ESR REVIEW

Economic and Social Rights in South Africa

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Editorial

Sandra Liebenberg

This special issue of the *ESR Review* focuses on security of tenure.

Most of the articles are based on papers delivered by the authors at a workshop on security of tenure hosted by the Stellenbosch University Law Faculty on 22 March 2006, to mark Human Rights Day. All the authors are involved in a direct, practical way and in various capacities with resisting evictions and promoting security of tenure.

The majority of the articles reflect on the chasm between our commitments to secure land and housing in sections 25 and 26 of the Constitution and the reality of the precarious and insecure tenure of millions of poor people in South Africa, especially in the rural areas.

Jean Du Plessis examines global trends in forced evictions. He also discusses relevant international law principles and exposes the fallacious assumptions underpinning the 'developmental rationale' for forced evictions.

Marc Wegerif highlights some of the significant findings of the *National Evictions Survey* conducted by Nkuzi Development Association. This survey examined the scale and impact of evictions, primarily in the post-apartheid period. It raises significant questions about the efficacy of the plethora of land reform legislation, such as the Extension of Security of Tenure Act (ESTA) and the Labour Tenants Act, in promoting security of tenure in the post-apartheid era. Wegerif also explores why legal processes seem to have been so ineffective in preventing evictions of occupiers of rural land.

Sidney Kgara raises the crucial question of the relationship between the limited land and housing rights accorded under our new constitutional dispensation and the need for a fundamental transformation of the semi-feudal social and economic relations on South Africa's farms. He argues that constitutional rights to land and housing will only become a cause for celebration if they contribute in a meaningful way to both overcoming the current marginalisation of the previously dispossessed and building sustainable livelihoods in the agrarian sector of our economy.

Marion Hattingh reflects on her four years' experience as an attorney with the Stellenbosch Legal Aid

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Economic and Social Rights in South Africa

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Clinic, acting for occupiers facing evictions. She examines some of the legal, ethical and practical problems arising in the context of eviction applications under ESTA. She highlights areas such as the lack of a clear right to adequate alternative accommodation for evicted farm dwellers under ESTA, the insufficient protection accorded to women as occupiers in their own right and the complex interaction between labour law, land law and the common law in the context of eviction applications.

Ashraf Mahomed explains the South African Human Rights Commission's strategy in relation to promoting and protecting security of tenure in South Africa. He also writes frankly about some of the difficulties and challenges experienced by the Commission in taking up these challenges. He emphasises the lack of appropriate alternative accommodation for evicted farm dwellers and the consequences of being caught in a spiral of insecure and marginal accommodation not linked to sustainable employment or livelihood prospects. He also focuses on the systemic problem of violence and on the racial and sexual harassment of farm dwellers coupled with the inadequate responses of law enforcement agencies.

This issue has recently received extensive press attention with the alleged rape of a woman and the brutal assault of a 15-year old boy by farmers and a farm worker in the Rawsonville area. As shocking as this incident is in its own right, what is even more disturbing is the alleged lack of a proper investigation by law enforcement authorities in the region.

Aoife Nolan explores a theme that has been marginalised in human rights discourse and theory on forced evictions, namely, security of tenure from a child rights perspective. She considers the particular impact of evictions on children and also examines applicable international and regional human rights law.

Finally, Johan van der Merwe discusses the import of a series of recent judgments dealing with implications of the Constitutional Court's decision in *Jaftha v Schoeman and Others* for executions against homeowners' mortgaged property. He illustrates how the right to housing, protected in section 26 of the Constitution, is beginning to have implications in areas of law dominated by what were previously considered the routine entitlements of banks and other powerful commercial entities.

In conclusion, this issue of *ESR Review* contains a rich collection of essays exploring various facets of security of tenure both in South Africa and in a global context. Crucial questions are raised concerning the extent to which the land and housing rights in our Constitution are contributing to fundamental transformation of economic and social relations in South Africa's countryside. Instead of being a cause for despair, it should invite reflection on how our hard-won socio-economic rights can better serve the needs of the poor.

In conclusion, I would like to thank Sibonile Khoza for his generosity in allowing *ESR Review* to be used as a vehicle to publish this collection of papers on security of tenure.

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Forced evictions
A global perspective

Jean du Plessis

One of the best definitions that I have heard of the concept of security of tenure is the 'freedom from fear of forced eviction'. Unfortunately, far too many people do not experience this freedom and live instead in constant fear of eviction.

Every year millions of people around the world are forcibly evicted, leaving them homeless and subject to deeper poverty, discrimination and social exclusion. Often these are large-scale mass evictions, where entire communities of tens or even hundreds of thousands of people are removed. Such communities are invariably evicted against their will, in most cases without any compensation or alternative housing.

The practice of eviction without consultation or adequate alternatives and compensation is illegal in terms of international law.

Forced evictions have various and often complex and interconnected causes. Regardless of the actual cause, those responsible for evictions generally justify them in the name of 'development' and, by implication, of advancing the general public good. Governments and other implementing agencies use compelling 'developmental' language, often backed up by technical jargon, in an attempt to defend actions which are, in most cases, totally indefensible.

It must, therefore, be made unambiguously clear at the outset of any discussion of forced evictions that the practice of eviction without consultation or adequate alternatives and compensation is *illegal* in terms of international law. It is also *unjust*, compromising fundamental human rights principles, with devastating consequences for those affected. Moreover, in terms of international experience and best practice, it is fundamentally *counterproductive* to the goal of human development.

Forced evictions are illegal

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the key legal source of housing rights under international human rights law. Article 11(1) of the Covenant explicitly recognises the right to adequate housing. Article 11(1), as interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comments No. 4 and No. 7, also prescribes legal protection against forced eviction, at least for those 150 countries that have signed and ratified the Covenant. General Comment No. 7 indicates that:

> The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (para 8).

It states further:

> evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights (para 16).

It also prescribes procedural protective mechanisms for evictees in those highly exceptional circumstances where eviction is unavoidable (para 15).

In addition, in 1993 the UN Commission on Human Rights declared that "forced evictions are a gross violation of human rights" (Res 77/1993, para 1). In 1998, the UN Sub-Commission on the Protection and Promotion of Human Rights reaffirmed that:

> The practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment (Res 9/1998, Forced Evictions).

In many countries around the world, forced evictions are also unlawful or unconstitutional under domestic law, unless strict procedural and substantive conditions are followed. Despite these legal protections of the rights of individuals and families against forced evictions, authorities will often try to circumvent the applicable laws and rules in order to secure the

speedy eviction of residents. Frequently the argument is that these communities are obstructing important development projects.

One of many examples is the City of Johannesburg's policy of evicting residents of buildings on the alleged grounds of health and safety, as part of an 'inner city regeneration strategy' aimed at eliminating developmental 'sinkholes' and promoting investment and property values. The policy of evicting Johannesburg inner city residents in terms of legislation such as the National Building Standards and Building Regulations Act, 1977, was recently ruled unconstitutional by the High Court of South Africa (see *City of Johannesburg v Rand Properties and Others* 2006 (6) BCLR 728 (W)).

The City has appealed the High Court's decision in the *City of JHB* to the Supreme Court of Appeal and the residents have cross-appealed. The Community Law Centre and the Centre on Housing Rights and Evictions have recently been admitted as joint *amici curiae* in the case. It is expected that the appeal will be heard in early 2007.

Forced evictions are unjust

The impact of forced eviction on families and communities, particularly the poor, is severe and deeply traumatic. Property is often damaged or destroyed, productive assets are lost or rendered useless, social networks are broken up, livelihood strategies are compromised, access to essential facilities and services is lost and violence, including rape, physical assault and murder, is often used to force people to comply with the eviction.

A recent example of this is found in an informal settlement on the outskirts of Harare, Zimbabwe. Amnesty International reports that on 2 September 2004, riot police, war veterans and members of the youth 'militia' reportedly went to Porta Farm to forcibly evict some 10 000 people, many of whom have been living there since 1991. The police acted in defiance of a court order prohibiting the eviction. According to eyewitness testimony, the police fired tear gas directly into the homes of the Porta Farm residents. Eleven people died, five of them children under the age of one.

Tragically, this was only the beginning. These events were replicated on a much larger scale less than a year later with the implementation by the Zimbabwean Government of Operation *Murambatsvina* (or 'drive out trash'). Commencing in mid-May 2005, this operation resulted in the decimation of Porta Farm and many other settlements in Harare and elsewhere. In the end over 700 000 people lost their homes and were forced to live in areas far away from jobs, services and income opportunities.

Indeed, the prospect of being forcibly evicted can be so terrifying that it is not uncommon for people to risk their lives in an attempt to resist it, or, even worse, to take their own lives when it becomes apparent that the eviction cannot be prevented. According to an online report by the Human Rights Watch in 2004:

> A wave of almost daily protests [in opposition to evictions] swept [through] cities across China from September to December 2003.

This opposition included a number of suicides and attempted suicides, including the following incidents:

- In August a Nanjing city man who returned from a lunch break one day to find his home demolished, set himself afire and burned to death at the office of the municipal demolition and eviction department.
- In September, resident Wang Baoguan burned himself to death while being forcibly evicted in Beijing.
- On October 1, China's National Day, Beijing resident Ye Guoqiang attempted suicide by jumping from Beijing's Jinshui bridge to protest his forced eviction for construction related to the 2008 Beijing Olympics.

Similar incidents have occurred elsewhere. For example, the Dawn Newspaper Group reports that in Lahore, Pakistan, a man tried to burn himself to death in front of the Chief Justice, in despair at:

> having lost his life savings when the highways department demolished his house as an encroachment (15 September 2004).

In South Africa, on 14 January 2005, a protesting Pietermaritzburg hawker drank almost a litre of paraffin fuel and swallowed some tablets when she realised that the police were going to confiscate the shelter in which she ran her pavement tuck shop. The hawker had been trying for two years to get a trading license. Another hawker on the scene said:

> I have been a target for so many years that I have lost count. I am not here out of boredom – I'm here because I have a family to

> support with the money I make" (Bongani Hans, Suicide bid to save tuck shop, *The Echo*, 20 January 2005).

Forced evictions are counterproductive

Forced evictions are often justified in the name of investment, development and promotion of the public good. In stark contrast to this, they invariably run counter to the goal of human development in a number of ways.

At the most basic level, forced removals are spectacularly destructive.

At the most basic level, forced evictions are spectacularly destructive, with their aftermath at times likened to a 'wasteland', 'war zone', or 'man-made tsunami'. Forced evictions destroy the assets of already poor and vulnerable communities. These include physical assets such as material possessions, as well as less tangible, but vital, 'social capital' assets such as survival networks painstakingly established over many years. In addition, the loss of ready access to facilities and services can, due to prohibitive increases in transport costs, significantly add to the already overwhelming monthly expenses for health, education and other essential services. As a result, affected individuals, families and communities can be set back years in their struggle for survival and development.

Forced evictions invariably fail to deliver the outcomes claimed for them by the implementing governments or agencies. In many instances, large-scale evictions are intended as an antidote to uncontrolled and unauthorised urban settlement in the hope that this will encourage investment and development. However, the causes of rural-urban migration are so varied and deep-seated, the resulting population pressure on cities so overwhelming, that resorting to forced eviction as a solution to illegal settlement amounts to little more than a futile gesture.

Evicted individuals, families and communities do not disappear. Nor do they tend to remain for long in the far-flung areas to which they are relocated. They often find their way back to unoccupied land closer to services and survival opportunities where they resettle and rebuild, as before. In addition, by focusing on the need to get people away from an area, governments often miss the very unique developmental opportunities presented by informal settlements. Properly conceived and implemented settlement upgrading, done in close consultation with the affected parties, has proven to be a much more effective option in addressing urban developmental challenges, with great potential benefits for all concerned (see COHRE, 2004).

Forced evictions also run directly counter to Millennium Development Goal (MDG) No. 7, which aims to achieve "significant improvement in the lives of at least 100 million slum dwellers by the year 2020". The practice of forced evictions leads to the destruction of homes and housing stock, thereby frustrating the aim of improving current levels of access to housing. It is not surprising, therefore, that the first indicator for the MDG is "security of tenure" and that the UN Secretary General's MDG Task Force noted:

> Meeting this challenge [of the MDG] requires a plan for secure tenure, affordable access to land, basic services and housing finance (see Task Force on Improving the Lives of Slum Dwellers, 2005).

Moreover, as one commentator has noted:

> Slum upgrading projects usually fail in the absence of an institutional framework to ensure secure tenure since powerful interests are able to intervene and reap the benefits of the increases in land and housing values (Langford, 2006).

During a fact-finding mission in Nairobi, Kenya, the Centre on Housing Rights and Evictions (COHRE) found that residents in Kibera, Africa's largest informal settlement, feared forced eviction in a slum upgrading project because it failed to establish the envisaged secure tenure zone, the transit site was far from the current settlement and the financing formula would lead to high rents and unaffordable rents (COHRE, 2005).

Examples: 1995 – 2005

Operation *Murambatsvina* in Zimbabwe was an extreme example of the harshness and inhumanity of evictions and received more international media attention than most evictions do. However, this was not an isolated incident. Nor was it, by any means, the largest eviction to occur in the last decade. Indeed, information of large-scale forced evictions collected since 1995 by COHRE and its partners from around the world reveals that there have been a disturbingly high number of large-scale forced evictions in that time, each of which involved tens of thousands of people.

The table on the next page gives

examples of such mass forced evictions in a selection of seven countries. These preliminary figures show that *over ten million* forced evictions were reported in just these seven countries between 1995 and 2005. Some of were from a single site or area (e.g. Port Harcourt in 2000). Others were from more than one site but the result of a single government policy (Operation *Murambatsvina*' 2005-2006). Finally, some are representative of an absence of sufficient or effective protection for a particular category of person (farm dwellers in South Africa, 1995-2005). However, all of these evictions constituted gross violations of the right to adequate housing and other related socio-economic rights.

Bulldozer governance

A disturbing aspect of many of the above cases is the apparently growing belief among certain governments that forced eviction is a legitimate tool of governance, which can and should be used in the quest for development.

An extreme but telling example of this was Zimbabwe's Operation *Murambatsvina,* a desperate attempt to deal with the increasingly restless and politically disaffected urban poor of Harare, Bulawayo and elsewhere. At the same time it was intended, quite paradoxically, to revive the local economy. According to public statements by President Robert Mugabe, the pro-

REPORTED FORCED EVICTIONS: SELECTION OF SEVEN COUNTRIES, 1995–2005
Number of persons evicted

	Zimbabwe	Indonesia	China	Bangladesh	Nigeria	India	South Africa	Totals
1995	6 500	300	336 754		17 300	6 550	86 965	454 369
1996		272 182	336 754	25 580	253 105	156 790	112 151	1 156 562
1997	200	272 182	336 754	22 000	15 000	65 000	128 996	840 132
1998			336 754			172 000	65 771	574 525
1999			336 754	100 205	300	2 460	88 223	527 942
2000			336 754		1 201 100	177 455	57 230	1 772 539
2001	8 300	49 205	341 754	63 750	7 500	450	27 924	498 883
2002	250 000	3 000	439 754		165	950	62 878	756 747
2003		5 184	686 779		12 000	150 850	138 308	993 121
2004	5 000	39 184	467 058	21 552	7 550	20 715	56 813	617 872
2005	704 300	4 425	187 064	9 355	820 413	363 795	1 420	2 090 772
Totals	**974 300**	**645 662**	**4 142 933**	**242 442**	**2 334 433**	**1 117 015**	**826 679**	**10 283 464**

NOTE: These figures are for reported evictions only (i.e. excluding threatened or pending evictions) and are drawn from a global database of forced evictions being compiled by the COHRE with the assistance of numerous partners around the world. Note that the absence of data for a particular year does not necessarily indicate zero or fewer evictions, but may be due to a lack of accurate information. Data was compiled from a number of primary and secondary sources. If you would like to report forced evictions, or to receive more information about a particular eviction, please contact the author at evictions@cohre.org.

gramme would rid urban areas of allegedly illegal settlers and black market traders, in order to promote "urban renewal" and the emergence of a "new breed of organised entrepreneurs".

In June 2005, a ZANU-PF lawmaker explained that the hardships of the evictions were a necessary price for a promised economic turnaround: "These are just temporary things and they are necessary for a long-term turnaround" (Hartnack, 2005).

Even more disturbing than the bizarre logic of this programme is the extent to which national leaders in Africa have failed to speak out or act against it. Despite a public outcry and sustained pressure from over 200 international and African NGOs on all African governments to intervene, little was said or done, with the result that these brutal evictions are now a *fait accompli*.

Even more disturbing than the bizarre logic of Operation Murambatsvina is the extent to which national leaders in Africa have failed to speak out or act against it.

Observers were particularly dismayed when, at the height of the controversy over the evictions the then-Minister of Housing in Kenya, Amos Kimunya, told a workshop of African housing ministers in Cape Town:

> However painful, evictions are necessary...In Kenya's experience, slum dwellers would move only when they saw a government bulldozer (Campbell, 2005).

As the author, Wole Soyinka said, in protest to the events in Zimbabwe:

> Bulldozers have been turned into an instrument of governance and it is the ordinary people who are suffering (BBC News, 2005).

Subsequent evictions in Abuja, Nigeria and Digya Forest in Ghana and others in Pakistan, Angola, India, China and elsewhere, seem to indicate that this is indeed the emerging trend.

Nor are forced evictions limited to developing countries. Disturbingly high numbers of evictions are regularly reported in countries such as France, Italy and the United States as a result of the reduction of public housing stock and dramatic increases in property prices and rentals, often due to gentrification. Elsewhere, for example in Greece, discrimination against minority groups like the Roma also results in forced evictions.

Everyone concerned with genuine human development needs to work together to make sure that this trend is reversed. Part of the struggle against forced evictions is a need to change the mindset of the leadership of those countries where this is a commonly used tool of development and of control of the poor. It is crucially important to get the message across that forced evictions are unacceptable and invariably counterproductive and that alternatives can and need to be found.

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Turning the tide

However, it is not all bad news. There have been encouraging signs of progress in the global struggle for the right to protection against forced eviction. All over the world, communities are creating opportunities to be heard and to be involved in the formulation and implementation of strategies to obtain their security and well-being. A number of excellent support organisations have also emerged, joining forces with affected communities in an attempt to turn the tide of forced evictions. This joint work by many actors has resulted in growing resistance to forced evictions globally, the prevention of many thousands of evictions, a number of local and some national governments openly speaking out against the practice and constructive engagement between governments and communities on the design and implementation of viable alternatives.

Such positive interventions by governments, partner communities and agencies to find alternatives are to be welcomed and celebrated. Yet we shall always need to remain vigilant as the issue of evictions invariably has deep links with powerful economic forces and can also be used to gain political support. The protector against evictions today could easily be the implementer of evictions tomorrow.

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Farm evictions

A failure of rights

Marc Wegerif

Forced removals under apartheid

In the early 1980s, the Surplus People Project (SPP) established that from 1960 to 1983 a total of 3.5 million black people had been forcibly removed from their land. The largest numbers of these, 1.1 million people, were removed from white farms. SPP saw the forced removals of this period as central to the apartheid system and essential for its survival.

A commitment to security of tenure

In 1994 apartheid as a political system came to an end and the first non-racial national elections took place. This new era of constitutional democracy was ushered in with justifiable national euphoria and international acclaim. The 1994 manifesto of the African National Congress (ANC) – the Reconstruction and Development Programme (RDP) – committed it to far reaching land reform. It specifically stated that:

> Labour tenants require security of tenure and legal defence and advice offices must be established to assist farm workers in cases of eviction.

The Constitution of the Republic of South Africa requires, in terms of section 25 (6), that the government pass legislation to give people with insecure land tenure due to past racially discriminatory laws or practices either secure tenure or comparable redress. Section 26(3) states unequivocally that:

> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The Department of Land Affairs' 1997 White Paper on South African Land Policy committed the government to dealing with the insecure tenure of farm dwellers and identified them as a priority group to benefit from land reform.

The message was clear. The blight of large-scale forced removals and evictions, one of the worst manifestations of the apartheid crime against humanity, cannot be part of the 'new South Africa'.

Farm dwellers, including labour tenants, have been correctly identified in a range of policy documents and laws as being particularly vulnerable to evictions and in need of protection.

Evictions post-apartheid

Ten years into our new democracy the National Evictions Survey set out to quantify the extent and impact of evictions from farms. It set out to discover, among other things, what the trend was in relation to farm evictions since the SPP had finished its work and to explore what change, if any, the constitutional and democratic dispensation had brought to the saga of farm evictions in South Africa. This was in response to largely anecdotal evidence from NGOs and others working with farm dwellers that evictions were still a major problem.

The National Evictions Survey was an initiative of Nkuzi Development Association (Nkuzi) that was primarily carried out by Social Surveys. It involved a scoping exercise in 300 settlements around the country and door-to-door surveys in 75 settlements. Interviews were conducted with more than 8,000 households. In-depth interviews revealed more detail on the nature of evictions and the impact on affected families and their livelihoods. Interviews were also carried out with farmers from some areas with a high prevalence of evictions to obtain a perspective from farmers and to gain some more insight into why evictions may be happening.

The survey found almost 1.7 million people were evicted from farms in the 21-year period from 1984 to the end of 2004. While the survey focused on those evicted (forced against their will to leave their land and homes), it was also found that a total of 3.7 million people left farms. Those not evicted were deemed to have left of their own choice. Sometimes this was in response to difficult circumstances, but it could not be established that the farmer or person in charge on the farm was involved.

The largest number of evictions occurred between 1984 and 1992, corresponding with periods of drought. The next largest number of evictions in any single year occurred in 2003, when the sectoral determination for agriculture came into effect including a minimum wage for farm workers.

Of great concern is that over 940 303 farm dwellers, almost all of them black South Africans, have been evicted since 1994 and less than 2% of these evictions involved any kind of legal process.

Economic pressure, driven by trade liberalisation and competition from subsidised European and North American farmers, is one of the main factors contributing to evictions. Farmers also had to contend with land reform and new tenure laws as well as new and amended labour laws. In this context, farmers have defended their interests by taking steps to cut costs and reduce risks. This has all taken place in an environment where low levels of education and unionisation, combined with inadequate enforcement of labour and tenure laws, results in farm dwellers and workers being unable to assert their rights and interests.

Employment on farms has declined over the last decades and there has been an increased casualisation of the work force, with women constituting the largest number of the more vulnerable seasonal and temporary workers.

Over two thirds of evictions were related to some kind of problem at work, ranging from wage disputes to

Table 1: Farm dwellers evicted[1]

1984 to end 1993	737 114
1994 to end 2004	942 303
Total	1 679 417

Source: All figures given in tables in this article are dawn from the report of the National Evictions Survey, *Still searching for security: The reality of farm dwellers evictions in South Africa*, Polokwane, Nkuzi Development Association and Social Surveys, 2005.

Table 2: Forced removals of black South Africans from farms

Period	Number	Average per year
1960–1983	1 100 000	47 830
1984–1993	740 000	74 000
1994–2004	940 000	85 450

Table 3: South African farm employment trends

	1986	1991	1996	2002
Regular employees	816 660	702 323	610 000	481 375
Casual employees	534 781	413 239	304 000	459 445
Total paid employees	1 351 441	1 115 562	914 000	940 820

farms going bankrupt and workers being retrenched. Even the 37% of the adults who were evicted from farms that they did not work on were still affected by labour disputes as many were evicted when those working on the farm were dismissed or had some other dispute with the farmer. This relates to farm owners viewing certain occupiers as the 'primary' occupiers and therefore believing, despite the laws saying differently, that other occupiers (e.g. their partners and children) only derive rights to the land through that 'primary' occupier.

A rather sad finding was that 28% of all those evicted for work-related reasons were evicted due to the death of the main breadwinner in the household. Their dependents, mostly women and children, were confronted with eviction from their homes and the loss of income and social networks at times of bereavement, when they were probably least able to cope with it.

While evictions continue, the government land reform programme is failing to deliver any positive change in land ownership patterns. Between 1994 and 2004 around 164 000 black households gained access to land or improved their security of tenure through the land reform programme, while over the same period over 199 000 households were evicted from white-owned farms. Of those families who have benefited from land reform very few are farm workers or farm dwellers. The available information at the DLA can only confirm that 7 543 farm dweller households benefited from land reform.

The first democratically elected government in South Africa has failed to halt the continued forced removal of black peasants and workers from farms owned by a small group of rich, still largely white, land owners.

The impact of evictions

Around 67% of evictees found themselves in urban centres, mostly in townships and informal settlements. Evictees continue to live in poverty, struggling to get any work at all. Those who are working are often only scraping an existence from piece jobs and informal employment. There is no evidence of any planning to accommodate or assist those evicted as they try to establish themselves in new settlements. With generally very low levels of education and no savings and assets of their own it is very hard for them to establish new lives of dignity.

Many of those evicted from farms had been producing for themselves, with 44% having livestock and 59% growing their own maize. Now less than 10% of the evicted households have livestock and they are often left with small stock, such as chickens, whereas they previously owned cattle. Only 26% now produce maize for themselves and in smaller quantities than they did when on the farm. Evicted farm dwellers also lost access to other natural resources, such as firewood, that 40% of the evictees had received for free on the farm.

Many evictees were long-term occupiers: 58% had lived on the farm they were evicted from for more than ten years while some had far longer histories on other farms in the same area. Not only are farm workers being evicted, but also thousands of families and black farmers continue to be evicted and left with no means to make a living.

Where was the law?

New tenure laws have been passed but they have weaknesses. Even if used to prevent an eviction, these laws often still leave farm dwellers as tenants on someone else's land. Laws like the Extension of Security of Tenure Act, 1997 (ESTA) fail to give real rights in land to those who live on and work the land. Ironically it is only in death that a certain fairly narrow category of farm dwellers specified in section 6 of ESTA can, through being buried on the farm, gain some real long-term security on the land. The living must rely on limited procedural rights.

There is a widespread and apparently well-founded belief that the courts and the prevailing legal culture favour the interests of land owners. Theunis Roux argued that the Land Claims Court has ignored or rejected pro-poor legal arguments that could have been used to justify an alternative outcome (*South African Journal on Human Rights* 20(4) 2004, p 515.)

A study of the court files, carried out by Kamal Makan of Lawyers for Human Rights (LHR) as part of the National Evictions Survey, found that six of the seven eviction orders granted by the Wor-cester Magistrate's Court and confirmed by the Land Claims Court (LCC) in the first four months of 2005 were undefended default judgments. This, despite the Judge President of the LCC, Justice Bam, claiming in a personal communication in March 2005 that the LCC would "almost always dismiss default judgments".

In 2001 the LCC ruled in the case of *Nkuzi Development Association v The Government of the Republic of South Africa & Another* (2001) 4 All SA 460 that the Minis-

ter of Justice and the Minister of Land Affairs must ensure legal assistance is available to indigent farm dwellers whose tenure is under threat. However, to date there has been no effective action to give effect to this court order. Non-governmental organisations like LHR, the Legal Resources Centre and the Rural Legal Trust (RLT) try, with limited and decreasing funding, to provide some defence to farm dwellers and have achieved successes in cases they can challenge in court, but this is not enough. The RLT has approached the DLA and the Legal Aid Board (LAB) with a proposed joint venture to provide legal services for farm dwellers. After years of negotiations, the Director General of the DLA has still not signed the agreement that will allow the project to move forward. The LAB has been keen to cooperate, but appears to get little support from the Justice Ministry and Justice Portfolio Committee in Parliament, which tend to prioritise criminal over civil cases. Evictions fall into the latter category.

In one of the cases investigated in Worcester, the magistrate noted that the farm dweller faced with eviction was entitled to legal representation. However, he went on to hold that, since the farm dweller was not present, it was impossible to inform him of this right. The magistrate proceeded to grant the eviction order.

The implementation of government's land reform laws is weak. For example, the government has no national plan to ensure that farm dwellers are aware of their rights and able to defend them. Nor is there a dedicated budget for tenure work with farm dwellers in the DLA budget voted by Parliament. The vast majority of farm dwellers simply do not have access to any legal assistance. The weaknesses in the laws and legal system further discourage farm dwellers and those who assist them from going to court as they are uncertain of being able to get good results.

Failure to protect farm dwellers: A continuing challenge

A year after the results of the National Evictions Survey were first released publicly in a briefing to the Parliamentary Portfolio Committee for Agriculture and Land Affairs, there has been no action to improve the situation. The Minister for Agriculture and Land Affairs, the senior management of DLA and others have been briefed on the findings, which also made national news headlines. All have agreed that evictions at this scale are a tragedy that should not be allowed to continue, but so far there has been little action from those in positions of power.

The failure to protect and provide benefits to farm dwellers, one of the most vulnerable groups in South Africa, is a continuing indictment of our constitutional democracy.

Marc Wegerif recently left Nkuzi Development Association where he worked as Policy and Research Manager and is now employed by Oxfam GB as Campaigns and Advocacy Officer. Marc is the author of *Still searching for security: The reality of farm dwellers evictions in South Africa: Report of the National Evictions Survey*. This article was written in his personal capacity.

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Farm evictions and housing crises

No cause to celebrate the Constitution for farm dwellers

Sidney Kgara

Historically, commercial agriculture in South Africa was dominated by paternalistic social relations between farmers and landowners, on one hand, and farm-workers and farm-dwellers, on the other. These relations of power were forged from the legacy of 17th and 18th century slavery in the Western Cape and colonial subjugation throughout the country.

Despite the advent of the democratic order in 1994, these social relations still persist amid a government land reform programme that is constrained by a constitutional guarantee of property rights. The entrenchment of the right to property, including property accumulated in the process of colonial plunder, means that government's attempts to redistribute land are predicated on the 'willing seller, willing buyer' principle, even though expropriation may be exercised where necessary. Thus, the lack of fundamental change in historical property relations is an objective condition for the persistence of the 'over-lordship' exercised by farmers and landowners over those who work the land.

The commercial countryside is engulfed in a wave of farm evictions and retrenchments.

Currently, the commercial countryside is engulfed in a wave of farm evictions and retrenchments at a time when government is beginning formulate a remedial programme to address the appalling housing conditions on farms. Despite the Constitution, between 1994 and 2004 nearly a million people were evicted and about 13% of the farm workers were retrenched.

A decade ago, on the 23rd April 1996, a draft of the celebrated South African Constitution was released, with the property rights partly accumulated under colonialism and apartheid firmly entrenched in terms of section 25. This property clause was among several outstanding issues on the negotiating table that were still unresolved only a day before the adoption of the Constitution. Hence, the combination of the 'willing seller, willing buyer' principle and the lack of a political will to embark on expropriations where necessary, have seen progress in land reform falling behind what is required in terms of the 30% target by 2011.

Resisting farm evictions

However, farm evictions no longer continue unchallenged. On 1 and 27 April 2006, thousands of people marched in Stellenbosch in protest against farm evictions and in solidarity with 80 farm workers and families facing evictions from the Jonkershoek Valley. The Jonkershoek protests epitomise the widespread crisis of farm evictions as well as a growing confidence among the rural poor to resist on-going deprivation of their land rights.

Jonkershoek is one of the richest wine-producing valleys in the country, comprising about 13 parcels of farmlands, two of which are state-owned but concessioned to the private sector.

Semi-feudal social relations on farms

Against a background of the forcible removal of about five million farm workers and farm dwellers between 1960 and 1994, section 26(3) of the Constitution raised expectations about tenure security. Arbitrary evictions from land became unlawful and the enactment of the Extension of Security of Tenure Act (ESTA) in 1997 heralded a new era for the tenure rights of the landless living on farms.

However, notwithstanding ESTA, the long-term trend of evictions which preceded the democratic order has not been turned around. About 942,303 people were forcibly removed from white farms between 1994 and 2004 and this trend spiked in 1997 when ESTA was enacted, as was the case with the introduction of the sectoral determination for the agricultural industry.

This wave of mass evictions can arguably be understood as a logical

extension of the colonial process of dispossession of land rights, albeit under the democratic order. Thus, the claim by farmer organisations that evictions have been provoked by labour, land and tenure security reforms introduced since 1994 is no more than an excuse. In reality, this trend is sustained by a clear political backlash in the light of the removal of a package of patronages dispensed by the apartheid regime to the white farmers over the years.

Thus, the government's tenure, labour and land reform measures have so far not yielded much for farm workers and farm dwellers. Instead, large-scale evictions and casualisation have taken place as farmers seek to externalise the housing and other costs of running their businesses – previously provided by them, though assisted by the state.

Turning the tide

Farm workers and farm dwellers would have had cause to celebrate 10 years of our Constitution if had government begun to implement resolutions of the 2005 Land Summit to reverse the on-going:

- deprivation of land rights and asset stripping;
- consolidation of the white agricultural landscape;
- marginalisation of the poor to the barren periphery; and
- wage-dependence of farm workers, even as their earnings and working conditions are declining.

These challenges call for the restructuring of the agrarian economic space, property regimes and socio-political relations, as well as the prioritisation of household food security for the poor. Otherwise, the displacement of farm dwellers in favour of elite enclaves in the form of idyllic 'village town-houses' (historically built from capital subsidies) will continue.

Merely trying to strengthen tenure and labour rights leaves the base of the persisting relations of power and racial hierarchy intact in the countryside. On the other hand, land reform is a necessary, but not sufficient, condition for the eradication of wage dependence and therefore poverty.

Farmers have responded to the land and tenure reforms introduced by the government since 1994 by escalating evictions and casualising the workforce.

Government's response

It is clear that farmers are frantically removing dwellers and workers from their farmlands in order to circumvent anticipated tenure reforms and to ensure exclusive and absolute right to their farm properties. So far, government has responded through the establishment of 'agri-villages' and 'emergency township developments'.

Agri-villages

The Department of Housing defines an agri-village as:

> A private settlement of a restricted size established and managed by a legal institution that is situated within an agricultural area and where residence is primarily intended for farm occupiers and farm workers of the farms involved in the development. Agri-village developments represent a partnership between farmers/landowners, the state, and farm occupiers and farm workers, and may involve agricultural, as well as residential land use.

In reality, agri-villages are proving little more than new dormitory settlements or worker compounds on the outskirts of small white rural towns. They create additional pressure on the vulnerable livelihoods of farm workers as they commute long distances between their workplace and new locations, often at their own cost. Two such settlements have been built in the Free State, one each in Fauresmith and Bothaville. Bothaville has an off-farm housing project of about 1,000 units called Naledi, built in 1998. It typifies apartheid spatial planning, being located on the periphery of an agricultural small town. Naledi is punted by the Free State's Department of Local Government and Housing as an agri-village. However, the Department acknowledges that "the urban nature of housing and the limited use of communal land results in the project functioning more as off-farm/urban housing".

Emergency township developments

In response to a situation where 55% of farmers within the Stellenbosch Municipal jurisdiction, including the Jonkershoek valley, are repudiating the provision of housing for their workforce as they did in the past, the municipality has embarked on the establishment of 'emergency township developments'.

These townships are established to accommodate farm-dweller communities on the periphery of Stellenbosch, adjacent to the existing Kayamandi township.

Thus, like the spatial location of the municipality's low-income housing projects, the location of these township developments consolidates the inherited apartheid urban form.

Conclusion

Clearly, the land and tenure reform introduced by the government since 1994 has not yielded the envisaged outcomes. Instead, farmers have responded by escalating evictions and by casualising the workforce. This has increased the housing demand on the outskirts of rural towns and cities while at the same time deepening poverty.

Rather than creating new worker compounds and replicating the apartheid rural landscapes, the establishment of agri-villages should advance land redistribution and agrarian reform.

Such agri-villages must be integral to the mooted agrarian strategy promoting sustainable livelihoods and rural household food-security.

Farm housing is not lacking in South African agriculture, as is evident from the growing number of 'ghost' houses in the wake of massive farm evictions.

What is lacking is a real determination on the part of the Department of Labour, Land Affairs and Housing to deal with the plight of workers and farm dwellers who are at the mercy of these semi-feudal landlords.

In conjunction with the national and provincial governments, the Stellenbosch Municipality and other similar jurisdictions should consider a multi-pronged agrarian reform intervention, including white agricultural land, municipal commonages as well as other parcels of land held by the state.

Land and tenure reform programmes since 1994 have not yielded the envisaged outcomes.

If such interventions were undertaken, farm workers and dwellers would have had cause to celebrate a decade of the democratic constitutional order in South Africa. Land, tenure security and adequate housing rights must weigh equally to considerations of private property.

Sidney Kara is the Head of the Parliamentary Office of the National Education Health and Allied Workers' Union (NEHAWU).

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ESTA litigation

Reflections on representing occupiers

Marion Hattingh

My (four year) experience as an attorney at the Legal Aid Clinic, at representing occupiers in applications under the Extension of Security of Tenure Act, 1997 (ESTA), have convinced me that no occupier on farm land has security of tenure. As long as any farm worker can lose his or her job *and* housing due to the smallest misconduct (such as arriving five minutes late for work), no farm worker's tenure rights are sufficiently protected.

The ruins of farm worker houses have become an all too familiar part of the Boland rural landscape as a grim reminder of the end of an historical period of farm workers living on farm land.

The Stellenbosch Legal Aid Clinic

The Legal Aid Clinic's service area, which has one of the highest instances of farm evictions, includes Stellenbosch, Paarl, Franschoek, Wellington, Ceres, Somserset West, Strand and Grabouw. While we try to provide legal representation for every farm worker who approaches us, we also recognise and salute the work of our colleagues at the Lawyers for Human Rights and the local Justice Centre in Stellenbosch, whose commendable efforts have the same goal. In the same breath, I would like to thank local organisations, such as the Centre for Rural Legal Studies, the Women on Farms Project, Sikhula Sonke and the Farm Workers' Forum for their successes in immediately responding to evictions or the threat of evictions.

General trends in ESTA litigation

During the past four years, I have detected a definite shift from initial confusion and legal uncertainty, to the current willingness of land owners to settle cases out of court.

When I began appearing in ESTA matters in 2002, I was astonished to find that, five years after the enactment of the Act, it was still considered to be new and strange. I recall one instance where the magistrate called me and the applicant's attorney to his office, took out his ruler and started scrutinising the Act, questioning us on the interpretation of the different provisions. I was shocked that this person, after what seemed like an apparent first encounter with the Act, had the authority to decide on my clients' future – on whether or not they would become homeless.

Prof AJ van der Walt's article, 'Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law' (*South African Journal on Human Rights*, 18, 2002, p372) highlights the above-mentioned legal uncertainty regarding the interpretation of eviction legislation during that period. He argues that the balancing of the rights of land owners and the rights of vulnerable groups of occupiers through statutory interpretation and the development of the common law should be influenced by the transformative social and political commitments of our Constitution.

A positivist approach

In the magistrates' courts, however, the approach in most cases is narrow and technical, with a definite tendency to judge in favour of the land owner. For example, in a particular case an occupier could provide proof in the form of medical reports that he received a pacemaker after a serious car accident, after which he was no longer able to do strenuous farm work. He could also prove that he had been living on the farm for 32 years.

The ruins of farm worker houses have become a familiar part of the Boland rural landscape.

Nevertheless, the court found that the land owner's need for housing for the successful continuation of his farming enterprise was more important than the very real possibility of homelessness for, and the potential suffering of, the farm worker. The court held that all the necessary notices had been served on the occupier and the Department of Land Affairs. Accordingly, an eviction order was granted. In his judgment, the magistrate commented that the occupier was surely still able to start a new career doing light manual work. The Land Claims Court confirmed the order (Magistrate's Court held at Grabouw, Case no 37/2003, *Die Landbounavorsingsraad v Petrus Johannes Davids & Others*).

Magistrates' Courts became obsessed with legal technicalities, which has resulted in a positivistic application of the Act. There was little recognition that security of tenure, land reform and human rights issues should be the main interpretative framework when balancing the interests of the parties involved.

Nowadays attorneys for land owners tend to be more willing to advise their clients to attempt to reach a settlement out of court. They argue that their clients will see results sooner if they settle and that their clients are willing, instead of spending money on litigation, to make a contribution towards future housing for the occupier. It is interesting to note that the alternative dispute resolution mechanisms in sections 21 and 22 of the Act, such as mediation and arbitration, are rarely used.

Sometimes the land owner offers alternative housing by buying the occupier a house in a nearby town, but in most instances money for a house is offered. In a few cases financial assistance is offered to buy building materials. In poorer communities in areas such as Ceres, land

owners maintain that they do not have the financial means to contribute to alternative housing. They are sometimes willing to grant the occupiers an additional 12 months on the land as a settlement proposal.

Difficult ethical problems

For an attorney acting for occupiers, settlement offers of this nature present difficult ethical problems. Clients, most of whom are illiterate or of limited literacy, must be fully informed of their rights and the complexities of their case in order for them to make informed decisions in the circumstances.

Furthermore, the goal of security of tenure and the ideal of home ownership must always be borne in mind. What the applicants in eviction cases frequently forget is that the average occupier has spent his entire life on a farm and does not have the necessary knowledge or skills to acquire alternative housing. To make money available and to tell the farm worker to "go and buy yourself a house" in two or three months time is as unrealistic as it is unfair.

The many cases settled out of court in the past two years are strongly indicative of a motion of no confidence in the Act and/or court proceedings by both land owners and occupiers. This tendency to settle out of court is also an acknowledgement of a lacuna in the Act – namely, that there is no provision for financial assistance from the land owner towards alternative housing. Maybe the legislator should consider providing for compensation for resettlement in all cases where an occupier worked on a farm for a considerable period.

Due to the lack of land and affordable state housing, the state subsidy, in my experience, is only accessed following an eviction application in very few cases. RDP houses sell for R35 000 in our region, which shows that the Department of Land Affairs subsidy of R 16 000 is a far from adequate contribution to the costs of house ownership.

It has become clear that many land owners are willing to contribute towards alternative housing. However, local authorities maintain that there is no land available for affordable housing and definitely no land specifically for evicted farm workers. Municipalities are usually quick to offer so-called emergency kits (comprising eight poles, a few packets of nails, sheets of plastic and three corrugated plates). This is unacceptable in terms of any definition of adequate housing and is an insult to human dignity.

It is a terrible blow for a person to lose their income and then to also become homeless.

The link between tenure and employment

Termination of employment is the main reason for evictions in the vast majority of ESTA cases we deal with, since the right of residence nearly always depends on the continuation of the employment contract. In most instances, our clients' defences are related to an unfair dismissal or to constructive dismissals. The latter phenomenon occurs, for example, when the land owner intimidates or assaults the occupier or his family members, or takes the law into his own hands by actions such as breaking down the roof of the occupier's house, which causes him to leave.

It is a terrible blow for any person to lose their income and then, a few months later, to also become homeless. For farm workers, who are a vulnerable and almost voiceless socio-economic group, the loss of a job and housing constitutes circumstances from which they might never recover without substantial financial and social assistance from the state.

Attorneys acting for occupiers are grateful for the judgment in *Mostert v Duiker* (LCC 101 R/02) wherein Acting Judge Moloto made it clear that when considering the question of whether it is just and equitable to order the eviction of an occupier, a court should also consider facts surrounding an alleged unfair dismissal (par 10).

But in practice, the Magistrate's Court is not the best forum to argue labour disputes. This court does not have jurisdiction over labour matters and many magistrates now, for the first time, have to hear arguments relating to complex labour disputes. Many are reluctant to hear arguments on the labour aspects of cases, but others are bold enough to refuse eviction orders if they can be convinced of the unfairness of a dismissal.

It is unfortunate that very few occupiers refer their labour disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) in time and, in our experience, the CCMA is reluctant to grant condonation for late referrals. In other cases, even where the occupier succeeds in referring a dispute timeously, CCMA Commissioners still tend to incorporate terms for the termination of residence in settlement awards. This results in the occupier never receiving their compensation due to the fact that they are not in a position to leave the

farm within the given time-span because of a lack of alternative housing. In *Karabo & Others v Kok & Others* (1998) 3 All SA 625 (LCC), the Land Claims Court clearly stated that all avenues of redress regarding the labour dispute must first be exhausted before an occupier's right of residence can be terminated.

Women's struggle to be recognised as occupiers in their own right

According to the Nkuzi Development Association's National Evictions Survey, 77% of evictees from farms are women and children. Special attention should be paid to women farm workers' employment contracts.

Many women in our area are still employed as seasonal workers on the fruit and wine farms. In practice they work on a daily basis from 8 am to 5 pm for six months (usually November until April) and for the rest of the year they work on demand. These women rarely receive housing as an employment benefit.

I met a woman recently who has worked as seasonal worker for 40 years, since she was 16, and now faces eviction from her brother's house on a farm. The owner's argument is that she is not an occupier in her own right and does not have an independent right to housing like her brother, who is the head of the household and has a permanent job. Nor does she qualify as a 'household member' of her brother. He, his partner and three children are offered a house in a housing project initiated and partly subsidised by the farmer, but his sister, although still in his employ, faces an eviction application.

Secondary occupiers

Since the decision of the Land Claims Court in *Die Landbou Navorsingsraad v Klaasen* (LCC 83R/01), women and their children have been labelled as 'secondary occupiers' without regard to the specific circumstances of the particular individuals (as in the above example). We need clarification on exactly what the full implications of Judge Gildenhuys' interpretation of the Act are. Logically the *Klaasen* judgment implies that the woman in the aforementioned example must be evicted in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 (PIE).

In practice there is widespread legal uncertainty about this. Does the *Klaasen* case, for example, also imply that a widow whose right of residence has been terminated and who is still occupying a house on the farm must be evicted in terms of PIE? In the case of *Simonsig Landgoed (Edms) Bpk v Salome Vers & Others* (Appeal Case in the Cape High Court nos A 141 - 143/2006), the widows received 12 months written notice to vacate their houses on the farm (as prescribed by ESTA). According to Applicant they became unlawful occupiers as defined by PIE and he applied for an eviction order in terms of PIE, thus avoiding the more onerous legal requirements in ESTA. We are awaiting judgment in the above-mentioned appeal case. But surely women must still have the protection of ESTA as far as applying for subsidies from the Department of Land Affairs is concerned?

Unfortunately, no ESTA matter has reached the Constitutional Court in order to clarify the precarious legal position of women living on farms. This is most probably due to lack of funding for the organisations representing occupiers.

Resisting the trauma of evictions

The trauma of evictions cannot be underestimated. In most cases families are torn apart. Children are given to friends or family members, while the parents face the agony of life in an informal settlement, or living illegally on land from which they will inevitably face another eviction. Everyone who has witnessed an eviction taking place will agree that it is an experience where human rights become seriously threatened and often openly violated.

Attorneys acting for occupiers should not necessarily withdraw cases because of a lack of merits. Even in a case with no material defence, all occupiers deserve a right to legal representation, as was held in the case of *Nkuzi Development Association v The Government of the Republic of South Africa & Another* (2001) 4 All SA 460 (LCC). Because their constitutional right to adequate housing is threatened (as are many other human rights), they are entitled to legal representation.

Finally, a word on eviction orders: My personal opinion is that magistrates should follow the trend in recent PIE eviction judgments and make eviction orders conditional. In other words, they should suspend the eviction until the local authority can convince the court that adequate alternative accommodation is indeed available for the persons involved. No-one should be evicted from a farm to face the future as just another statistic of homelessness.

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Security of tenure

Giving effect to the mandate of the South African Human Rights Commission

Ashraf Mahomed

The South African Human Rights Commission (SAHRC) is guided by the Constitution, which provides that the state must take reasonable legislative and other measures, within its resources, to foster conditions that enable citizens to gain access to land on an equitable basis (s 25(5)). It also provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled either to tenure that is legally secure or to comparable redress (s 25(6)).

It is also guided by the international human rights provisions relating to property rights contained in article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter on Human and Peoples' Rights.

Still insecure

The SAHRC recognises the property rights of everyone and the need to accommodate the interests of both owners and occupiers within a constitutional framework. An important principle underlying our constitutional and legislative framework is that owners and occupiers must exercise their rights and duties in a socially responsible manner, with due regard to the socio-economic needs of poor, vulnerable and marginalised people and communities. Security of tenure is important to advance human rights. Thus we cannot promote and protect human rights unless there is security of tenure.

Considering that we have seen progress at the level of policy, legislation and administrative action to promote security of tenure and tenure reform and to protect the rights of farm dwellers, there is sufficient evidence to suggest that little practical change has occurred on the ground. The conclusion drawn by the SAHRC in August 2003 remains relevant today. To quote from the executive summary of the SAHRC, *Final Report on the Inquiry into Human Rights Violations in Farming Communities*, August 2003:

> Despite constitutional provisions and the promulgation of legislation such as the Extension of Security of Tenure Act (ESTA) and the Labour Tenants Act (LTA) to protect those whose tenure on land is legally insecure, evictions and the rights of those who dwell on the farm owners' land dominated the inquiry. There is a clear lack of support for the legislation from organised agriculture and a failure to ensure legal representation for those whose rights are violated. Patterns of land ownership remain, for the most part, unchanged from the apartheid era and the pace of land redistribution has been slow. The expectations of many people are unrealistic and there is a limited understanding of the complexity of the land reform programme.

Security of tenure therefore presents a number of challenges in the current context. These include:

- circumvention or non-compliance with tenure legislation such as ESTA by, for example, magistrates, the SAPS and private attorneys;
- illegal evictions;
- the lack of legal representation for farm workers and tenants;
- the rights of farm dwellers to receive visitors not being respected;
- race and gender discrimination because of our historical legacy;
- the particularly harsh impact of evictions on vulnerable groups such as women, children, people living with disabilities and the elderly; and
- the provision of emergency accommodation after evictions.

The questions that confronts us is: How does the systemic lack of secure tenure in South Africa speak to the promises contained within our Constitution and expressed in the Bill of Rights as we celebrate the 10th anniversary of our Constitution? What has the Tenure Reform Programme accomplished?

Security of tenure as a human right

This year we celebrate 10 years of our democratic Constitution. We celebrate the development of our constitutional democracy and reflect on

the advances made in promoting and protecting human rights. It is no longer disputed that the Bill of Rights applies horizontally and this means that it applies not only to the State, but also between private persons.

A rights-based approach to security of tenure emphasises the importance of human rights as inalienable, universal, interrelated and interdependent. It is important because everyone is entitled to live with dignity and security, especially vulnerable groups such as farm dwellers. It is important for us to recognise the principle that a violation of security of tenure is a violation of human rights on many levels. Security of tenure is a facilitative right that unlocks many other socio-economic rights. The benefits of providing secure tenure are usually also systemic. Security of tenure helps to promote other rights such as housing, water, health and education for children, with benefits extending to the whole family.

Owners and occupiers must exercise their rights and duties in a socially responsible manner.

A balancing of interests

Various provisions in the Bill of Rights safeguard security of tenure, such as sections 25 and 26. These enabling provisions have given rise to legislation such as the Extension of Security of Tenure Act (ESTA), the Labour Tenants Act (LTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). The legislative provisions are based on a common theme of ensuring that the legal process prevents arbitrary and illegal evictions and promotes a degree of certainty in relation to land and housing rights.

By design, tenure legislation such as ESTA that provides protection against insecure tenure rights contains both civil and criminal law procedures. It has been suggested that the civil law process requires that the parties' rights and interests be subjected to a delicate constitutional balance and that one cannot strictly argue in terms of victims and perpetrators without regard to the specific circumstances of a case.

The Bill of Rights and tenure legislation seeks to ensure that there is a balance to the process of regulating relations in farming communities and that there are opportunities for achieving secure tenure and historical redress. In maintaining this delicate balance, it is important for previously disadvantaged individuals and vulnerable communities to remain at the centre of the legal process. The threshold created by the criminal law process is slightly different in that it creates the criminal offence of an illegal eviction in circumstances where human rights have been flagrantly violated.

Providing redress

Our country can best be described as a constitutional democracy with a Constitution as the supreme law of the land and an entrenched Bill of Rights at its heart. We have independent courts with the Constitutional Court at the apex, a free and independent media, a vibrant civil society and key institutions such as the SAHRC, the Public Protector and the Commission for Gender Equality to protect our democracy and promote the development of a human rights culture. These institutions are meant to carry out their mandate without fear, favour or bias. However, the Constitution requires appropriate redress where a violation of human rights occurs and this necessarily involves 'taking sides'.

The Chapter 9 institutions (named after the Chapter in the Constitution responsible for their establishment) are mandated to act independently of government and civil society and are accountable to Parliament. A lack of security of tenure threatens the survival of our democracy. These institutions are strategically located to play a significant role in providing redress and alleviating and eradicating violations of human rights that arise from this.

The role of the SAHRC

Our courts deal with human rights violations in criminal and civil cases through an adjudication process. However, the SAHRC has the power to hold independent enquiries about human rights violations through its own investigations. In recent years it has increasingly played an advocacy and monitoring role, which culminated in its hosting two key public enquiries: the *Public Hearings on Human Rights Violations in Farming Communities* and the *Report on the Investigation into Human Rights Violations in the Khomani San Community*. These hearings identified the violation of tenure rights, the tension between tenure rights and customary rights and women's rights as systemic problems requiring redress.

Guided by its mandate, the SAHRC has focused in a dedicated manner on the following issues:

- responding to individual complaints relating to, for example, water and electricity cut-offs;
- providing education and training around human rights in general;

- participating in legislative processes and policy development, for example, making submissions on key issues such as relations between women and traditional leaders in respect of the Communal Land Rights Act;
- monitoring socio-economic rights in fulfilment of the SAHRC's constitutional mandate in terms of s 184(3) of the Constitution;
- engaging in vigorous follow-up of the findings and recommendations by the SAHRC in respect of the two public inquiries; and
- participating in ESTA forums at provincial level and interacting with all stakeholders and role-players.

Future challenges

The following are challenges that must still be responded to in the area of promoting security of tenure.

Land rights and the transformation of social relations on farms

Land rights appear to fall within the category of economic and social rights. The SAHRC will, for the sixth time, report this year on advances made in respect of land rights in terms of its monitoring mandate under section 184(3) of the Constitution.

However, a particular concern is that, since its inception, the land reform programme has not created a clear link between enforcing land rights and the moral and legal imperatives of restoring and maintaining the substantive yet delicate socio-economic balance in respect of the land question. We have had the benefit of almost 10 years of the Land Reform Programme and yet:

1. the nature and scope of the rights in land have not been clearly defined in terms of transformative vision of our Constitution; and
2. the concepts of 'legally secure tenure' and 'comparable redress' have not been articulated clearly, nor have they been given a clear legal meaning.

Consequently, many farm dwellers remain vulnerable and marginalised with insecure tenure.

The gap between laws and policies and their implementation has allowed the statutory protections to be circumvented through casualisation and the reliance on ordinary common law contractual principles to guide relations in farming communities. The link between tenure rights and labour rights simply created another layer of procedural rights that allowed for short-term security of tenure. However, the centrality of land tenancy in tenure legislation has held no promise of substantive ownership-type access to land rights for occupiers unless they:

- qualified as long-term occupiers; or
- accessed the section 4 mechanism within ESTA. This represents an important opportunity for farm dwellers to gain access to state subsidies with the approval of the Minister.

The need to translate security of tenure into secure ownership through constitutional means thus remains a challenge for us.

There is still a need to educate police officials and land owners on land reform, human rights and legal procedures.

Discrimination in terms of race and gender

The Final Report on the Inquiry into Human Rights Violations in Farming Communities describes situations in which farm dwellers have been ill-treated by land owners, police officers, etc. Examples abound of victimisation, harassmen and abuse because of blatant racism and sexism, suggesting bias and prejudice among land owners and the police services. Issues of skin colour appear to have been used in making or not making arrests. The fact that there have been very few prosecutions under ESTA bears testimony to this. The mindsets and behaviour of land owners and police officers suggest that, while there has been transformation in many areas, it has not resulted in the delivery of quality and impartial services by law enforcement officials, nor compliance by land owners with relevant laws. There continues to be a need to educate law enforcement officials and land owners on land reform, human rights and legal procedures.

We recently celebrated Women's Month. This presents an opportunity to reflect on the fact that men and women experience insecure tenure differently. Women continue to carry the brunt of poverty and inequality, they are hardly consulted in legal and developmental processes and they still struggle to gain equitable access to land in their own right.

Inequitable distribution of land resources

It is trite that lack of capacity and resources hampers effective distribu-

tion of land resources and the achievement of security of tenure. The reduction in services and benefits also impacts on the rural poor, who experience immense hardship because of the iniquitous distribution of land resources across society and the widening of the gap between rich and poor.

We still need to see greater equity between the various role-players and stakeholders in order to address the reality that poorer communities have fewer resources or land available. The transformation agenda for land rights is a difficult one, but not so the idea that farm dwellers and occupiers can become the centre of rural and urban communities in a constitutional democracy.

This revolutionary idea, which aims at addressing the underlying issues of poverty and inequality, gives expression to our constitutional values and precepts. One way of advancing this constitutional vision is by providing broader access to secure ownership of land.

Off-site developments

When the land reform programme was conceived the drafters made a critical assumption that the wealthy propertied class would accept and embrace the principle of reconciliation and participate in the land reform programme. Anecdotal evidence suggests that compensation has became the preferred method for resolving land rights disputes, making it difficult to achieve substantive rights through, for example, restoration of land and long-term security of tenure. The result is that there has been a disproportionate emphasis on off-site developments, which involve complex negotiating processes, requiring buy-in from local authorities, the Department of Housing and other role players.

Denial of legal aid to occupiers / farm dwellers

A particular difficulty encountered is the denial of legal aid to farm dwellers and the resulting frustration of seeking alternative means of ensuring access to justice for marginalised communities. This places additional pressure on the Commission, other Chapter 9 institutions and statutory bodies that are based in the urban areas and often do not have the capacity to handle time-consuming tenure related disputes in rural areas. There continues to be a need for the provision of legal representation for farm dwellers facing eviction and occupiers seeking secure tenure and access to land.

A human rights framework for security of tenure

There are various activities and programmes that could be pursued to promote security of tenure within a human rights framework. These include:

- actively promoting the values and precepts of the Constitution and the Bill of Rights through education and awareness campaigns;
- using the rights-based approach to place farm dwellers and occupiers at the centre of legal disputes involving insecurity of tenure;
- improving relationships between role players such as owners, occupiers, police and municipal officials to achieve sustainable results, such as respect for human rights and improved prospects for long-term security of tenure or secure ownership;
- ensuring that farm dwellers and occupiers have access to legal representation and assistance for land reform; and
- prioritising the allocation and use of resources to generate alternatives that will guarantee long-term security of tenure.

The chasm that haunts us

This article has shown that security of tenure is a human rights issue requiring protection in terms of our Constitution. The gaps between policies and laws and their implementation continue to haunt us as we seek to give expression to the promise of freedom, equality and justice. We need to strive to realise the commitments made when the Constitution was adopted, to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (*preamble of the Constitution*).

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Security of tenure from a children's rights perspective

Aoife Nolan

This article focuses on one key element of the right to adequate housing, namely security of tenure. It considers security of tenure from a children's rights perspective and discusses the specific obligations of states under international law in relation to guaranteeing security of tenure for children.

The impact of evictions on children

Probably the clearest violation of children's security of tenure is forced eviction. In its General Comment No. 7 on Forced Evictions, the Committee on Economic, Social and Cultural Rights (CESCR) stated that:

> Women, children, youth, older persons, indigenous people, ethnic and other minorities and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction (para 10).

This statement can be interpreted in two ways. First, the CESCR may mean that that the groups mentioned are subject to forced evictions more frequently than others are. I am unable to confirm this, although the Special Rapporteur on adequate housing observed in 2005 in a report on adequate housing as a component of the right to an adequate standard of living that children are often a large proportion of those evicted, particularly when evictions affect large numbers of (see UN Doc. E/CN.4/2005/48.)

Alternatively, the CESCR may be highlighting that the groups referred to are more vulnerable than others are in the context of forced evictions. This second possible interpretation is certainly true in relation to children. In addition to being especially vulnerable to forced evictions (due to their restricted ability to prevent them) and to the violence and trauma that may accompany them, children are also at a significant disadvantage in the aftermath of forced evictions.

They are vulnerable both physically (in terms of size, strength and their resultant decreased ability to provide for their physical needs) and psychologically (due to a lack of life experience and maturity, which make them susceptible to both psychological trauma and exploitation).

Forced evictions are probably the clearest violation of children's security of tenure.

Due to their nature and condition, children have a reduced capacity to meet their post-eviction housing rights needs either by obtaining or by creating sustenance from the resources of their environment (C. Wringe, *Children's Rights: A Philosophical* Study, 1981, at 135-6).

Furthermore, they are less likely to have the skills necessary to gain a stake in the resources of the community by negotiating special rights for themselves (i.e. rights which arise from transactions or relationships).

Thus, where children have no security of tenure and are forcibly evicted, they generally have a limited capability to provide a solution to their housing requirements themselves.

Security of tenure is not simply a crucial aspect of children's right to adequate housing. It is also a precondition for children's enjoyment of a whole range of other, non-housing rights, which may be violated by forced eviction. In the short term, children risk suffering breaches of their rights to bodily integrity, freedom from exploitation, privacy and freedom from torture, inhuman or degrading treatment or punishment. In the longer term, the reduced access to educational institutions and programmes, health ser- vices and social security benefits caused by homelessness will impact on their health, education and social security rights and have long-term detrimental effects on their development and future prospects.

Finally, when children and/or their families or caregivers do not enjoy security of tenure, they frequently live in constant fear of eviction. This is especially the case where children have previously experienced forced eviction. Such stress may affect their well-being and impact upon their health and development.

States' obligations

In its General Comment No.4 on the right to adequate housing (article 11(1)), the CESCR stated that

> all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats (para 8(a)).

The obligations of states' parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) with regard to guaranteeing the security of tenure of children will vary, depending on children's specific situations. In particular, the steps that states parties must take will differ depending on whether children are living with their families or other caregivers, or whether they are removed from the family context.

However, the Convention on the Rights of the Child makes it clear that whatever actions the government or other state agencies take in relation to ensuring children's security of tenure, they must ensure that the best interests of the child are a primary consideration (art 3(1)).

Children living in a family context

Where children live with their families or caregivers, it will arguably be adequate for the state to ensure that the parent(s) or care-giver(s), or the household as a whole benefits from security of tenure. In other words, where a parent or care-giver has legal protection against forced eviction, this will generally be sufficient to ensure that children also enjoy security of tenure.

Admittedly, the close relationship between parents (or caregivers) and children, coupled with the dependency of children on adults, does not establish an identity of their interests. One cannot always take for granted that providing parents with security of tenure will automatically ensure equal consideration of children's interests.

Furthermore, although important resources are often delivered to children from parents, this is not always the case. One example of this is the higher priority accorded to the education of male children than to that of female children by parents in some developing countries. This is merely one instance of the systemic discrimination frequently experienced by girl children in their access to socio-economic resources in a family context as a result of gender-discriminatory social, economic and cultural practices and attitudes.

Providing parents with security of tenure may not automatically ensure equal consideration of children's interests.

However, in general children's socio-economic conditions (including their living conditions) are almost invariably linked to those of parents or adults who live with them. Thus, one can be relatively confident that where parents or caregivers are guaranteed security of tenure, those children residing with them will benefit from this also.

One could also raise the question of whether, by only addressing the issue of security of tenure for adult family members or households as a whole the state is fully guaranteeing the right to adequate housing of individual children? Let us take a case in which the state provides a dwelling to a homeless adult caregiver on the understanding that she will ensure that her dependent children enjoy security of tenure. In this instance, does the fact that the dependent children have their housing-related needs met through the implementation of the rights of others amount to a true satisfaction of their right to adequate housing? Or is the State obliged to take steps to provide direct security of tenure for the child right-holders themselves, for instance, by naming them as joint tenants with their adult caregivers?

To answer this, one must look at article 27 of the Convention on the Rights of the Child (CRC), which enshrines the right of the child to a standard of living adequate for his or her physical, mental, spiritual, moral and social development. Article 27(2) provides that parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Article 27(3) continues that states parties:

> in accordance with national conditions and within their means, shall take appropriate measures to *assist parents and others responsible for the child to implement this right* and shall, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, clothing and *housing* (emphasis added).

As with the other economic, social and cultural rights enshrined in the CRC, states parties are obliged to undertake all appropriate legislative, administrative and other measures for the implementation of the right to an adequate standard of living to the maximum extent of their available resources and, where needed, within the framework of interna-

tional co-operation (art 4). A similar duty is imposed on states by the African Charter on the Rights and Welfare of the Child (ACRWC), which obliges them to take:

> in accordance with their means and national conditions all appropriate measures...to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to...housing (article 20(2) ACRWC).

The phrasing of article 27(2) of the CRC makes it clear that the primary obligation for satisfying children's right to an adequate standard of living, including housing, falls on the parent, with the state playing a supplementary role. Thus, it is arguable that, where a state enables parents to ensure that children enjoy an adequate standard of living, by, among other things, guaranteeing security of tenure for the adult-headed households of which children form part, then it has met its obligation under Article 27.

The primary obligation for satisfying children's right to housing falls on the parent, with the state playing a supplementary role.

In addition to their obligations under article 27, states parties to the CRC are obliged to ensure, to the maximum extent possible, the survival and development of the child (art 6(2)). The term 'development' in this context should not be construed in a narrow sense. It is only physical health that is intended, but also mental, emotional, cognitive, social and cultural development. In General Comment No. 5, the Committee stated that it:

> expects States to interpret 'development' in its broadest sense as holistic concept, embracing the child's physical, mental, spiritual, moral and psychological and social development (para 12).

This duty clearly includes the provision of security of tenure where this is necessary to ensure such survival and development. This duty is immediate and, unlike the right to an adequate standard of living, is not expressly subject to available resources.

Children removed from the family context

We now consider children removed from the family context – that is, children who are living without a parent or adult care-giver. Such children may be single or double orphans (i.e. a child who has lost one or both their parents) and may live alone or with siblings in child-headed households. UNICEF defines a child-headed household as one headed by a child aged 18 years or under.

Challenges to the security of tenure of children living without an adult parent or caregiver may come from within the family or community. In Africa, the growing phenomenon of property grabbing upon the death of children's parents frequently results in violations of children's security of tenure. Property grabbing also frequently occurs where children have lost their father and are still living with their mother or another female care-giver. This article does not, however, deal with this situation.

Few people in poorer communities in sub-Saharan Africa make official wills, which increases the risk that a deceased person's property will simply be taken by family members or by other members of the community. This may result in the forced displacement of children from family land or housing. Furthermore, even where legal protections of land and property rights are in place they may not be enforced effectively, resulting in children enjoying *de jure* but not *de facto* legal security of tenure. A strong legislative framework supporting children's inheritance rights and security of tenure will be inadequate in a context in which it is difficult to make claims or to have them enforced.

Furthermore, traditional or customary laws that result in land passing to (generally male) adult relatives over the heads of dependent children also poses a threat to children's enjoyment of security of tenure. This is a particular risk for girl children in the light of the patriarchal nature of customary law in many jurisdictions.

A recent example of an African domestic court addressing the negative impact of customary law on girl children is the South African case of *Bhe v. Magistrate Khayelitsha & Ors.* 2005 (1) BCLR 1 (CC). It centred on the customary law rule of male primogeniture, which, among other things, precludes daughters from inheriting from their parents. The Court held that it was inconsistent with the South African Constitution's equality provisions (section 9), the right to human dignity (section 10) and the rights of children (section 28).

In its General Comment No. 7 on forced evictions, the CESCR recognised that:

> Women in all groups are especially vulnerable [to the practice of forced eviction] given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation (para 10).

This undoubtedly also applies to girl children. Provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa seek to counter this discrimination by providing, among other things, that women (including girl children) and men have the right to inherit, in equitable shares, their parents' properties (art 21(2)). The Protocol also guarantees the right of women to equal access to housing and to acceptable living conditions in a healthy environment (art 16).

Obstacles to realising children's tenure security rights

The obstacles that states parties must take into account in their efforts to enforce children's security of tenure will frequently include:

- the lack of a legal framework providing for the protection of children's security of tenure;
- the challenges faced by children in accessing the formal justice system (e.g., financial costs, lack of physical access to formal law institutions);
- the non-registration of births and the resultant lack of legal identity for children;
- the non-registration of property; and
- the lack of legal education and dearth of knowledge of children's rights both on the part of children and communities more broadly.

A final issue the state must address is the stigma that children may experience in challenging the actions of their relatives or extended family, particularly where such action is permitted under customary law.

In its General Comment No. 4, the CESACR recognises that tenure:

> ...takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property (para 8(a)).

When discussing the issue of legal security of tenure in relation to children, it must be borne in mind that children lack legal capacity in most jurisdictions. In general, children needs their parents' or guardians' assistance to undertake legal transactions, such as acquiring, renting or disposing of property.

As stated above, where children are living with their parents or other adult caregivers, legal security of tenure is generally accorded to their adult caregivers rather than to the children themselves. This results in the child enjoying security of tenure through their caregivers and the legal capacity of the individual child is largely irrelevant.

However, children's lack of legal capacity may pose a major obstacle to guaranteeing security of tenure to those children living outside the family context.

Where security of tenure is guaranteed through some form of legal transaction (for instance, a lease), children may be unable to access legal protection against forced eviction, harassment and other threats.

'Children made adults by death'

It should be noted that regardless of the type of tenure experienced by children, the CESCR has made it clear that states parties should:

> 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 (para 8(a)).

Thus states parties will have to take into account and to address children's lack of legal capacity in fulfilling their obligation to provide them with legal security of tenure.

One option, (as pointed out by Waithira Ikumbu at a 2006 workshop on HIV/AIDS and children's property rights and livelihoods in Southern and East Africa) might be to recognise orphans and heads of child-headed households as 'children made adults by death', granting them the legal capacity to manage their parents' property and to enter into transactions such as leases and owner-occupation agreements to ensure that they benefit from legal security of tenure.

Obviously this option will only be effective where children have the requisite maturity or ability to pursue their rights through the legal system. Bearing in mind those challenges faced by children in accessing the formal justice system discussed above, this may not be possible in all (or even many) cases. Governments might also make provision for the appointment of household mentors with legal capacity in respect of child-headed households, without depriving those households of their autonomy (see further J. Sloth-Neilsen, *Realising the Rights of Chil-*

dren Growing up in Child-Headed Households, Community Law Centre, Bellville, 2005, at 37).

Another solution might be to develop a way of according security of tenure that does not require children to enter into contractual or other transactions of a formal legal nature. It is important to note that, in the absence of the provision of other state support services and assistance, granting children legal security of tenure is likely to be insufficient in terms of giving effect to their rights to an adequate standard of living and guaranteeing their survival and development.

Such an approach would also violate children's right to such protection and care as is necessary for their well-being (CRC, art 3(2)) and the right of children temporarily or permanently deprived of their family environment to special protection and assistance provided by the state (CRC, art 20(1)).

Children's right to be heard

Finally, in determining its approach in relation to guaranteeing children security of tenure, the state will have to consult children themselves.

This is consistent with the right of children to express their views freely in all matters affecting them, the views of the child being given due weight in accordance with the age and maturity of the child (CRC, art 12). It also gives effect to children's right to freedom of expression, including the right to receive and impart information (CRC, art 13).

Security of tenure is central to children's enjoyment of a range of their human rights and, under international law, states are obliged to ensure that children benefit from such rights. There are a wide variety of ways in which states might give effect to this duty. This article has outlined some of them, while highlighting various issues that states must address in their efforts to guarantee security of tenure for children.

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Case review

Johan van der Merwe

The meanings of the constitutional rights first, to have access to adequate housing (enshrined in section 26(1) of the Constitution), and second, to security of tenure (protected in section 26(3) of the Constitution), have been developed in the above three recent cases. Both relate to the impact of housing rights on the procedure to execute against residential property. The judgments advance the jurisprudence in this area. The principles emanating from this jurisprudence translate into rules of practice and procedures.

Standard Bank of South Africa Limited v Rudiger Marshall Saunderson and two others 2006 (2) SA 264 (SCA)

ABSA Bank Ltd v Xonti and another 2006 (5) SA 289 (CPD)

Campus Law Clinic (University of KwaZulu-Natal Durban v Standard Bank of South Africa Ltd 2006 (6) BCLR 669 (CC)

Section 26 of the Constitution provides that:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Saunderson

Does Jaftha apply to execution by bond holders against mortgaged property?

In the *Saunderson* case, the Supreme Court of Appeal (SCA) held that Blignaut J, in the court *a quo* – *Standard Bank of SA Ltd v Snyders and*

Eight Similar Cases 2005 (5) SA 610 (CPD) – was misplaced in his interpretation and application of *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

The latter is the first judgment from the Constitutional Court (Court) that engages and develops the negative obligations imposed by the right to adequate housing in section 26.

In this case the Court found that 'the right to have access to adequate housing', in section 26(1) embodies both a positive and negative aspect:

> Positively, the provision obliges the state to take measures to achieve the progressive realisation of the right. In its negative aspect, the right operates horizontally: it obliges private parties not to interfere unjustifiably with any person's existing access to adequate housing (Saunderson, paragraph 12 referring to paras 31–33 of *Jaftha*).

The Court thus declared unconstitutional provisions of the Magistrates' Court Act that permitted sales in execution against poor people's homes for trifling, unrelated debts without any form of judicial oversight.

By way of remedy, the Court read certain provisions into the Act providing for judicial oversight and a consideration of all relevant circumstances before a court orders execution against the immovable property of the debtor.

According to the SCA in *Saunderson, Jaftha* does not apply in every instance where execution is levied against residential property:

> It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s 26(1) rights and would therefore need to be justified as contemplated by s 36(1). ...One need only postulate execut-ing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all (para 15–17).

The *Saunderson* judgment then proceeds to apply the two-stage approach to the determination of an infringement of constitutional rights. These two stages comprise:

1. a demonstration of an infringement of constitutional rights; and
2. a demonstration that such infringement is justifiable, if at all.

The SCA held that the onus was on the debtors (mortgagees) to show that orders for execution would infringe section 26(1) of the Constitution.

Until this was done, the banks were not called upon to justify the grant of the orders of execution. Since none of the defendants in *Saunderson* had alleged or shown than an order for execution would infringe their rights of access to adequate housing, their was no burden on the banks to justify the orders it sought. Accordingly the properties were declared to be executable.

The right to have access to adequate housing embodies both a positive and negative aspect.

Practice and procedure

However, the SCA also held that it nevertheless remains possible that section 26(1) may be infringed by execution against bonded property. Bearing in mind that in most cases where an order for execution is sought the defendant is unlikely to seek legal advice, the Court held that it was desirable that the defaulting debtor should be informed, in the process of initiating action, that section 26(1) may affect the bond holder's claim to execution. The debtor would then be given the opportunity to raise relevant circumstances that might persuade a court that the debtor's section 26(1) rights would be infringed by the execution order.

Accordingly, the SCA in *Saunderson* concluded by ordering the following practice direction:

> The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:
>
> The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that that claim before the Court' (paragraph 27).

The *Xonti* case

In this case, Selikowitz J underscores the fact that section 26 is a matter of substantive law. Previously, an application for leave to execute and to declare property

executable was merely a procedural matter and could have been dealt with accordingly. Selikowitz J held that because a substantive right is sought, related litigation can no longer be dealt with merely on a procedural level.

Although only reported during September 2006, the *Xonti* judgment was delivered on 28 October 2005. It is referred to in note 14 of the *Saunderson* judgment, which was delivered on 15 December 2005. *Xonti* does not refer to actions, but to applications. An application for an order affected by section 26 (for example an order declaring that a property which is bonded may be sold in execution) may no longer be brought as a simple notice of motion. Such applications but must be brought on a long form of notice of motion, which calls upon the parties to indicate whether they wish to oppose the matter and provides them a time within which to file any affidavits they may wish to file in order to place information before the Court (at 290 E-F).

As a matter of logic, it seems clear that the practice direction in *Saunderson* applies to motion procedures as well and that the averments of the above practice note should be incorporated in the relevant notice of motion.

The Campus Law Clinic

Appeal against *Saunderson*

The Campus Law Clinic of the University of KwaZulu-Natal (Durban) approached the Constitutional Court for leave to appeal against the SCA decision in the *Saunderson* case on a public interest basis. Although the Constitutional Court held that the Campus Law Clinic did have public interest standing in the case, it held that it was not in the interests of justice for the application for leave to appeal to be granted. It did so on the basis that the appeal pertinently raised the constitutionality of s 27A of the Supreme Court Act, 1959 and Rule 31 of the Uniform Rules of Court (authorising the registrar to grant default judgment and an order permitting immediate execution against the immovable property of the debtor).

The High Court and the SCA had not expressly considered the constitutionality of these sections and thus it was not desirable for the Constitutional Court to consider this question as a court of first and last instance.

Conclusion

The norms on which the Constitution is founded and which inform section 26 seek to curb the unbridled power of the banks, creditors and land owners to deprive people of security of tenure and to trade people's need for adequate housing for capital gain. The cases under review have developed the statutory and common law to some extent in accordance to constitutional values.

In the *Saunderson* case, the SCA delivered a judgement which considers the application of section 26(1) and the *Jaftha* case to executions by bond holders against mortgaged property. The developments, particularly in the practice and procedure of executing against mortgaged property that were introduced by *Saunderson* and High Court cases like *Xonti,* illustrate that the constitutionally entrenched right of adequate housing is starting to have implications in areas where the powers of banks and other mortgage holders were previously unassailable.

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Highway of Tears

A new documentary by COHRE illustrates the human cost of forced evictions. It looks at the evictions that accompanied the construction of the Lyari Expressway in Karachi, Pakistan and focuses on three affected communities which reflect different stages of the eviction process.

Thousands of families have been evicted from their communities along the Lyari River and resettled in areas that lack adequate infrastructure, services, transport and – critically – access to livelihoods. Residents speak of isolation, increased poverty, bureaucratic neglect and broken promises – and in many cases have responded by moving back to central Karachi. This film leaves no doubt about the appalling human cost of evictions – the tears shed by Karachi's urban poor as a result of the Lyari Expressway are ample evidence of that.

Copies of *Lyari – Highway of Tears* on DVD can be ordered by sending details to: documentary@cohre.org.