-term livelihood provisions.[87] Though the UISP aims to achieve the reduction of poverty, vulnerability and social exclusion, since its introduction, the government has focused on an approach to eradicating informal settlements that results in evictions, and consequently, constitutional challenges before the courts. The policy responses, riddled with problems of implementation, have not been a silver bullet to the housing crisis or the growing inequity in South Africa. Generally, various forms of upgrading have been used in projects across South Africa; thus upgrading projects have not necessarily followed the policy guidelines.[88] However, a project that has arisen from the BNG such as the N2 Gateway project deviates from many of the guiding principles contained in the BNG, with negative implications as seen subsequently. Provincial legislation on informal settlements, as seen below, has also deviated from the BNG.

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[81] Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 6, 11; Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 13, 16

[82] Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 6; Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 13

[83] Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 6, 11; Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 13

[84] Roll-over upgrades require the removal of residents from the settlement to be upgraded to temporary relocation areas, while in-situ upgrades do not necessarily require relocation and involve minimal disruption to the location of dwellings

[85] Huchzermeyer et al "Policy, Data and Civil Society" in *Informal Settlements: A Perpetual Challenge?* 49

[86] Department of Human Settlements *Upgrading of Informal Settlements Programme* 19

[87] Huchzermeyer et al "Policy, Data and Civil Society" in *Informal Settlements: A Perpetual Challenge?* 52, 58 The programme makes provision for R600 for household support in the case of relocation, R250 of which is food support, R200 for transport support and R150 for social service support (see Department of Human Settlements *Upgrading of Informal Settlements Programme* (2004) 20) While the revised UISP also makes provision food, transport and social services support, no specific amounts are mentioned, as the amounts will be announced annually by the Director-General of the National Department (see Department of Human Settlements *Upgrading of Informal Settlements Programme* (2009) 18-19

[88] Department of Human Settlements *Measuring Success in Human Settlements: An Impact Evaluation Study of the Upgrading of Informal Settlements Programme in Selected Projects in South Africa* (2011) 2

Though the focus has been on national policies, some provinces have contemplated enacting provincial legislation to deal with the challenge of slums while KwaZulu-Natal province in fact enacted a controversial piece of legislation, the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 ("Slums Act"), which aimed to eliminate slums in the Province. Though this Act was found to be unconstitutional for mandating evictions, it is important to outline the contents of the Act here as the Constitutional Court, as explained subsequently, did hold that the province had the competence to pass the Act. It is also important to establish the link between the Act and the aforementioned standards.

The Slums Act came into force in October 2007 and listed the elimination of slums and prevention of the re-emergence of slums among its aims.[89] It prohibited unlawful occupation[90] and the use of substandard accommodation for financial benefit.[91] Under the Act, a municipality may institute proceedings for the eviction of an unlawful occupier from land or buildings falling within its jurisdiction if this is in the public interest.[92] Should a municipality decide to make alternative land or buildings available to persons relocated from slums, it "must take reasonable measures, within its available resources, to ensure that such alternative land or building is in reasonable proximity to one or more economic centres".[93] Furthermore, the Slums Act enabled municipalities to set up transit areas for people evicted from their homes, which must have suitable accommodation and be equipped with the necessary basic infrastructure and sanitation.[94] Owners or persons in charge of land or buildings are required to take reasonable steps to prevent unlawful occupation. Failure to do so constitutes an offence.[95] They are also required to institute proceedings for the eviction of unlawful occupiers. If they do not, a municipality "must" institute such proceedings.[96] The Act further made it an offence to unlawfully interfere with measures aimed at preventing unlawful occupation.[97] Thus, it criminalised (non-legal) attempts to stop evictions. An offender can be fined up to R20,000 or imprisoned for up to five years or both.[98]

Following the passing of the Slums Act, local government officials demolished some shacks without a court order, contrary to section 26(3) of the Constitution. The approach of the KwaZulu-Natal housing department to informal settlement upgrading was clearly contrary to the standards mentioned above and the principles in the BNG, prioritising evictions over in-situ upgrading. For instance, while international law prohibits evictions that render people homeless, the Slums Act made the provision of alternative

89 S 3 of the Slums Act
90 S 4
91 S 5 According to the Act, a building is not fit for human habitation if it does not have access to natural light, running water and ablution facilities, if it is a health nuisance as defined in the National Health Act 61 of 2003, or if it is in a serious state of neglect or disrepair
92 S 10
93 S 12
94 S 13
95 S 15
96 S 16
97 S 20
98 S 21

accommodation discretionary, even for those who will not be able to provide for themselves once evicted. It further mandated evictions and did not make provision for in-situ upgrading, contrary to constitutional, legislative and judicial principles. It was also contrary to the established principle in previous constitutional jurisprudence requiring the provision of alternative accommodation, even if as a temporary measure, particularly in situations where people would be rendered homeless and are not able to provide for themselves.[99] It would, of course, be difficult for most informal settlement dwellers to provide for themselves in the event of an eviction since they are mostly poor. It is therefore not surprising that the Constitutional Court found the Act to be unconstitutional, specifically section 16 of the Act. In addition, the Act has been seen as reminiscent of the apartheid policy of control and the Prevention of Illegal Squatting Act 52 of 1951, which empowered landowners to eliminate informal settlements.[100]

3 2 Judicial response

Two key cases have come before the Constitutional Court relating specifically to the upgrading of informal settlements, which are considered below. However, these cases should be analysed in the light of the key principles established in previous constitutional jurisprudence, particularly reasonableness, meaningful engagement and alternative accommodation. These principles, explained further below, are relevant to people living in informal settlements, and should guide the government's approach to dealing with the challenge of informal settlements or the provision of housing in general. In addition, the importance of section 26(3) of the Constitution, requiring the consideration of "all relevant circumstances" before an eviction is granted should be borne in mind. Drawing from constitutional jurisprudence referred to below, these circumstances would include the above key principles as well as the personal circumstances of those faced with eviction, including the duration of occupation.

3 2 1 Relevant principles in previous jurisprudence

The criteria of reasonable government action for realising socio-economic rights was first established in *Government of the Republic of South Africa v Grootboom*,[101] which concerned the right to have access to adequate housing in the context of an eviction. The Constitutional Court stated that in assessing whether the government is meeting its obligation under section 26(2) of the Constitution,[102] any measures adopted must be comprehensive,

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[99] See, generally, L Chenwi "Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of those subject to Evictions" (2008) 8 *HRLR* 105

[100] M Huchzermeyer *Settlement Informality: The Importance of Understanding Change, Formality and Land and the Informal Economy* (2008) 4 paper presented at the Groupement de Recherche sur Development International workshop on Informality, Centre for Urban and Built Environment Studies, University of Witwatersrand, 03-07-2008–04-07-2008

[101] 2001 1 SA 46 (CC) para 42 ("*Grootboom*")

[102] S 26(2) of the Constitution imposes a positive duty on the state to take "reasonable" measures to achieve the progressive realisation of the right to have access to adequate housing

coherent, inclusive, balanced, flexible, transparent, and be properly conceived and properly implemented. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation.[103] They must be tailored to the particular context in which they are to apply, as what may be appropriate in a rural area may not be appropriate in an urban setting.[104] The measures must also take account of different economic levels in the society, including those who can afford to pay for housing and those who cannot. Short, medium and long-term provision must be made for housing needs, a significant segment of society should not be excluded, and those whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril cannot be ignored.[105]

The *Grootboom* case is also significant as it gave birth to the Emergency Housing Programme,[106] which provides assistance in cases of exceptional housing need. The assistance is provided to people who are homeless as a result of, for instance, evictions or threatened evictions, floods, or devastating fire. This programme is quite relevant to people living in informal settlements, who are often faced with evictions as a result of informal settlements upgrade or eradication. The programme thus provides them with a safety net when faced with evictions that will leave them in crisis.

It is argued that the reasonableness principle has been expanded in subsequent cases to include meaningful engagement. *Occupiers of 51 Olivia Road v City of Johannesburg*[107] is instructive in this regard. The case was a challenge of several aspects of the City of Johannesburg's (the "City") practice of evicting residents of dilapidated buildings for health and safety reasons. The Constitutional Court found it inappropriate to evict people where meaningful engagement had not taken place.[108] The Court located the City's duty to engage within several constitutional provisions, including the state's obligation to act reasonably in section 26(2) of the Constitution.[109] The Court thus grounds meaningful engagement in the reasonableness principle by citing section 26(2) of the Constitution. The Court explained meaningful engagement as "a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives".[110] The objectives would include: determining the obligations of the City to

[103] *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 42

[104] Para 37

[105] Paras 43, 44

[106] Department of Human Settlements *National Housing Code: Housing Assistance in Emergency Circumstances* (2004) The programme is now contained in Part 3 of the revised *National Housing Code* (2009)

[107] 2008 5 BCLR 475 (CC) For a detailed analysis of this case, see L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *CCR* 1-19

[108] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 5 BCLR 475 (CC) para 22 ("*Olivia Road*")

[109] Paras 16 and 17 The Court also located this duty within the government's constitutional obligations to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government (s 152(1) of the Constitution); to fulfil the objectives in the Preamble to the Constitution; and to respect, protect, promote and fulfil the rights in the Bill of Rights (s 7 of the Constitution)

[110] Para 14

those affected and how it can be fulfilled; determining the consequences of the eviction; and whether the City could assist in alleviating the situation of those in dire need.[111] Of crucial importance, especially to informal settlement dwellers, are the following points: "the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement";[112] and "the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential".[113] This would thus enable not just those affected but other parties as well to be able to evaluate the process and result of the engagement.

The Constitutional Court has also established the principle of suitable alternative accommodation or land, especially for those who find themselves in crisis situation and cannot afford for themselves. This principle is important in determining whether an eviction is just and equitable. In *PE Municipality*, for example, the Court emphasised the importance of this principle where settled occupiers are to be evicted, especially if they are not at fault, and the result of the eviction will be homelessness.[114] The provision of alternative accommodation is evaluated on a case-by-case basis, taking into consideration, among other factors the number of people affected, their age, and whether they can provide for themselves. This principle has also been established in subsequent cases.[115] Though there is no unqualified constitutional duty on the state to provide alternative suitable accommodation or land in all instances, current constitutional jurisprudence shows that the duty to respect and protect the right to have access to adequate housing essentially implies a right to alternative accommodation on eviction, particularly where those evicted are not able to obtain this through their own effort.[116]

3 2 2 Joe Slovo case

Joe Slovo[117] concerned the eviction of a large and settled community from their homes in order to facilitate housing development under the N2 Gateway Housing Project,[118] a pilot project to test the implementation of the BNG policy.

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[111] Para 14

[112] Para 19

[113] Para 21

[114] *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 28 ("*PE Municipality*")

[115] See, for example, *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 1 BCLR 78 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC); and *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 5 BCLR 475 (CC)

[116] G Budlender "The Right to Alternative Accommodation in Forced Evictions" in J Squires, M Langford & B Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 127 136

[117] *Thubelisha Homes v Various Occupants* CPD 10-03-2008, case no 13189/07; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) ("*Joe Slovo*") This section draws largely from L Chenwi "Upgrading of Informal Settlements and the Rights of the Poor: The Case of Joe Slovo" (2008) 9 *ESR Review* 13-18; L Chenwi & K Tissington "'Sacrificial Lambs' in the Quest to Eradicate Informal Settlements: The Plight of Joe Slovo Residents" (2009) 10 *ESR Review* 18-24

[118] N2 Gateway Housing project is a joint programme by the national Housing Department, the Western Cape Provincial Government and the City of Cape (Municipality), targeting a number of informal settlements for upgrade including Joe Slovo

The project envisaged the provision of between 25,000 and 30,000 housing opportunities.[119] Joe Slovo settlement has approximately 4,500 informal dwellings occupied by about 18,000 to 20,000 people.[120] The informal housing structures are built mostly of combustible materials, with odd assortments of wood, plastic and corrugated iron. In fact, overcrowding, fires, floods, unhealthy conditions and crime are characteristics of the area.

While the BNG encourages phased in-situ upgrading, which will maintain community networks, minimise disruption and enhance community participation in all aspects of the development solution, the planning and implementation of the N2 Gateway project in Joe Slovo shows the contrary. The government decided to do a roll-over upgrade in Joe Slovo as opposed to an in-situ upgrade. Residents were to be relocated to Delft, on the outskirts of the city and far from livelihood opportunities. It was envisaged that once the houses had been built, a significant number of residents who met the qualifying criteria would be given the opportunity to return to Joe Slovo to occupy the formal houses.[121] The qualifying criteria were as follows: those whose household income fell below R1,500 per month would get a house free of charge; those whose household income fell between R1,500 and R3,500 per month would get a house against a once-off payment of R2,479; and those with household income in excess of R3,500 per month did not qualify for housing under the project and would have to buy other housing on the open market. It should be noted that most residents in Joe Slovo earned under R3,500 per month.

The residents of Joe Slovo opposed the relocation, resulting in an application to the Western Cape High Court for their eviction, under section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), which allows for urgent eviction proceedings. The applicants also relied on section 6 of PIE, which regulates evictions instituted by an organ of state.[122] Importantly, PIE was enacted to give effect to section 26(3) of the Constitution, which prohibits arbitrary evictions, requiring courts to consider all relevant circumstances in the case of an eviction. The High Court granted an eviction order interdicting and restraining the residents of Joe Slovo, once evicted, from returning to the land for the purpose of erecting or taking up residence in informal dwellings.[123] A difficult challenge posed by the *Joe Slovo* case is how to reconcile respect for the inadequate accommodation that poor people have managed to secure and the implementation of a project that is aimed at improved housing.

The High Court saw the case as a strategic relocation – and not a mass eviction – that would not result in homelessness, as alternative accommodation would

[119] *Thubelisha Homes v Various Occupants* CPD 10-03-2008, case no 13189/07 para 55
[120] Para 7
[121] Para 57
[122] The applicants in the case were Thubelisha Homes (a company charged with the responsibility of transforming the Joe Slovo informal settlement in terms of the BNG policy and develop proper formal housing in the area), the Minister of Housing and the Provincial Minister of Local Government and Housing in the Western Cape (the MEC) (first, second and third applicants respectively)
[123] *Thubelisha Homes v Various Occupants* CPD 10-03-2008, case no 13189/07 para 85

be provided by the state. The High Court found the residents to be unlawful occupiers as envisaged in the PIE, without any substantive or procedural legitimate expectation to benefit from the housing being developed because they were occupying Joe Slovo unlawfully.[124] Following dissatisfaction with the High Court's judgment, the Joe Slovo residents appealed directly to the Constitutional Court.[125] The Constitutional Court case raised issues relating to the state's obligation to provide access to adequate housing under the Constitution, and the interpretation and application of the PIE. Two key legal questions had to be answered: First, whether the respondents had made out a case for the eviction of the applicants in terms of PIE, including whether at the time the eviction proceedings were launched, the applicants were "unlawful occupiers" in terms of the PIE. Second, the issue of whether the respondents acted reasonably within the meaning of section 26 of the Constitution in seeking the eviction of the applicants.[126]

The Constitutional Court supported the granting of an eviction order, agreeing that the applicants were unlawful occupiers in terms of the PIE at the time of the eviction application.[127] The Court ordered that the residents be relocated to temporary residential units ("TRUs") in Delft or another appropriate location; and annexed a relocation time table to the order, detailing the dates by which households would be relocated.[128] The Court, however, ensured that there were substantive guarantees relating to the nature and quality of the alternative accommodation to be provided, and the engagement to be undertaken. Accordingly, the Court was very specific and robust with regard to these. On alternative accommodation, existing TRUs must: be at least 24m2 in extent; be serviced with tarred roads; be individually numbered for identification purposes; have walls constructed with Nutec; have galvanised iron roofs; be supplied with electricity through a pre-paid electricity meter; be situated within reasonable proximity of a communal ablution facility; make reasonable provision for toilet facilities, which may be communal, with water-borne sewerage; and make reasonable provision for fresh water, which may be communal. New units that are constructed must be of equivalent or superior quality.[129] This was the first time that the Court had been very prescriptive as regards alternative accommodation. Its decision strongly affirmed alternative

[124] Para 75 The Court observed that the requirements for legitimacy of expectation included the following: the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification; the expectation must be reasonable; the representation must have been induced by the decision-maker; the representation must be one which it was competent and lawful for the decision-maker to make, without which the reliance cannot be legitimate (para 71)

[125] The respondents in the case were Thubelisha Homes (responsible for developing the housing at Joe Slovo settlement), the national Minister of Housing and the Western Cape provincial Minister of Local Government and Housing Though the City of Cape Town (the City) was the owner of the land in question, it did not participate in the eviction proceedings at the Constitutional Court

[126] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) para 3; see also para 15

[127] Paras 4 and 5 The five judgments issued arrived at this conclusion though based on slightly different reasoning

[128] Annexure A to the Order of Court dated 10-06-2009 The parties could make revisions to the timetable if they agreed to following meaningful engagement with each other (see para 7(4) and (5))

[129] Para 7(10)

accommodation as a decisive factor in evaluating whether an eviction is just and equitable.

The Constitutional Court also considered meaningful engagement in determining whether an eviction was a reasonable measure to facilitate the government's housing development programme; thus grounding engagement within the reasonableness principle as was the case in *Olivia Road*. Regarding engagement on the relocation, the Court directed the respondents to consult with affected residents on individual relocations, one week before the specified date for relocation. The Court was more robust as regards the engagement process, providing a detailed engagement order including a range of issues on which the government is required to consult, which it pointed out were not exhaustive.[130] The issues to be included in the engagement as listed by the Court were: ascertaining the names, details and relevant personal circumstances of those affected by each relocation; the exact time, manner and conditions under which the relocation will be conducted; the precise TRUs to be allocated to those relocated; the provision of transportation for those to be relocated, as well as their possessions; the provision of transport facilities to those affected from the temporary accommodation to amenities such as schools, health facilities and places of work; and the prospect of subsequent allocation of permanent housing to those relocated to temporary accommodation, which should include information on their current position on the housing waiting list and the provision of assistance, in the completion of housing subsidies application forms, to those relocated.

By ordering engagement, the Court recognises the importance of fostering participation thus contributing to the promotion of participatory citizenship by the poor. Engagement further develops the principle of accountability. It also enhances the possibilities for the kind of participatory democracy that forms part of South African constitutional vision of democracy.[131] A concern, however, is that despite its misgivings about the engagement process – finding serious faults and inadequacies in the process – the Court went ahead to order the mass eviction, as the beneficial ends of low-income housing development had to be considered when condemning this "deplored" deficiency.[132]

The Court further stipulated that 70% of the new homes to be built at Joe Slovo should be allocated to current Joe Slovo residents or former residents who had moved to Delft previously to make way for the N2 Gateway Project.[133] The Court further placed a reporting obligation on the parties so as to ensure effective implementation of its order. Furthermore, the Court showed some

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[130] Para 7(11)

[131] In *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC) paras 111, 625 and 627, the Constitutional Court stated that the Constitution contemplates participatory democracy that is accountable, transparent, responsive, open and makes provision for the participation of society in decision-making processes

[132] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) paras 112, 117, 167, 301, 302, 280 and 284 The *amici* also criticised the state for not engaging sufficiently with the applicants (see paras 112 and 300)

[133] Paras 5 and 7(17) The remaining 30% are to be allocated to people living in backyard shacks in the neighbouring township of Langa (paras 187, 248 and 307) This aspect of the order is important as previous phases of the project (Phases 1 and 2), did not give effect to a promise by the government to accommodate 70% of Joe Slovo residents

flexibility in its order by allowing any party to approach the Court for an amendment, supplementation or variation of the order should the order not be complied with or gives rise to unforeseen difficulties.

Despite the positive aspects in the judgment, particularly its attempts to ensure that the impact of the relocation on the applicants is minimised by ordering the provision of alternative accommodation as well as emphasising meaningful engagement in relation to the relocation, it however raised a number of concerns with implications for the poor. The Court's willingness to condone inadequate consultation processes that had taken place merely because the objectives of the N2 Gateway project outweigh the defects in the consultation process, for example, is of concern. Evidence before the Court, as Sachs J stated, suggested a top-down approach where the residents were not involved in the decision-making process itself. Instead, information about decisions already taken was passed on to them.[134] The Court also observed that "it would have been ideal for the state to have engaged individually and carefully with each of the thousands of the families involved".[135] Yet it went ahead to condone the inadequacies in the process, contrary to its position in *Olivia Road* stated above. The Court thus showed deference to government housing policy even though it was implemented without reasonable engagement.

Furthermore, there was the very real concern that the temporary relocation units will become permanent housing for many relocated Joe Slovo residents because the judgment was silent on what would happen to the relocated residents that do not benefit from the new houses. Also, some of the relocated residents would not qualify for formal housing under the housing subsidy scheme. In addition to meeting income requirements, beneficiaries of the housing subsidy must: be South African citizens or permanent residents; be 21 years of age and above; be married, cohabiting or have proven financial dependants (at least one), and should not have benefited from a housing subsidy before. It was also likely that some of the residents had received subsidised housing in other provinces before relocating to Joe Slovo.

Subsequent to the judgment, the Constitutional Court issued an order suspending the evictions until further notice, based on the government's concern that the relocation might end up costing more than upgrading Joe Slovo settlement and the lack of a plan to accommodate those who would not benefit from the new houses.[136] Taking this into consideration, the Court was of the view that considerations of justice and equity require the discharge of its initial eviction order.[137] This turn-around is interesting as the government was adamant that it is not possible to do in-situ upgrade in Joe Slovo. And the Court's response had been that the government's decision not to do in-situ upgrading is acceptable and "it is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide".[138] It could be argued that the government's decision to consider in-situ upgrading despite

[134] Para 378
[135] Para 117
[136] *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC)
[137] Para 28
[138] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) para 253

arguing initially that this was impossible goes to illustrate the desirability and effectiveness of in-situ upgrading as opposed to resettlement of slum dwellers. The current turn-around would thus – though not a direct aim of the government when it made its decision – ensure compliance with the UISP, which as stated above provides that relocation should be the exception rather than the rule, and discourages evictions and does not envisage a "blanket" application of relocation.

3 2 3 Abahlali case

Abahlali[139] was a constitutional challenge to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act discussed earlier. This resulted from dissatisfaction with the approach of the Act, by informal settlement dwellers and some civil society organisations and academics, especially as it encouraged evictions, made it mandatory for landowners to institute eviction proceedings and made resisting evictions a criminal offence. Following its enactment, Abahlali baseMjondolo[140] instituted legal action before the High Court, asking it to declare the Act unconstitutional.[141]

The High Court had to consider whether the provincial government did not have the competency to pass the Act, and whether sections 9, 11, 12, 13 and 16 of the Slums Act were unreasonable and therefore inconsistent with section 26(2) of the Constitution as well as national legislation and policies. These sections of the Slums Act gave municipalities an open-ended discretion whether to upgrade informal settlements and whether to provide alternative accommodation,[142] notwithstanding the obligation on the state, explained earlier, to provide alternative accommodation where an eviction would result in homelessness. The applicants argued that the failure of the Slums Act to provide guidance to municipalities on how to exercise this discretion rendered the Act unconstitutional and invalid.[143]

The High Court held that it could not strike down the Slums Act without first giving the provincial government the opportunity to implement it.[144] With reference to *Grootboom* in relation to whether the measures taken by the state to realise the right were reasonable, the High Court stated that the Housing Act had been passed to give effect to the right of access to adequate housing and required provincial governments to promote and facilitate the provision of adequate housing in their provinces within the framework of the national policy. The Court was of the view that the Act provided a legislative

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[139] *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal* 2009 3 SA 245 (D) and *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) This section draws largely from L Chenwi "Housing Rights of 'Slum' Dwellers at Stake" (2009) 10 *ESR Review* 25-28 and L Chenwi "Slums Act Unconstitutional" (2009) 10 *ESR Review* 9-12

[140] Abahlali baseMjondolo is an association working towards improving the lives and living conditions of shack dwellers in South Africa

[141] The president of Abahlali baseMjondolo joined as the second applicant The respondents in the case were: the Premier of the Province of KwaZulu-Natal; the MEC for Local Government, Housing and Traditional Affairs in KwaZulu-Natal; the Minister of Housing; and the Minister of Land Affairs

[142] *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal* 2009 3 SA 245 (D) para 10

[143] Para 10

[144] Para 39

framework for the implementation of housing policies in KwaZulu-Natal pursuant to national and provincial legislation;[145] and did not duplicate the PIE Act as the applicants contended, since it aimed to assist provincial and local governments in the provision of housing,[146] and constituted "a reasonable legislative response to deal with the plight of the vulnerable in our society".[147] The Court further observed that "the Slums Act does not envisage a random eviction of people", and "evictions will be carried out with due consideration of whether it is just and equitable to do so".[148] The Court concluded:

> "The province of KwaZulu-Natal must be applauded for attempting to deal with the problem of slums and slum conditions. This is the first province to have adopted legislation such as the Slums Act. The Slums Act makes things more orderly in this province and the Act must be given a chance to show off its potential to help deal with [the] problem of slums and slum conditions. This Court cannot strike the Act down before it has even [been] properly implemented."[149]

The High Court's decision would have allowed for the implementation of the Act, which would in turn have resulted in the removal of poor people from areas within reach of their sources of livelihood, putting their housing rights at stake. As the Constitutional Court held in *Jaftha*, at the very least, any measure that permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26 of the Constitution.[150] Hence, the Act could not therefore be a silver bullet to the informal settlement challenge in the province. Dissatisfied with the High Court's judgment, the applicants approached the Constitutional Court directly, appealing against the judgment.

The Constitutional Court first considered whether the provincial legislature had the competence to pass the Act. The applicants had argued that the Act was not concerned with housing (which falls within the concurrent jurisdiction of both provincial and national legislatures) but with land tenure and access to land, which does not fall within provincial legislative competence.[151] The Court found that the province had the competence to pass the Act. It held that the Act related primarily to housing, as it was aimed at improving the housing conditions of people living in slums.[152] The Court stated that the Act and its preamble echo the constitutional right to have access to adequate housing as it is concerned mainly with improving the circumstances under which people live;[153] and places responsibilities on municipalities and the Member of the Executive Council for Local Government, Housing and Traditional Affairs ("MEC") of the province of KwaZulu-Natal to progressively realise this right.[154]

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[145] Para 34
[146] Para 34
[147] Para 36
[148] Para 37
[149] Para 39
[150] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 1 BCLR 78 (CC) paras 34 and 39
[151] *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) para 20
[152] Paras 40 and 97
[153] Paras 29 and 98
[154] Paras 98, 100 and 101; see also paras 20-40

The Court then considered whether section 16 of the Act was consistent with section 26(2) of the Constitution, the PIE, the Housing Act and the National Housing Code containing guidelines in respect of housing policy.[155] The applicants argued that section 16 of the Act violated section 26(2) of the Constitution because it precluded meaningful engagement between municipalities and unlawful occupiers, violated the principle that evictions should be a measure of last resort, and encouraged eviction proceedings.[156] Section 16 of the Slums Act made it obligatory for an owner or person in charge of land or a building to institute eviction proceedings against unlawful occupiers once the MEC in a notice requires so; failing which, the obligation shifts to the municipality. The Slums Act was however silent on whether the owners or municipality have the discretion not to institute eviction proceedings if, based on their evaluation, the eviction will not be justified under the PIE. Accordingly, the Court found that it was not in the exclusive discretion of the owners or municipality to do so because "owners and municipalities must evict when told to do so by the MEC in a notice".[157] The PIE, as observed by the Court, does not compel an owner or municipality to evict unlawful occupiers.[158] Hence section 16 was seen to be "at odds with section 26(2) of the Constitution because it [required] an owner or municipality to proceed with eviction of unlawful occupiers even if the PIE Act cannot be complied with".[159] The Court added that the compulsion "erodes and considerably undermines the protections against arbitrary institution of eviction proceedings".[160] The power given to the MEC to issue a notice, the Court held, was "overbroad and irrational", and thus "seriously invasive of the protections against arbitrary evictions" in section 26(2) of the Constitution read with the PIE Act and national housing legislation and does not properly relate to the aim of the Slums Act.[161] The Court also stated that section 16 was not capable of an interpretation that promoted the elimination and prevention of slums and the provision of adequate and affordable housing.[162] The section also, especially due to its compulsory nature, was inconsistent with the constitutional and legislative framework for the eviction of unlawful occupiers that establishes that housing rights should not be violated without proper notice and the consideration of all alternatives.[163] It therefore found the section to be inconsistent with the Constitution.[164]

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[155] Paras 9 and 91
[156] Paras 42 and 102
[157] Paras 110-111
[158] Para 112
[159] Para 111
[160] Para 112
[161] Paras 116 and 118
[162] Para 121
[163] Para 122
[164] Paras 128 and 129 In a dissenting opinion, Yacoob J suggested that the invalidity of section 16 could be overcome by reading in the following six qualifications: (a) the notice is issued in the process of slum elimination; (b) it can only be issued in respect of property that perpetuates slum conditions and is a slum; (c) the MEC must identify the property or properties to which the notice relates; (d) it must be necessary to evict the unlawful occupiers from the property or properties concerned to achieve the objects of the Act; (e) the owner is obliged to evict only if she has not consented to the occupation and only if, on the evidence available, the eviction is just and equitable; and (f) a municipality is obliged to evict consequent upon the notice only if it can establish that it is just and equitable and that it is in the public interest that

An intriguing aspect of the judgment worth noting is the question of the distinction between slums and informal settlements. Yacoob J distinguished between slums and informal settlements stating that "slum" must be given a narrow meaning.[165] He pointed out three significant differences between slums and informal settlements as defined in the Slums Act.[166] He noted that "the conditions under which people in slums live is worse than those who live in informal settlements";[167] slum dwellers "have no security of tenure";[168] and "slums consist of occupants of land or buildings while an informal settlement, as the name suggests, is a settlement of people".[169] The majority of the Court, as stated earlier, found the distinction to be untenable, stating that the distinction in the Act does not mean that section 16 of the Act is not applicable to informal settlements, especially as the section does not distinguish between unlawful occupiers in a slum or those in an informal settlement.[170] The majority held that it would not be appropriate to give "slum" a narrow meaning which places informal settlements beyond the scope of the Act, as the latter are also squalid and overcrowded, are not permanent until they are upgraded, and the residents live under constant threat of eviction and have little or no security of tenure.[171]

The Constitutional Court in *Abahlali* thus prevented the eviction of many poor people who were targeted by the Slums Act. Similar to *Joe Slovo* and *Olivia Road*, the Court further emphasised the importance for those seeking eviction to engage reasonably with those to be affected before instituting eviction proceedings, a requirement that is mandated by both the Constitution and the PIE.[172] Yacoob J observed that:

> "If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process."[173]

The requirement of engagement is important as it could have a material impact on the question of whether an eviction is just and equitable and on the issue of whether the eviction is in the public interest.[174] The decision thus promotes participation of the poor in any upgrading project. Another

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the unlawful occupiers concerned be evicted (para 80) The majority of the Court, however, found such an interpretation to be "intrusive" and offensive of the requirements of the rule of law (which requires that a law must be clear and ascertainable) and separation of powers doctrine (which requires that courts should not embark on an interpretative exercise that rewrites the law) (para 123)

165 Para 48

166 S 1 of the Slums Act defines an informal settlement as "an area of unplanned and unapproved settlement of predominantly indigent or poor persons with poor or non-existent infrastructure or sanitation" A slum on the other hand is defined as "overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons, without security of tenure with poor or non-existent infrastructure or sanitation"

167 *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) para 46

168 Para 47

169 Para 47

170 Paras 104 and 106

171 Paras 104 and 105

172 Paras 69, 79 and 113-114

173 Para 69

174 Para 79

implication of the case is that other provinces that were hoping to pass similar legislation would not be able to as it would contravene the Constitution.

4 Conclusion

The South African government is attempting to deal with the question of informal settlements and has adopted policy measures with some good principles. However, as illustrated in this article, flawed planning and implementation, as is the case with the N2 Gateway Project, has resulted in the measures not being a silver bullet to the challenge of informal settlement, the housing crisis and the gross inequities in society. At the provincial level, displacement of occupiers seems to be the policy approach as opposed to improvements with the involvement of the occupiers. Moreover, the approach to implementation has thus far been mainly top-down, with the poor and their housing solutions presented as the problem, instead of acknowledging poverty and inadequate housing as the problem. This has resulted in an approach that is far from pro-poor and does not acknowledge peoples' existing circumstances. The government's efforts are directed more at "eradicating" slums without providing appropriate alternative housing in line with existing constitutional jurisprudence.

Conversely, the judicial responses, despite having some aspects of concern as is the case with *Joe Slovo*, generally and strongly affirm the significance of the right to housing and respect of the dignity of those living in informal settlements. The Court shows respect for the dignity of the poor by recognising the importance of fostering participation of those in informal settlements in upgrading initiatives or projects in accordance with participatory democracy as envisaged in the Constitution. Meaningful engagement is an expression of the dignity of the poor. Instead of treating them as passive objects, it recognises the agency of the poor to participate in giving substance to socio-economic rights. The participation of communities in their own development is thus crucial in any development project.[175] The emphasis on providing alternative accommodation of acceptable quality also ensures respect for not just the right to adequate housing but also the right to dignity.

The upgrading of informal settlements no doubt poses a number of challenges relating to, among other things, respect for and the protection of the right to have access to adequate housing and ensuring the effective participation of communities in housing development. It should therefore not just be about the eradication of shacks, but should include understanding people's existing circumstances and contributing to improving people's lives in a meaningful way.[176] This is because socio-economic rights concern more than simply the delivery of material goods: they also have a more intangible dimension which

[175] C Lemanski "Houses without Community: Problems of Community (In)capacity in Cape Town, South Africa" (2008) 20 *Environment and Urbanisation* 393, who also, and rightly so, attributes the previous failure of the state to address local poverty largely to the exclusion of the poor from projects and planning

[176] Smit "Understanding the Complexities of Informal Settlements" in *Informal Settlements: A Perpetual Challenge?* 13

is critical to enabling them to fulfil their purpose as human rights guarantees. This, therefore, highlights the need in dealing with informal settlements to adopt an integrated approach aimed at addressing poverty and that promotes partnership and meaningful community participation.[177] In understanding the complexities and dealing with the challenge of informal settlements, it is also important to consider the relationship between social relations, property and informal settlements.[178]

SUMMARY

The growth of informal settlements or slums has been an issue of concern for many, with international initiatives increasingly focusing on informal settlements, particularly the need to improve the living conditions in these settlements. This article examines the challenge of dealing with informal settlements, with particular focus on South Africa. It analyses the legislative and judicial processes at work in addressing informal housing issues in South Africa. The South African government is attempting to deal with the question of informal settlements and has adopted policy measures with some good principles. It is argued that the policy responses to informal settlements, riddled with problems of planning and implementation, have not been a silver bullet to the housing crisis or the growing inequity in South Africa. The courts on the other hand, the Constitutional Court in particular, have attempted to ensure that the rights of informal settlement dwellers are protected.

[177] W Smit "Ten Things to Remember about Informal Settlement Upgrading" (2005) *DAG* <http://www dag org za/docs/research/2 pdf> (accessed 29-06-2012)

[178] See J Wigle "Social Relations, Property and 'Peripheral' Informal Settlement: The Case of Ampliación San Marcos, Mexico City" (2010) 47 *Urban Studies* 411-436, examining the complexities of informal settlements in Mexico