

# Evictions in South Africa

Relevant International and National Standards





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National Standards

Lilian Chenwi

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## Abbreviations

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>BCLR</b>	Butterworths Constitutional Law Reports
<b>CC</b>	Constitutional Court of South Africa
<b>CESCR</b>	United Nations Committee on Economic, Social and Cultural Rights
<b>CPD</b>	Cape of Good Hope Provincial Division
<b>DVA</b>	Domestic Violence Act
<b>ESTA</b>	Extension of Security of Tenure Act
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IPILRA</b>	Interim Protection of Informal Land Rights Act
<b>LRLTA</b>	Land Reform (Labour Tenants) Act
<b>NBRA</b>	National Building Regulations and Building Standards Act
<b>PE</b>	Port Elizabeth
<b>PIE</b>	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
<b>RHA</b>	Rental Housing Act
<b>RLRA</b>	Restitution of Land Rights Act
<b>SA</b>	South African Law Reports
<b>SCA</b>	Supreme Court of Appeal of South Africa
<b>UN</b>	United Nations



# PART 1

Introduction

Apartheid laws and policies contributed to the unremitting evictions South Africa is facing today. During apartheid, millions of black people were arbitrarily evicted on a regular basis from informal settlements as a result of “influx control” policies. Evictions have continued after the end of apartheid and affect the most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of the society, including the poor, women and children, who are engaged in a daily struggle to survive. These evictions at times result in homelessness and, in most instances, they occur in a manner that is incompatible with the fundamental human rights contained in the Constitution as well as other procedural safeguards on evictions.

Forced evictions threaten a range of human rights. These include the rights to human dignity, security of the person, privacy, health, access to adequate housing, education<sup>1</sup> and life,<sup>2</sup> as well as freedom of movement and freedom to choose one’s residence. In addition, evictions have a drastic effect on people’s social, economic, physical and psychological well-being. In this regard, the African Commission on Human and Peoples’ Rights (African Commission), the supervisory body of the African Charter on Human and Peoples’ Rights to which South Africa is a party, has observed:

*Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness.*<sup>3</sup>

Every state has a legal obligation to respect, protect and fulfil the right to adequate housing and not to sponsor, tolerate or carry out forced evictions. This obligation arises from various international and national instruments protecting the right to adequate housing and other related human rights. States must ensure that the right to adequate housing, security of tenure and the protection against forced evictions are guaranteed without discrimination of any kind.

Section 26 of the Constitution of the Republic of South Africa, 1996 (the Constitution) guarantees to everyone the right to have access to adequate housing, requires the state to take reasonable legislative and other measures towards realising this right, and prohibits arbitrary evictions.<sup>4</sup> An eviction can be arbitrary in two respects: *procedurally arbitrary* because the procedure was unfair; and *substantively arbitrary* because there were not sufficient reasons for the eviction.<sup>5</sup>

The government has enacted legislation and policies which give effect to the housing and tenure rights enshrined in the Constitution and provide procedural and substantive protection to people faced with evictions. Legislation has defined an eviction as “the act of temporarily or permanently removing a person against his or her will from a building or structure or land that the person is occupying, including the deprivation of access to basic services that are linked to the right of residence”.<sup>6</sup>

1 Relocation often prevents children from attending school.

2 Use of force during evictions could result in death and the conditions to which people are exposed after eviction may be life-threatening.

3 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96, 2001 ACHRR 60 (ACHPR 2001) para 63.

4 See Part 3 of this book for the full provision.

5 See, for example, the meaning ascribed to “arbitrary” deprivations of property [s 25(1) of the Constitution] in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC) paras 67 and 99 to 100.

6 See s 1 of the Extension of Security of Tenure Act 62 of 1997; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and the Land Reform (Labour Tenants) Act 3 of 1996.

“The practice of forced eviction involves the involuntary removal of persons from their homes or land, directly or indirectly attributable to the State. It entails the effective elimination of the possibility of an individual or group living in a particular house, residence or place, and the assisted (in the case of resettlement) or unassisted (without resettlement) movement of evicted persons or groups to other areas.”<sup>7</sup>

“The term ‘forced evictions’ ... is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy without providing access to appropriate forms of legal or other protection.”<sup>8</sup>

In the light of South Africa’s legal and policy framework and its international and regional obligations, the South African courts have played a significant role in ensuring substantive and procedural protections to those facing evictions from their homes, particularly vulnerable and marginalised persons and communities. Furthermore, as a signatory to the Habitat Agenda, South Africa has committed itself to providing, as appropriate, alternative solutions when evictions are unavoidable.<sup>9</sup>

Despite these protections in legislation and jurisprudence, many people are unaware of their rights or face significant obstacles in enforcing them through the legal system. There is accordingly a need to increase awareness of the substantive and procedural standards that have to be respected prior to, during and after evictions, so that people have the relevant information to advance housing rights. This resource book provides accessible information on the human rights standards in international and national law relating to evictions. It is a useful guide for non-governmental organisations, academics, students, paralegals and legal practitioners assisting those facing eviction and advocating reform in housing rights and evictions.

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7 United Nations, Fact Sheet No 25 - *Forced Evictions and Human Rights*.

8 General Comment 7: Forced Evictions, adopted on 16 May 1997, UN doc. E/1998/22, annex IV, para 4.

9 Habitat Agenda, paras 40(n) and 98(b), adopted by the Second United Nations Conference on Human Settlements [Habitat II] at Istanbul in 1996.







# PART 2

International standards

## The relevance of international law

The right to adequate housing is recognised in a number of international human rights instruments, some of which South Africa has ratified (thus agreeing to be legally bound by them under international law). Various international bodies have developed detailed standards on evictions. Parliament and government should take these international standards into account in drafting legislation and policies relevant to evictions. The courts must also be guided by them in interpreting the right of access to adequate housing in the Constitution.

Section 39(1) of the Constitution requires the courts to interpret the Bill of Rights so as to promote the values that underlie an open and democratic society. Section 39(1) also requires the courts to take international law and foreign law into account in interpreting the rights. In addition, section 233 of the Constitution requires every court to interpret legislation as far as possible to be consistent with international law.

The Constitutional Court observed in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) that international law provides a framework within which the rights in the Constitution can be evaluated and understood. The Court pointed out that public international law would include “non-binding” as well as binding law, which can both be used as tools of interpretation.<sup>10</sup>

The courts have referred to international law and standards when interpreting the right to adequate housing in eviction cases, although the weight attached to any rule of international law varies from case to case.<sup>11</sup>

## United Nations Commission on Human Rights

The United Nations Commission on Human Rights (UNCHR), the predecessor to the UN Human Rights Council, was established on 10 December 1946 to examine, monitor and publicly report on human rights issues and violations in specific countries or territories worldwide. The UNCHR adopted a range of resolutions on forced evictions.

On 15 March 2006, the UN Human Rights Council was established to replace the UNCHR.<sup>12</sup>

The UN Human Rights Council is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. The Human Rights Council is also required to address and make recommendations on violations of human rights, including gross and systematic violations. It also promotes the effective co-ordination and the mainstreaming of human rights within the UN system.<sup>13</sup>

### Commission on Human Rights Resolution 1993/77: Forced evictions, adopted on 10 March 1993

The Commission affirmed that the practice of forced evictions is a gross violation of human rights, in particular the right to adequate housing (para 1). The Commission urged governments to:

<sup>10</sup> Para 35.

<sup>11</sup> *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) at para 26 [*Grootboom*].

<sup>12</sup> UN General Assembly resolution 60/251 of 15 March 2006, UN doc. A/RES/60/251.

<sup>13</sup> More information on the Human Rights Council is available on <http://www2.ohchr.org/english/bodies/hrcouncil>.

- take immediate measures, at all levels, to eliminate the practice of forced evictions;<sup>14</sup>
- give legal security of tenure to all people currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups;<sup>15</sup> and
- provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted. This has to be based on mutually satisfactory negotiations with those affected and be consistent with their wishes, rights and needs.<sup>16</sup>

### **Commission on Human Rights Resolution 2004/28: Prohibition of forced evictions, adopted on 16 April 2004**

The commission reaffirmed that the practice of forced eviction violates several human rights, in particular the right to adequate housing.<sup>17</sup> The commission urged governments to:

- take immediate measures, at all levels, to eliminate the practice of forced eviction by, among other things, repealing existing plans for forced evictions and any legislation allowing for forced evictions, and by adopting and implementing legislation ensuring the right to security of tenure for all residents;<sup>18</sup>
- protect all people who are currently threatened with forced eviction by adopting all necessary measures based upon effective participation, consultation and negotiation with affected people;<sup>19</sup>
- provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted. This has to be based on mutually satisfactory negotiations with the affected people and be consistent with their wishes, rights and needs;<sup>20</sup> and
- ensure that any eviction that is otherwise deemed lawful is carried out in a manner that does not violate any of the human rights of those evicted.<sup>21</sup>

## **United Nations Committee on Economic, Social and Cultural Rights**

The UN Committee on Economic Social and Cultural Rights (CESCR) is the body that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) by States Parties. It consists of 18 independent experts. It is one of the most important international instruments relating to socio-economic rights. At present, the main functions of the Committee are supervising state reports submitted in terms of the requirements of the ICESCR and adopting general comments in which the Committee provides its interpretation of the content of the relevant rights and the nature of the obligations they impose on states. Once the Optional Protocol to the ICESCR is adopted, enters into force and is ratified by the relevant states, the functions

14 Para 2.

15 Para 3.

16 Para 4.

17 Para 1.

18 Para 2.

19 Para 3.

20 Para 4.

21 Para 5.

of the Committee will also include considering individual and inter-state complaints as well as conducting inquiries relating to grave or systematic violations of socio-economic rights by a state that has ratified the Protocol.<sup>22</sup> Inter-state complaints are complaints submitted by one state against another.

General comments are important mechanisms for developing the jurisprudence of the CESCR. Though not legally binding, they have considerable weight and are important and useful for the courts and other human rights bodies in interpreting the right to adequate housing and the prohibition of arbitrary evictions.

In its General Comment 4, the CESCR has given guidance on the content of the right to adequate housing, which is among the rights guaranteed in article 11 of the ICESCR. It has also adopted a special general comment dealing specifically with forced evictions – General Comment 7. This defines the right not to be forcibly evicted as well as the nature of the protections which should be accorded to people facing eviction from their homes. It also deals with the obligations of international agencies in relation to evictions.

South Africa has signed the ICESCR, but has unfortunately not yet ratified it. Nevertheless, the ICESCR as well as the general comments are relevant to the interpretation of the right of access to adequate housing in section 26 of the Constitution. In some landmark judgments, the courts have referred to the ICESCR and the related general comments as a valuable source of guidance when interpreting section 26 of the Constitution.<sup>23</sup>

## General Comment 2: International technical assistance measures

General Comment 2 was adopted on 2 February 1990.<sup>24</sup> Generally, international agencies have to make every effort, at each phase of a development project, to ensure that the rights contained in the ICESCR are duly taken into account.<sup>25</sup>

The obligations of international agencies in relation to forced evictions require them particularly to avoid becoming involved in projects that, for example, use forced labour in violation of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the ICESCR, or involve large-scale evictions or displacement of people without the provision of all appropriate protection and compensation.<sup>26</sup>

## General Comment 4: The right to adequate housing

General Comment 4 was adopted on 12 December 1991.<sup>27</sup> It identifies a number of factors to be taken into account in determining whether particular forms of shelter can be considered to be “adequate housing” in terms of the ICESCR. These include: legal security of tenure; availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.<sup>28</sup>

The CESCR has set the following standards which are relevant to forced evictions:

- All people should have a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures to give legal security of tenure to those people and households currently lacking such protection, in genuine consultation with affected persons and groups.<sup>29</sup>

22 More information on the CESCR is available on <http://www2.ohchr.org/english/bodies/cescr>

23 See *Grootboom* para 45; *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) 1266F-J and 1267A.

24 UN doc. E/1990/23.

25 Para 8(d).

26 Para 6.

27 UN doc. E/1992/23.

28 Para 8.

29 Para 8(a).

- The right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence is a very important element of defining the right to adequate housing.<sup>30</sup>
- Forced evictions are incompatible with the requirements of the ICESCR and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.<sup>31</sup>

The CESCR also views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. These include legal appeals to prevent planned evictions or demolitions by issuing court-ordered injunctions and legal procedures seeking compensation following an illegal eviction.<sup>32</sup>

### General Comment 7: Forced evictions

General Comment 7 was adopted on 16 May 1997.<sup>33</sup> It goes further than General Comment 4 in detailing what governments, landlords and institutions must do to prevent forced evictions. It also contains detailed procedural and substantive safeguards pertaining to forced evictions.

**Before evictions**, states have to ensure that:

- legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out without appropriate safeguards, by private people or bodies;<sup>34</sup>
- all feasible alternatives are explored in consultation with the affected people to avoid, or at least minimise, the need to use force;
- legal remedies or procedures are provided to those who are affected by eviction orders; and
- all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.<sup>35</sup>

**The procedural protections to be applied in relation to forced evictions** include the following:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected people before the scheduled date of eviction;
- information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- government officials or their representatives to be present during an eviction, especially where groups of people are involved;
- all people carrying out the eviction to be properly identified;
- evictions should not take place in particularly bad weather or at night unless the affected people consent;
- provision of legal remedies; and

30 Para 9.

31 Para 18.

32 Para 17.

33 UN doc. E/1998/22, annex IV.

34 Para 9.

35 Para 14.

- provision, where possible, of legal aid to people who are in need of it to seek redress from the courts.<sup>36</sup>

### Important point to note

#### **A critical protection to be applied is the following:**

Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.<sup>37</sup>

The CESCR states further that international agencies should avoid involvement in projects that promote or reinforce discrimination against individuals or groups contrary to the provisions of the ICESCR, or involve large-scale evictions or displacement of people without the provision of all appropriate protection and compensation.<sup>38</sup>

## UN Special Rapporteur on Adequate Housing

The UN Commission on Human Rights appointed a Special Rapporteur on adequate housing in 2000 to focus on adequate housing as a component of the right to an adequate standard of living. The Commission further requested the rapporteur to report on the status, throughout the world, of the realisation of housing rights. The rapporteur is also required to promote, as appropriate, co-operation among and assistance to governments in their efforts to secure these rights, and to discuss possible areas of collaboration with governments, relevant UN bodies, specialised agencies and international organisations in the field of housing rights.

The current Special Rapporteur is Ms Raquel Rolnik from Brazil, who assumed her role from 1 May 2008. The previous Special Rapporteur, Mr Miloon Kothari from India, visited South Africa from 12 to 24 April 2007, to examine whether the right to adequate housing in the country had been realised. During his visit, he met with government representatives at state, provincial and municipal level, civil society organisations, social movements, academics and women's groups. He then produced a report on this mission.<sup>39</sup> With regard to evictions, he recommended the following:

- The government should stop the introduction of new provincial Bills that seek to authorise evictions and the eradication of slums until all national, provincial and local legislation, policies and administrative actions have been brought into line with constitutional provisions, local judgments and international human rights standards that protect the human right to adequate housing and freedom from forced eviction.
- The authorities are urged to implement court judgments on the right to adequate housing and on forced evictions and to seek guidance from these judgments when formulating national, provincial and local housing law and policies.
- The authorities should prosecute all farmers who illegally evict farm workers. Human rights education is necessary to ensure that all citizens know about their right to housing and to protection against eviction.<sup>40</sup>

36 Para 15.

37 Para 16.

38 Para 17.

39 UN doc. A/HRC/7/16/Add.3 of 29 February 2008.

40 The report as well as more information on the Special Rapporteur is available on: <http://www2.ohchr.org/english/issues/housing/index.htm>

## Basic Principles and Guidelines on Development-Based Evictions and Displacement

The Basic Principles and Guidelines were the result of an international workshop on forced evictions held in Berlin in June 2005. The workshop was organised by the United Nations Special Rapporteur on Adequate Housing in collaboration with the German Federal Foreign Office and the German Institute for Human Rights. The purpose of the workshop was to elaborate on existing guidelines aimed at assisting states and the international community in developing policies and legislation to address forced evictions.

The Basic Principles and Guidelines are contained in the report of the Special Rapporteur presented to the Human Rights Council at its fourth session in 2007.<sup>41</sup>

Development-based evictions are defined in the Basic Principles and Guidelines as including evictions that are often planned or conducted under the pretext of serving the “public good”. Examples of such evictions include those linked to development and infrastructure projects like large dams, large-scale industrial or energy projects, or mining and other extractive industries; land-acquisition measures associated with urban renewal, slum upgrades, housing renovation, city beautification, or other land-use programmes; property, real estate and land disputes; and major international business or sporting events.<sup>42</sup>

The Special Rapporteur has urged states to incorporate the Basic Principles and Guidelines into national laws and policies. These guidelines are particularly applicable to cases where evictions are planned as part of inner city “regeneration” initiatives such as the situation in the inner city of Johannesburg<sup>43</sup> or where people are evicted in order to facilitate the upgrading of an informal settlement such as the situation in Joe Slovo.<sup>44</sup>

The Basic Principles and Guidelines list, among others, detailed steps to be taken by states before, during and after evictions, which are similar to those stated in General Comment 7.

**Before an eviction**, the guidelines include:

- Giving appropriate notice to all people likely to be affected that an eviction is being considered and that there will be public hearings on the proposed plans and alternatives.
- The effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups.
- Giving a reasonable time period for public review of, comment on, or objection to the proposed plan.
- Providing opportunities and facilitating the provision of legal, technical and other advice to affected people about their rights and options.
- Holding public hearing(s) that provide(s) affected people and their advocates with opportunities to challenge the eviction decision or to present alternative proposals and to articulate their demands and development priorities.<sup>45</sup>

41 UN doc. A/HRC/4/18, 5 February 2007, Annex 1.

42 Para 8.

43 See *Occupiers of 51 Olivia Road, Berea Township, and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) [Olivia]

44 See *Various Occupants v Thubelisha Homes and Others Case* No CCT 22/08.

45 Para 37.



***During an eviction,*** the guidelines include:

- The mandatory presence of governmental officials or their representatives on site during evictions, who must identify themselves to the people being evicted and present formal authorisation for the eviction action.<sup>46</sup>
- Allowing access, upon request, to neutral observers, including regional and international observers.<sup>47</sup>
- The carrying out of evictions in a manner that does not violate the dignity and human rights to life and security of those affected.
- The taking of steps by states to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected.<sup>48</sup>
- Ensuring that any legal use of force is in accordance with the principles of necessity and proportionality, as well as the basic principles on the use of force and firearms by law enforcement officials and any national or local code of conduct consistent with international law enforcement and human rights standards.<sup>49</sup>
- Ensuring that evictions do not take place in bad weather, at night, during festivals or religious holidays, before elections, or during or just before school examinations.<sup>50</sup>
- Ensuring that no one is subject to direct or indiscriminate attacks or other acts of violence, especially against women and children, or arbitrarily deprived of property or possessions as a result of demolition, arson and other forms of deliberate destruction, negligence or any form of collective punishment. This includes protecting property and possessions that are left behind involuntarily against destruction and arbitrary and illegal appropriation, occupation or use.<sup>51</sup>
- Not requiring or forcing those evicted to demolish their own dwellings or other structures. However, the option to do so must be provided to them so that they can salvage possessions and building materials.<sup>52</sup>

***After an eviction,*** the guidelines include:

- The immediate provision, upon eviction, of just compensation and sufficient alternative accommodation, or restitution when feasible by states and other parties responsible for doing so.
- Ensuring, at the very minimum, that evicted people or groups, especially those who are unable to provide for themselves, have safe and secure access to: essential food, potable water and sanitation; basic shelter and housing; appropriate clothing; essential medical services; livelihood sources; fodder for livestock and access to common property resources previously depended upon; and education for children and childcare facilities.
- Ensuring that members of the same extended family or community are not separated as a result of evictions.<sup>53</sup>
- Making special efforts to ensure the equal participation of women in all planning processes and in the distribution of basic services and supplies.<sup>54</sup>

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46 Para 45.

47 Para 46.

48 Para 47.

49 Para 48.

50 Para 49.

51 Para 50.

52 Para 51.

53 Para 52.

54 Para 53.

**Important point to note**

Alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted.<sup>55</sup>

*The criteria for resettlement* that states must adhere to include:

- Identified relocation sites must fulfil the criteria for adequate housing according to international human rights law.<sup>56</sup>
- The resettlement must take place only after a comprehensive resettlement policy consistent with the present guidelines and internationally recognised human rights principles is in place.
- The human rights of women, children, indigenous peoples and other vulnerable groups must be equally protected; including their right to property ownership and access to resources.
- The person or organ proposing or carrying out the resettlement must be required by law to pay for any associated costs, including all resettlement costs.
- The right of those affected, as well as host communities, to the continuous improvement of living conditions must not be subject to infringement.
- The right of those affected to full and prior informed consent regarding relocation must be guaranteed and all necessary amenities, services and economic opportunities at the proposed site must be provided.
- The time and financial cost of travel to and from work or to access essential services should not place excessive demands upon the budgets of low-income households.
- The relocation sites must not be situated on polluted land or in immediate proximity to sources of pollution that threaten the right to the highest attainable standards of mental and physical health of the inhabitants.
- Those affected must be provided with sufficient information on all state projects and planning and implementation processes relating to the concerned resettlement, including information on the intended use of the eviction dwelling or site and its proposed beneficiaries.
- Those affected must be given the opportunity to participate fully in the resettlement process. In particular, states should take into account all alternative plans proposed by the affected people, groups and communities.
- If, after a full and fair public hearing, it is found that the resettlement still needs to proceed, the affected people must be given at least 90 days' notice before the date of the resettlement.
- Local government officials and neutral observers, properly identified, should be present during the resettlement so as to ensure that no force, violence or intimidation is involved.<sup>57</sup>

55 Para 43.

56 Para 55.

57 Para 56.

**Important points to note on the Basic Principles and Guidelines**

- States are required to explore fully all possible alternatives to evictions.
- States have an obligation to ensure that evictions occur only in exceptional circumstances, and any eviction must be: authorised by law; carried out in accordance with international human rights law; undertaken solely for the purpose of promoting the general welfare; reasonable and proportional; regulated so as to ensure full and fair compensation and rehabilitation; and carried out in accordance with the present guidelines.
- Any decision relating to evictions should be announced sufficiently in advance, in writing and in the local language, to all individuals concerned.
- An eviction notice should contain a detailed justification for the decision, including information on reasonable alternatives to eviction, the full details of proposed alternative accommodation, and where no alternatives exist, all measures taken and foreseen to minimise the adverse effects of evictions.
- All final decisions on eviction should be subject to administrative and judicial review.
- Evictions should not result in individuals becoming homeless or vulnerable to the violation of other human rights.
- States are required to make provision for the adoption of all appropriate measures to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available and provided, especially for those who are unable to provide for themselves.
- States are also required to take into account, in particular, all alternative plans proposed by the affected people, groups and communities.



# PART 3

Constitutional framework

The Constitution of South Africa recognises the injustices of the past and aims to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.<sup>58</sup> It calls for the improvement of the quality of life of all and equal protection under the law. The inclusion of a range of socio-economic rights in the Bill of Rights is central to the achievement of these fundamental constitutional purposes. These rights include the protection of housing and land rights, security of tenure and the protection of everyone from arbitrary evictions.

## Access to land

### Section 25

- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

The Constitutional Court has observed that “the stronger the right to land, the greater the prospect of a secure home”.<sup>59</sup>

Section 25 is thus an integral component of the right to have access to adequate housing. The state is required to adopt appropriate measures to enable people to gain access to land on an equitable basis. It is also required to adopt legislation to ensure security of tenure or comparable redress to people whose tenure is insecure as a result of past racially discriminatory laws or practices.

## Access to adequate housing

### Section 26

- (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.

Section 26 is aimed at ensuring that every person has access to adequate housing and the state may not interfere with such access unless justifiable.

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<sup>58</sup> Preamble to the Constitution.

<sup>59</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 19

### The obligations imposed by section 26

- Section 26(1), at the very least, requires the state, other entities and people to desist from preventing or impairing the right of access to adequate housing.<sup>60</sup> Hence, any measure which removes from people their pre-existing access to adequate housing limits the right to housing in the Constitution.<sup>61</sup>
- Section 26(2) places a duty on the state to adopt appropriate measures to ensure that the right of access to adequate housing is effectively realised on a progressive basis. However, it should be noted that it is not only the state that is responsible for the provision of housing, but individuals and other agents within the society must be enabled by legislative and other measures to provide housing. The state's duty is to create the conditions for access to adequate housing for people at all economic levels.<sup>62</sup>
- Section 26(3) requires anyone wanting to evict people or demolish homes to get a court order first. Before making such an order, the court must consider all relevant circumstances. It also prohibits the state from passing laws that allow for arbitrary evictions.

## Children's right to basic shelter

### Section 28

- (1) Every child has the right ...
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic healthcare services and social services.

### The obligations imposed by section 28(1)

- Children have the right to parental or family care and only where this is lacking do they have the right to alternative appropriate care.
- The obligation to provide shelter in section 28(1)(c) is imposed primarily on the parents or family and only alternatively on the state where children are removed from their families.<sup>63</sup>

## Other constitutional provisions relevant to housing rights and evictions

The Bill of Rights of the Constitution contains other provisions that could be useful in enforcing housing rights and the right not to be arbitrarily evicted. These provisions include, among others, the right to equality,<sup>64</sup> the right to dignity,<sup>65</sup> the right to life,<sup>66</sup>

60 *Grootboom* para 34.

61 See *Jafftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC), para 34 [Jafftha], which affirms this negative obligation.

62 *Grootboom* para 36.

63 *Grootboom* para 77.

64 s 9.

65 s 10.

66 s 11.

access to information,<sup>67</sup> the right to just administrative action,<sup>68</sup> access to courts,<sup>69</sup> limitation of rights,<sup>70</sup> enforcement of rights<sup>71</sup> and interpretation of the Bill of Rights.<sup>72</sup> In addition to the Bill of Rights, chapters 3, 5, 6 and 7 of the Constitution stipulate the obligations and legislative requirements of the different spheres of government.

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67 s 32.  
68 s 33.  
69 s 34.

70 s 36.  
71 s 38.  
72 s 39.



# PART 4

National legislation



## The Housing Act

The main legislation which aims to give effect to the right to have access to adequate housing is the Housing Act 107 of 1997. It clarifies the roles and responsibilities of the three spheres of government and provides a framework for housing delivery in South Africa.

### What the Housing Act does

The Housing Act:

- sets out the basic principles that must guide housing development;
- defines the roles of national, provincial and local government on housing;
- commits local government to taking reasonable steps to ensure that all people in its area have access to adequate housing progressively; and
- places a duty on municipalities to set housing delivery goals and identify land for housing development.

### Who the Housing Act covers

The Housing Act applies to everyone.

#### Important definition in the Housing Act

##### Housing development

Housing development is defined in section 1 of the Act as “the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to -

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- (b) potable water, adequate sanitary facilities and domestic energy supply.”

### Basic principles that must guide housing development

The basic principles that must guide housing development as outlined in section 2 of the Housing Act include:

- giving priority to the needs of the poor in respect of housing development;
- consulting meaningfully with individuals and communities affected by housing development;
- providing as wide a choice of housing and tenure options as is reasonably possible;
- ensuring that housing development is economically, fiscally, socially and financially affordable and sustainable;
- administering housing development in a transparent, accountable and equitable manner;

- encouraging and supporting individuals and communities – including, but not limited to, co-operatives, associations and other bodies which are community based – in their efforts to fulfil their own housing needs. This should be done by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community;
- promoting education, consumer protection and conditions in which everyone meets their obligations in respect of housing development;
- promoting racial, social, economic and physical integration in urban and rural areas as well as promoting the provision of community and recreational facilities in residential areas;
- establishing, developing and maintaining socially and economically viable communities and safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;
- promoting measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in housing development; and
- facilitating active participation of everyone involved in housing development.

## Other legislation relevant to evictions

Before the advent of the 1996 South African Constitution, eviction laws were regulated in terms of the common law and various pieces of apartheid land legislation. Therefore in addition to the Housing Act, which deals with the progressive realisation of housing rights, a number of laws have been enacted which define the procedures and circumstances in which the eviction of various types of occupiers may occur. This legislation aims to give effect to the constitutional provision of section 26(3). It seeks to protect lawful and unlawful occupiers from unfair evictions through the granting of tenure rights and the consideration of circumstances that prevent homelessness and further abuses of other rights such as the right to dignity, health and life. Some of this legislation places clear limits on the circumstances in which an eviction may occur.

This legislation includes:

- The Extension of Security of Tenure Act 62 of 1997 (ESTA);
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE);
- Land Reform (Labour Tenants) Act 3 of 1996 (LRLTA);
- The Rental Housing Act 50 of 1999 (RHA);
- The Restitution of Land Rights Act 22 of 1994 (RLRA); and
- The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA).

The relevant provisions in the above laws as well as provisions in other legislation that place limits on evictions are set out in the subsequent parts of this book.





# PART 5

National policies and programmes

## The White Paper on Housing

The White Paper on a New Housing Policy and Strategy for South Africa was adopted in 1995. This White Paper sets out government's housing policy and outlines the responsibilities of the three spheres of government – national, provincial and local – in relation to housing delivery. It also aims at promoting stability in the housing market.

### What it does

The White Paper recognises the following:

- housing is a basic human right and it is the duty of the government to take steps and create conditions that will lead to the effective realisation of the right to adequate housing for all;
- it is the duty of government not to take steps that encourage or cause homelessness;
- government must ensure conditions suitable for the delivery of housing;
- communities must be involved in the housing development process;
- individuals have the right of freedom of choice in satisfying their housing needs; and
- the principle of non-discrimination in the delivery of housing.

## Housing Assistance in Emergency Housing Situations

The national housing programme, Housing Assistance in Emergency Housing Situations (Emergency Housing Programme), contained in chapter 12 of the National Housing Code, was adopted in 2004. It seeks to give effect to the judgment of the Constitutional Court in the *Grootboom* case. In this judgment, the Constitutional Court ordered the state to “devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing”.<sup>73</sup> The Court added that the programme must include reasonable measures “to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.<sup>74</sup>

### What it does

It sets out the rules relating to assistance to people who, for reasons beyond their control, find themselves in an emergency housing situation, such as disasters, evictions or threatened evictions, demolitions or imminent displacement, or immediate threats to life, health and safety.

### The kind of assistance

The assistance is provided in the form of grants to municipalities through the provincial government concerned, to enable municipalities to provide secure access to land, basic

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<sup>73</sup> Para 99(2)(a).

<sup>74</sup> Para 99(2)(b).

municipal engineering services or shelter in a wide range of emergency situations of exceptional housing need. The assistance is of a temporary nature, apart from assistance with the repair or rebuilding of damaged permanent formal housing.

### **Activities covered by the grant**

Municipalities can use the grant for the following activities:

- compiling project applications;
- purchasing or leasing land, as a last resort, where the municipality owns no alternative land;
- settlement planning;
- basic municipal engineering services design;
- land surveying;
- providing basic municipal engineering services as provided for in the programme;
- providing temporary shelter or supplying materials for its construction;
- relocating and resettling affected people who qualify for assistance under the programme and who are compelled, due to circumstances beyond their control, to relocate or resettle to an approved area;
- repairing or reconstructing damaged formal housing as well as related municipal engineering services; and
- procuring any housing goods, services or materials, in terms of the programme directives, or in the process of achieving any of the above activities.

### **Activities not covered by the grant**

The grant may not be used for the following activities:

- any bulk and connector engineering services in existing developments that were damaged;
- normal housing products in terms of project-linked subsidies;
- any litigation;
- street lighting and electrical services;
- refuse removal;
- any operation, maintenance and management costs of developments;
- any other aspect provided for under another assistance programme of government, except where assistance from such programme is not available or appropriate;
- repair of dams, boreholes and pumps, delivery of water supplies by tanker, and drilling and equipping of new boreholes, which will primarily be the responsibility of the municipality, water services authority or provider; and
- repair of eroded access roads, which will normally be the responsibility of the municipality.

## In the case of an eviction

Where people are evicted from land or unsafe buildings and can no longer live on the land or in the buildings temporarily or permanently, and do not qualify for assistance under the Emergency Housing Programme, they will be relocated to a temporary settlement area. They will stay there until a permanent housing solution becomes available.

### **Points to note on the Emergency Housing Programme**

- municipalities are encouraged to assess in advance the emergency housing needs in their areas and take definite steps to address them;
- the housing problem must be urgent;
- beneficiaries can also include people who do not qualify for subsidies under the Housing Subsidy Scheme, such as single persons with no dependents;
- the assistance provided is the first step towards a permanent housing solution;
- the assistance provided is of a temporary nature except assistance with the repair or rebuilding of damaged permanent formal housing; and
- people who get assistance under this programme can later, if they qualify for a housing subsidy, apply for subsidies for permanent housing under the Housing Subsidy Scheme.



# PART 6

Eviction procedures under  
the Extension of Security  
of Tenure Act



## What ESTA does

The Extension of Security of Tenure Act:

- protects occupiers against unfair evictions by a landowner;
- sets out the rights and duties of owners and occupiers, which include the rights to human dignity, privacy, freedom and security of the person, freedom of religion, belief, opinion and of expression, and to freedom of movement;
- regulates the conditions and circumstances under which the right of people to reside on land may be terminated;
- regulates the conditions and circumstances under which people whose right of residence has been terminated may be evicted from land;
- provides special protection to occupiers who are over 60 and have lived on the land for ten years or more or are employees or former employees and because of ill health, injury or disability are unable to supply labour; and
- criminalises unlawful evictions under the Act.

## Who and what ESTA covers

ESTA applies to unlawful occupiers who previously had some form of consent or right to occupy the land in question. It also applies to all rural and peri-urban land. However, it does not apply to land in townships.

### Important point to note

**The following persons are excluded from the category of occupiers:**

- a person using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes;
- a person who has an income of more than R5000 a month; and
- a labour tenant under the Land Reform (Labour Tenants) Act.

### Important definitions in ESTA

**The following definitions are contained in section 1 of ESTA except as stated otherwise.**

#### **Occupier**

An occupier is a person living on land which belongs to another person, and who has on or since 4 February 1997 had the consent (permission) of the owner or another right in law to live there. In addition, a person shall be deemed to be an occupier if that person who lived on or used land on 4 February 1997 with the consent of the owner and such consent was lawfully withdrawn before the above date but the person continued to live on or use the land.<sup>75</sup>

#### **An owner or person in charge**

An owner is the owner of the land at the time of occupation or use of the land.<sup>76</sup> A person in charge refers to a person who at the time of occupation or use of the land had or has legal authority to give consent to a person to reside on the land. A person in charge also refers to a person who has been certified by the Director-General of the Department of Land Affairs to be the owner or person in charge.

<sup>75</sup> s 3(2).

<sup>76</sup> s 1(1).

**Consent**

Consent means express or tacit (unspoken or implicit) permission of the owner or person in charge of the land. Consent given by the owner or person in charge of the land is binding on his or her successor.<sup>77</sup>

For purposes of civil proceedings in terms of ESTA, a person who has continuously and openly resided on land for a period of one year is presumed to have consent unless the contrary is proved,<sup>78</sup> and a person who has continuously and openly resided on land for a period of three years is deemed to have done so with the knowledge of the owner or person in charge.<sup>79</sup> However, sub-ss (4) and (5) do not apply to any land held by or registered in the name of the state or an institution exercising powers on behalf of the state.<sup>80</sup>

## Eviction procedure under ESTA

ESTA sets out the circumstances for granting an eviction order for two groups of occupiers: (1) those who became occupiers on or before 4 February 1997; and (2) those who became occupiers after 4 February 1997.

A landowner is required to get a court order before evicting an unlawful occupier. A court can only make such an order if:

- the occupier's right of residence has been terminated in terms of the Act;
- the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- the procedures for an eviction in terms of the Act have been complied with; and
- the owner or person in charge has, after the termination of the right of residence, given notice of the intention to obtain an eviction order to the occupier, the local municipality and the head of the relevant provincial office of the Department of Land Affairs.<sup>81</sup>

**Point to note on the eviction notice**

The notice of the intention to obtain an eviction order must be in writing, given not less than two months after the termination of the right of residence, and must set out the grounds on which the eviction is based.

In addition to the above, the court is required to request a probation officer or an officer of the department or any other officer in the employment of the state, as may be determined by the Minister of Land Affairs, to submit a report within a reasonable period on the following:

- the availability of suitable alternative accommodation to the occupier;
- how the eviction will affect the constitutional rights of any affected persons, including the rights of the children, if any, to education; and
- any undue hardships that an eviction would cause the occupier.<sup>82</sup>

77 s 24(2).

78 s 3(4).

79 s 3(5).

80 s 3(6).

81 s 9.

82 s 9(3).

**Suitable alternative accommodation**

ESTA defines "suitable alternative accommodation" in section 1(1) as that which is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction. It must also be suitable having regard to:

- the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
- their joint earning abilities; and
- the need to reside in proximity to job opportunities or other economic activities if they intend to be economically active.

**Points to note on termination of the right of residence**

- Where the right of residence of an occupier who is an employee arises solely from an employment agreement, it may only be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act 66 of 1995.
- Where an occupier has resided on the land in question or any other land belonging to the owner for ten years and has reached the age of 60 years, or is an employee or former employee of the owner or person in charge, and as a result of ill health, injury or disability is unable to supply labour to the owner or person in charge, the occupier's right of residence cannot be terminated. However, if the occupier has committed a breach in terms of section 10(1)(a), (b) and (c) of ESTA (set out below), then the right of residence can be terminated. The mere refusal or failure to provide labour does not constitute such a breach.
- If the occupier dies, the right of residence of an occupier who was his or her spouse or dependant may be terminated only after giving one year's written notice to leave the land. This applies where there has been no breach in terms of section 10(1) of the Act (set out below) on the part of the spouse or dependant.

## Eviction of a person who was an occupier on or before 4 February 1997

The procedure for evicting a person who was an occupier on or before 4 February 1997 is set out in section 10 of the Act. Under section 10(1)(a–d), a court may grant an order for the eviction of such a person if:

- The occupier has breached section 6(3) of the Act (set out below) and the court is satisfied that the breach is material and that the occupier has not remedied it.
- The owner or person in charge has complied with the terms of any agreement relating to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, and has not remedied the breach within one calendar month of being given notice, although reasonably able to do so.

- The occupier has committed such a fundamental breach of the relationship with the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.
- The occupier is an employee whose right of residence arises solely from that employment and has voluntarily resigned.

### Section 6(3) of ESTA

Prohibits an occupier from intentionally and unlawfully causing harm to any other person, occupying the land or materially damaging the property of the owner or person in charge. It also prohibits engaging in conduct that threatens or intimidates others who lawfully occupy the land or other land in the vicinity, or enabling or assisting unauthorised people to establish new houses on the land in question.

Where the above four circumstances do not apply, a court may grant an eviction order if suitable alternative accommodation is available to the occupier within nine months after the date of termination of his or her right of residence.

A court may also grant an eviction order if it is fair in the following situations:

- where suitable alternative accommodation is not available to the occupier within the stated time period;
- where the owner or person in charge provided the house where the occupier lives.
- where the business of the owner or person in charge will be seriously prejudiced unless the house is available for occupation by another person, who will be employed.

In deciding whether it is fair to grant an order for eviction, the court must consider the following:

- the efforts which the owner or person in charge and the occupier have made to secure suitable alternative accommodation for the occupier; and
- the interests of each side, including whether refusing to grant an eviction will cause the owner or person in charge more hardship than the occupier will experience if the eviction order is granted.

## Eviction of a person who became an occupier after 4 February 1997

The procedure for evicting a person who became an occupier after 4 February 1997 is set out in section 11 of the Act. A court may grant an order for the eviction of such a person if:

- It was an express, material and fair term of the consent granted to the occupier to live on the land for a specific period, that period has come to an end, and the court believes that it is fair to evict the occupier.
- The court, for any other reason, thinks that it is fair to do so.

In deciding whether it is fair to grant an order for eviction, the court must consider the following:

- the period that the occupier has resided on the land in question;
- the fairness of the terms of any agreement between the parties;
- whether suitable alternative accommodation is available to the occupier;
- the reason for the proposed eviction; and
- the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

#### **Points to note on the eviction date**

- Once a court orders the eviction of an occupier, it is required under section 12 of ESTA to determine:
  - a just and equitable date on which the occupier shall vacate the land (first date); and
  - the date on which the eviction order may be carried out (second date) in case the occupier has not vacated the land on the first date.
- The relevant factors that the court must consider in determining a just and equitable date are:
  - the fairness of the terms of any agreement between the parties;
  - the balance of the interests of the owner or person in charge, the occupier and the remaining occupiers on the land; and
  - the period that the occupier has resided on the land.

## **Urgent eviction proceedings under ESTA**

ESTA makes provision under section 15 for urgent eviction applications for the removal of an occupier from land pending the outcome of proceedings for a final order. For a court to grant an order in this regard, it has to be established that:

- there is a real and imminent danger of substantial injury or damage to any person or property if the occupier is not immediately removed from the land;
- there is no other effective remedy available;
- the likely hardship to the owner or any other affected person if an order for removal is not granted exceeds the likely hardship to the occupier if an order for removal is granted; and
- adequate arrangements have been made for the reinstatement of anybody evicted if the final order is not granted.

Before commencing urgent eviction proceedings, the owner or person in charge is required to give reasonable notice of the application to the local municipality and to the head of the relevant provincial office of the Department of Land Affairs for his or her information.

## Mediation and arbitration

ESTA provides in section 21 that a party to a dispute may request the Director-General of the Department of Land Affairs or an officer of that department who has been designated by the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle the dispute in terms of ESTA.

In addition, section 22 makes provision for the use of arbitration in terms of the Arbitration Act 42 of 1965 if the parties to the dispute choose to do so. In which case, the parties may appoint a person from the panel of arbitrators established in terms of section 31(1) of the Land Reform (Labour Tenants) Act.

### The difference between mediation and arbitration

**Mediation** of a dispute involves using a neutral third party (a mediator) to act as a guide or negotiator. The mediator acts as a facilitator and not a decision-maker. The mediator may or may not be a legal professional.

**Arbitration** is generally more formal than mediation. It is more like a court proceeding. The neutral third party (an arbitrator) makes decisions on how the dispute must be resolved. The arbitrator is a legal professional, such as a retired or active judge or an experienced attorney.

### Points to note on mediation and arbitration under ESTA

- The parties have the right to, at any time and by agreement, appoint another person to facilitate meetings or mediate the dispute, on the conditions that the Director-General of the Department of Land Affairs may determine.
- The discussions and submissions made during mediation are confidential unless the parties agree otherwise.
- The parties to the arbitration are not restricted to appointing only a person who is on the panel of arbitrators established in terms of the Land Reform (Labour Tenants) Act.

## Criminal offences and penalties

Section 23 makes it a criminal offence to evict an occupier under the Act without a court order. Any person who contravenes this provision shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.

The Act also makes provision for private prosecutions in accordance with the Criminal Procedure Act 51 of 1977.





# PART 7

Eviction procedures under  
the Prevention of Illegal  
Eviction from and Unlawful  
Occupation of Land Act



## What PIE does

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act:

- prohibits unlawful eviction;
- sets out the procedures for the eviction of unlawful occupiers;
- reinforces the court order requirement under section 26(3) of the Constitution.
- decriminalises squatting and repeals the Prevention of Illegal Squatting Act 52 of 1951 (PISA) and other obsolete laws;
- notes that special consideration needs to be given to the rights of the elderly, children, disabled persons and particularly households headed by women; and
- criminalises unlawful evictions under the Act.

## Who and what PIE covers

PIE applies to unlawful occupiers who did not have consent to occupy the land in question. PIE also applies to all land throughout South Africa (without stating any exceptions as is the case with ESTA).

### Important points to note

#### PIE does not apply to:

- people who occupy land with the consent of the owner or person in charge, or have the right to occupy the land;
- people who occupy land and are protected by ESTA;
- people who have informal right to land and are protected by the Interim Protection of Informal Land Rights Act.

PIE does not apply to business premises or property which is being leased for business purposes, unless used as a home.<sup>83</sup>

### Important definitions in PIE

The following definitions are contained in section 1 of PIE except as stated otherwise.

#### Unlawful occupier

PIE defines an unlawful occupier as a person living on land without the express or tacit (unspoken or implicit) consent of the owner or person in charge, or without any other legal right to occupy the land (s 1).

#### Consent

Consent as used under PIE means the express or tacit consent, whether in writing or not, of the owner or person in charge to the occupation by the occupier of the land in question (s 1).

#### An owner or person in charge

An owner refers to the registered owner of land, which includes an organ of state. A person in charge is someone who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question (s 1).

<sup>83</sup> *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 20.

## Eviction procedure

PIE sets out the procedures for evictions carried out by two groups of people: (1) an owner or person in charge; and (2) an organ of state.

### Eviction instituted by an owner or person in charge

Under section 4 of PIE, an owner or person in charge can institute proceedings to evict an unlawful occupier. Before the hearing, written and effective notice of the proceedings must be served by the party initiating the litigation on the unlawful occupier and the municipality having jurisdiction.

#### Notice of eviction by owner or person in charge

This notice of eviction proceedings must be served at least 14 days before the hearing of the proceedings.

In addition, the notice must:

- state that proceedings are being instituted in terms of section 4(1) for an order for the eviction of the unlawful occupier;
- indicate on what date and at what time the court will hear the proceedings;
- set out the grounds for the proposed eviction; and
- state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

***Where an unlawful occupier has occupied the land in question for less than six months*** at the time when the eviction proceedings are started, a court may grant an eviction order if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

***Where an unlawful occupier has occupied the land in question for more than six months*** at the time when the eviction proceedings are started, a court may grant an eviction order if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances. These circumstances include:

- whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier. There is an exception where the land is sold in a sale of execution pursuant to a mortgage.
- the rights and needs of the elderly, children, disabled persons and households headed by women.

**Important point to note**

The main criterion as to whether an eviction should proceed and how it should proceed is whether the eviction will be “just and equitable”. This amounts to asking whether the eviction will be fair. This criterion is emphasised in section 4(6) and (7) and section 6(1) of PIE.

## Eviction instituted by an organ of state

An organ of state may institute proceedings, under section 6 of PIE, for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage.

The organ of state is required to give notice to the owner or person in charge of the land before instituting eviction proceedings.

**Notice of eviction by organ of state**

The notice of eviction proceedings must be in writing and served at least 14 days before the hearings to the owner or person in charge of the land.

A court may grant an eviction order if it deems it just and equitable to do so, after considering all the relevant circumstances and if:

- the occupier is occupying a building or structure on the land without the consent of that organ of state; or
- it is in the public interest to grant the eviction order.

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*Public interest as used under PIE includes “the interest of the health and safety of those occupying the land and the public in general”.*<sup>84</sup>

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In deciding whether it is fair to grant an order for eviction, a court is required to consider the following:

- the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- the period the unlawful occupier and his or her family have resided on the land in question; and
- the availability to the unlawful occupier of suitable alternative accommodation or land.

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84 s 6(2).

## Urgent eviction proceedings under PIE

Despite the procedures for evictions instituted by an owner or person in charge stated above, section 5 of PIE allows for the owner or person in charge to institute urgent eviction proceedings for the eviction of an unlawful occupier pending the outcome of proceedings for a final order.

Similar to the procedure under section 4, a court is required to give written and effective notice to the unlawful occupier and the local municipality of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier.

### **The eviction notice in urgent eviction proceedings**

#### **The notice must be given before the hearing of the proceedings and must state:**

- that urgent eviction proceedings will be instituted in terms of the Act for an order for the eviction of the unlawful occupier;
- the date and time the court will hear the proceedings;
- the grounds for the proposed eviction; and
- that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

In granting an urgent eviction order, a court must be satisfied that:

- there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not immediately evicted from the land;
- the likely hardship to the owner or any other affected person if an order for eviction is not granted, is greater than the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
- there is no other effective remedy available.

## Mediation

PIE makes provision under section 7 for mediation of disputes. Where the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land, the municipality may appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle the dispute in terms of PIE.

Where the municipality is the owner of the land in question, the member of the executive council designated by the premier of the province concerned, or his or her nominee, may appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle the dispute in terms of PIE.

**Points to note on mediation under PIE**

- The parties may at any time, and by agreement, appoint another person to facilitate meetings or mediate the dispute. The conditions are, however, determined by the municipality or the member of the Executive Council, respectively.
- The discussions, disclosures and submissions made during the mediation process are confidential, unless the parties agree to the contrary.

## Criminal offences and penalties

PIE makes it a crime to solicit, whether directly or indirectly, any money or other consideration as a fee or charge for arranging or organising or permitting a person to occupy land without the consent of the owner or person in charge of that land.<sup>85</sup> The offence is punishable with imprisonment not exceeding two years or a fine or both.<sup>86</sup>

Furthermore, section 8 makes it a crime to evict an unlawful occupier under the Act without an order of court. Any person who contravenes this provision is subject, if convicted, to a fine, or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment. PIE also makes provision for private prosecutions.<sup>87</sup>

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*With regard to how courts should approach PIE evictions, see also the case discussions in Part 15 of this book.*

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## Proposed amendments to PIE

PIE is currently under revision and the proposed amendments, among others, seek to repeal the distinction between persons occupying land for less than six months and persons occupying land for more than six months, as the distinction constitutes unequal protection of a person's right not to be evicted as afforded by section 26(3) of the Constitution. However, one of the problematic aspects of the amendments is the proposed narrowing of the ambit of PIE to exclude some unlawful occupiers, for instance ex-tenants, ex-mortgagors and ex-owners of land, from the protection of PIE, despite the fact that they are not currently protected by other legislation.<sup>88</sup>

### Notice requirement (section 4(2))

The proposed amended section 4(2) recognises that the serving of an eviction notice is not the function of a court. The proposed amended provision pertaining to the giving of

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<sup>85</sup> s 3(1).

<sup>86</sup> s 3(2).

<sup>87</sup> s 8(5).

<sup>88</sup> See the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment B8-2008. Parliament's Housing Committee has noted that the Bill needs much more work and that the participation of the Department of Land Affairs was required to ensure its compatibility with ESTA. The Housing Committee was concerned that the Bill did not, among other things, extend the protection granted to illegal squatters to farm workers (see Land Occupational Bill dumped by Parliament, *Legalbrief Today*, Issue No 2127, August 2008).

notice on eviction proceedings is similar to that under ESTA. The proposed amendment in this regard is as follows:

- The owner or person in charge must give at least two months' notice before the hearing of proceedings.
- The notice has to be given to the unlawful occupier, the head of the provincial office of the national Department of Land Affairs in whose jurisdiction the land is situated, the relevant provincial department of housing, and the relevant municipality.

### **Period of occupation (section 4(6))**

The proposed amended section 4(6) does not distinguish between persons occupying for less than six months and persons occupying for more than six months. A single set of criteria will be applicable in all cases of unlawful occupation.

### **Relevant circumstances (section 4(6))**

The relevant circumstances to be considered, as stated in the proposed amended section 4(6), are:

- the circumstances under which the unlawful occupier occupied the land;
- the period of occupation;
- the availability to the unlawful occupier of suitable alternative accommodation or land; and
- the rights and needs of the elderly, children, disabled persons and households headed by women.

### **Institution of proceedings by an organ of state (section 6(1))**

Under the proposed amended section 6(1), an organ of state has to be the owner or person in charge of the land from which it seeks the eviction of unlawful occupiers. The exception relating to an unlawful occupier who is a mortgagor and to land that is sold in a sale of execution pursuant to a mortgage (stated above) has been deleted in the proposed amendment.

### **Relevant circumstances (section 6(3))**

The relevant circumstances to be considered, as stated in the proposed amended section 6(3) are those stated in section 4(6):

- the circumstances under which the unlawful occupier occupied the land;
- the period of occupation;
- the availability to the unlawful occupier of suitable alternative accommodation or land; and
- the rights and needs of the elderly, children, disabled persons and households headed by women.

### **Relevant circumstances under urgent eviction (section 5(1))**

In addition to the above four circumstances, in the proposed amended section 5(1), the following must also be taken into account:

- The circumstances of the unlawful occupation, including the pace and scale of such occupation.

### **Notice requirement under urgent eviction (section 5(2))**

The proposed amended section 5 is similar to the proposed amended section 4(2), except for the omission of the minimum period for the notice. Under the proposed amended section 5(2), the owner or person in charge, before the hearing of proceedings, must give written notice of such proceedings to the unlawful occupier, the head of the provincial office of the national Department of Land Affairs in whose jurisdiction the land is situated, the relevant provincial department of housing and the relevant municipality.



# PART 8

Eviction procedures  
under the Land Reform  
(Labour Tenants) Act



## What LRLTA does

The Land Reform (Labour Tenants) Act:

- protects labour tenants and their families from eviction;
- promotes their acquisition of land rights and measures to obtain security of tenure;
- provides strict procedures for the eviction of a labour tenant or their family or associate (see below for the definition of an associate); and
- criminalises unlawful evictions.

## Who and what LRLTA covers

The LRLTA applies to labour tenants (defined below). The Act also applies to farm land which is a portion or portions of agricultural land as defined in the Subdivision of Agricultural Land Act 70 of 1970.

### Important point to note

A farmworker is not considered a labour tenant under the LRLTA.

## Important definitions in LRLTA

**The following definitions are contained in section 1 of the LRLTA except as stated otherwise.**

### Labour tenant

Labour tenants are people allowed to live on and develop land in return for their labour. A labour tenant is:

- a person who is residing on or has the right to reside on a farm;
- a person who had or has the right to use cropping or grazing land on this farm or another farm of the owner, and in return works or has worked for the owner or lessee;
- a person whose parent or grandparent resided or resides on a farm, and had the use of cropping or grazing land on this farm or another farm of the owner or lessee, and in return works or worked for the owner or lessee of the farm; or
- a person who has been appointed a successor to a labour tenant under the LRLTA.

### Farmworker

Farmworker refers to a person who is employed on a farm in terms of a contract of employment and is paid mainly in cash or other remuneration, and not mainly through his or her right to occupy and use the land. He or she is also obliged to perform his or her services personally.

### Associate

An associate means a family member of a labour tenant, and any other person who has been nominated in terms of the LRLTA as the successor of the labour tenant, or who has been nominated in terms of the Act to provide labour.

### **Court case on the definition of a labour tenant – *Brown v Department of Land Affairs and Another* Case No 119/07, 28 May 2008**

This case concerned an illiterate 67-year-old woman (Ms Mbhense) who was born on a farm in the Umgeni District of KwaZulu-Natal and has lived there all her life. Her parents were born on the farm, lived there and worked for the owner. Her parents and parents-in-law were buried on the farm. She claimed that there was an agreement between her parents and the owner, entered into before she was born, that they could keep stock and also plough portions of the land. Ms Mbhense had also worked for the owner of the farm, first looking after his children and thereafter as a cook. When she married, her husband was also working for the owner of the farm and he continued to do so until his death. They used cropping land on the farm throughout their marriage and she continued to do so after her husband's death. Ms Mbhense sought an order in the Land Claims Court declaring her a labour tenant in terms of the LRLTA.

Since Ms Mbhense satisfied the requirement of living on the farm, the appeal focused on whether or not she had proved that: (i) she had the right to use cropping or grazing land in return for providing labour to the owner or lessee of the farm; and (ii) her parent or grandparent lived on the farm and had the right to use cropping or grazing land in return for providing labour to the owner or lessee of the farm.

The majority of the Supreme Court held that Ms Mbhense did have the right to use cropping land on the farm, an entitlement which she exercised freely over a lengthy period of time, both during her employment and afterwards, and in return for which she provided labour.<sup>89</sup> The Court also held that her father provided labour at least partly for the right to use cropping or grazing land on the farm.<sup>90</sup> In making this decision, the Court considered the agreement between Ms Mbhense's parents and the owner that they were to have cropping rights and the right to graze a number of stock on the farm and the fact that her father was paid. The Court then arrived at the same conclusion as the Land Claims Court – that Ms Mbhense is a labour tenant.

#### **Key points**

- In deciding whether or not a person is a labour tenant, the court must consider the effect and substance of all agreements entered into between the person and their parent or grandparent, and the owner or lessee of the land concerned.<sup>91</sup>
- It is important to take note that labour tenants represent a vulnerable section of society and when they enter into contracts with farm owners, they are not assisted by lawyers. There is therefore a power imbalance in the relationship between the farm owner and the labour tenant.<sup>92</sup>
- Successive owners assume the responsibilities brought about by already established relationships and existing rights.<sup>93</sup>
- When assessing a labour tenancy agreement, a more substantive and less formal evaluation of the nature of the relationship should be adopted.<sup>94</sup>

## **Eviction procedure**

An owner may institute proceedings for the eviction of a labour tenant or his or her associate. Other persons are excluded from instituting such proceedings unless the owner gives evidence under oath that he or she supports the institution of the proceedings by that person.

89 Para 31.

90 Para 35.

91 Para 21.

92 Para 27.

93 Para 28.

94 Para 30.

The owner first has to obtain a court order and is then required to give notice to the labour tenant and the Director-General of the Department of Land Affairs of his or her intention to obtain an order for eviction. Only a Land Claims Court can order an eviction of a labour tenant.

### **The eviction notice**

The notice must be in writing, given not less than two months before the intended eviction and must contain, among others, the grounds for the intended eviction.

Under section 7 of the LRLTA, a court can only make an order for the eviction of a labour tenant if it is *just and equitable* to do so, under the following circumstances:

- where the labour tenant or his or her associate is not in the category of those who are protected from eviction under the Act; and
- where the labour tenant has, contrary to the agreement between the parties, refused or failed to provide labour to the owner or lessee and, despite one month's written notice having been given to him or her, still refuses or fails to provide such labour; or
- where the labour tenant or his or her associate has committed such a material breach of the relationship between the labour tenant or associate and the owner or lessee, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship.

The following persons cannot be evicted in the above circumstances:

- a labour tenant who is 60, or as a result of disability is unable personally to provide labour to the owner or lessee; and
- a labour tenant who has not nominated a person to provide labour in his or her stead in terms of the Act.

However, in the event of the death of a labour tenant who falls under the above categories of those who cannot be evicted, the Act requires the owner to give 12 months' notice to the associates of the labour tenant to leave the farm.

In addition, a labour tenant cannot be evicted while an application by him for the acquisition of ownership or other rights in land in terms of the Act is pending. However, a court may still order the eviction if it is satisfied that special circumstances exist which make it fair to do so and after considering all the circumstances.

### **Points to note on termination of a labour tenant's right to occupy and use land**

#### **The right of a labour tenant to occupy and use land can only be terminated:**

- By the waiver of his or her rights, either through voluntarily leaving the farm or appointing a person as his or her successor, with the intention to terminate the labour tenant agreement, or through a written agreement signed by both the owner and the labour tenant containing the waiver. The written agreement is only effective if certified by the Attorney General.

- On his or her death. However, if the labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, his or her family may appoint a person as his or her successor and shall, within 90 days of being called upon in writing to do so by the owner, inform the owner of the appointed person.
- On his or her eviction.
- On acquisition by the labour tenant of ownership or other rights to land or compensation in terms of the Act.

## Urgent proceedings under LRLTA

Similar to ESTA and PIE, the LRLTA makes provision for urgent eviction proceedings. Under section 15 of the LRLTA, an owner or lessee may make an urgent application for the removal of any person from the farm in question pending the outcome of proceedings for a final order.

A court can only grant an urgent order if it is satisfied that:

- there is a real and imminent danger of substantial damage to the owner or lessee or to his or her property if the person concerned is not removed from the farm;
- there is no other effective remedy available to the owner or lessee;
- the likely harm to the owner or lessee, if an order for removal is not granted, exceeds the likely harm to the person against whom the order is sought, if an order for removal is granted; and
- adequate arrangements have been made for the reinstatement of any person removed, if the final order is not granted.

## Mediation

Sections 11 and 36 of the LRLTA make provision for mediation. Before instituting court proceedings for an eviction – that is, during the two months' notice period of the intended eviction proceedings – the Director General is required to convene a meeting between the labour tenant and the owner to attempt to mediate a settlement of the dispute between them.

### Points to note on mediation under the LRLTA

- Despite the above, mediation is not limited to the period before an eviction proceedings.
- The mediator is appointed by the Director General.
- The parties may by agreement and at any time during the course of mediation or negotiation appoint another person to mediate the dispute.
- The discussions, disclosures and submissions made during the mediation process are confidential, unless the parties agree to the contrary.

## Reinstatement of an evicted labour tenant or an associate

Section 12 makes provision for the reinstatement (restoration) of the right to occupy and use land of an evicted labour tenant or associate. This applies to labour tenants or associates:

- who would have had a right to occupy and use land before if the provisions of this Act had been in force on 2 June 1995; and
- who between 2 June 1995 and the commencement of the LRLTA vacated a farm or were evicted for any reason or by any process.

If the labour tenant was evicted in terms of a court order, the proceedings for reinstatement must be instituted within one year of the commencement of the LRLTA. In making its decision, a court is required to consider any factors which it deems just and equitable as well as the following factors:

- whether the order of eviction would have been granted if the proceedings had been instituted after the commencement of this Act; and
- whether the person ordered to be evicted was effectively represented in those proceedings, either by himself or herself or by another person.

## Criminal offences and penalties

The LRLTA makes it a crime to arbitrarily evict a labour tenant or an associate.<sup>95</sup> This offence is punishable with imprisonment not exceeding two years or a fine or both.<sup>96</sup>

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<sup>95</sup> s 15A(1).

<sup>96</sup> s 15A(3).



# PART 9

Limitations on  
eviction under the  
Rental Housing Act

## What the RHA does

The Rental Housing Act:

- defines the state's role in rental housing;
- sets out the rights and duties of tenants and landlords;
- prohibits legislation that permits arbitrary evictions;
- reinforces the court order requirement under section 26(3) of the Constitution;
- regulates unfair practices, that is, unlawful and constructive evictions, demolitions of property; and
- provides for offences and penalties if a landlord does not comply with certain provisions.

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*The RHA does not provide a definition for “constructive eviction”. However, the term has been defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment B8-2008 as any act or omission that is calculated or likely to cause or force a person to vacate occupied land or to return to such land. Such acts or omissions include the deprivation of access to land or to essential services or other facilities relating to land.*

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## Who the RHA covers

The RHA applies to tenants and landlords.

### Important definitions in the RHA

**The following definitions are contained in section 1 of the RHA except as stated otherwise.**

#### **Dwelling**

Includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage, or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease.

#### **Landlord**

Landlord means the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sublet.

#### **Tenant**

Tenant refers to the person who leases premises from a landlord.

#### **Unfair practice**

Unfair practice means any act or omission by a landlord or tenant in contravention of this Act, or a practice that unreasonably prejudices the rights or interests of a tenant or a landlord.

## Limitations on eviction

The RHA contains some provisions relating to the eviction of tenants by landlords.

Section 4 of the RHA specifically prohibits the infringement of a tenant's right to privacy. It also prohibits the unlawful search of her home or property or the confiscation of her possessions without a court order.

Under section 13 of the Act, a landlord is required to obtain a court order before evicting a tenant.

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*The Rental Housing Tribunal does not have jurisdiction to hear applications for eviction orders.<sup>97</sup>*

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In addition, the RHA places certain limitations on evictions. A tenant cannot be evicted if:

- a complaint has been lodged with a rental housing tribunal and the tribunal has not yet made its ruling, or a period of three months has not passed since the complaint was lodged; and
- the tenant continues to pay the rental as applicable before the complaint or, if there was an increase before the complaint was lodged, the amount payable immediately before the increase.

### General points to note

- A ruling of a rental housing tribunal is deemed to be an order of a magistrate's court in terms of the Magistrates' Courts Act 32 of 1944.
- Any person can approach a competent court for urgent relief in circumstances where he or she would not have been able to do so were it not for this Act; or to institute proceedings for eviction in the absence of a dispute regarding an unfair practice.

## Mediation

The RHA also provides for disputes to be resolved through mediation if a rental housing tribunal believes that the dispute is of such a nature that it can be resolved through mediation.

### Point to note on mediation under the RHA

The Tribunal appoints the mediator.

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<sup>97</sup> s 13(14) of the RHA.



## Criminal offences and penalties

Any person who fails to comply with, among others, the provisions on the rights and duties of landlords and tenants,<sup>98</sup> the provision on reducing the lease to writing,<sup>99</sup> or the provisions on the composition of the Rental Housing Tribunal or the ruling of the Tribunal in terms of the RHA,<sup>100</sup> will be guilty of a crime and liable on conviction to a fine, or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.

It is also a crime to lock out a tenant unlawfully or shut off the utilities. Any person who does this may be fined or imprisoned for a period not exceeding two years, or may be liable to both the fine and imprisonment.<sup>101</sup>

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98 s 4.  
99 s 5(2).

100 s 9.  
101 s 16(hA).



# PART 10

Limitations on eviction  
under the Restitution of  
Land Rights Act

## What the RLRA does

The Restitution of Land Rights Act:

- provides for the restitution of rights in land to people or communities who lost their land after 19 June 1913 under past racially discriminatory laws or practices;
- aims to prevent arbitrary evictions;
- establishes the legal structures and framework for restitution, including the Commission for Restitution of Land Rights and the Land Claims Court; and
- allows the Minister of Land Affairs to expropriate property without a court order for restitution or other land reform purposes.

## Who the RLRA covers

The RLRA applies to occupiers of land who have instituted a restitution claim.

### Important definitions in the RLRA

**The following definitions are contained in section 1 of the RLRA except as stated otherwise.**

#### **Claim**

A claim means any request for restoration of a right in land submitted to the Commission on Restitution of Land Rights in terms of this Act. A claim also refers to any application lodged with the Registrar of the Land Claims Court for the purpose of claiming restitution of a right in land.

#### **Equitable redress**

Equitable redress means any form of fair compensation other than restoring the relevant land to the person concerned. It could include, for example, alternative state-owned land or the payment of compensation.

#### **Restitution of a right in land**

Restitution of a right in land refers to the restoration of a right in land, or equitable redress.

#### **Restoration of a right in land**

Restoration of a right in land means the return of land taken away after 19 June 1913 as a result of past racially discriminatory laws or practices.

#### **Right in land**

Right in land refers to any right in land whether registered or unregistered. This includes the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.<sup>102</sup>

## Limitations on eviction

Under section 11 of the RLRA, a claimant who was resident on the land in question at the date of commencement of the RLRA cannot be evicted from the land without the

<sup>102</sup> See definition of "beneficial occupation" under the Interim Protection of Informal Land Rights Act in Part 11 of this book.

written authority of the Chief Land Claims Commissioner after a restitution claim has been lodged and once a notice has been published in respect of any land and a temporary note has been made in the records.

In addition, under section 38E, during proceedings for the restitution of rights in land, the Land Claims Court may make an order prohibiting the eviction of any claimant who was resident on the land in question at the date of commencement of the RLRA.

## Mediation

Section 13 of the RLRA also provides for disputes to be settled through a process of mediation and negotiation.

Under section 35A, the Land Claims Court can, at any stage during proceedings under the RLRA or any other Act conferring jurisdiction upon it, make an order directing the parties concerned to attempt to settle the issue by mediation and negotiation, if it becomes evident that there is any issue which might be resolved in this way.

### **Points to note on mediation under the RLRA**

- The mediator is appointed by the Chief Land Claims Commissioner or the Land Claims Court.
- The parties may agree at any time during the course of mediation or negotiation to appoint another person to mediate the dispute.





# PART 11

Limitations on eviction  
under the Interim Protection  
of Informal Land Rights Act

## What the IPILRA does

The Interim Protection of Informal Land Rights Act:

- provides for the temporary protection of certain rights to and interests in land that are not otherwise adequately protected by law; and
- ensures that there is legal recognition and protection of the various kinds of land rights existing in South Africa.

## Who the IPILRA covers

The IPILRA applies to people who have informal right to land.

### Important point to note

The IPILRA does not give a holder of a real (formal) right in land any rights in addition to those which the person holds in that land.

### Important definitions in IPILRA

**The following definitions are contained in section 1 of the IPILRA except as stated otherwise.**

#### **Beneficial occupation**

Beneficial occupation refers to a situation where a person lives on land as if he or she is the owner, without force, openly and without the permission of the registered owner.

#### **Community**

Community refers to any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land that is held in common by the group.

#### **Informal right to land**

Informal right to land means:

- the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe, or in terms of the custom, usage or administrative practice in a particular area or community, where the land at any time vested in the South African Development Trust or the government of a previous self-governing territory, or the government of one of the TBVC states (Transkei, Bophuthatswana, Venda and Ciskei);
- the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;
- beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or
- the use or occupation by any person of land as if he or she is the holder of a land tenure right under the Upgrading of Land Tenure Rights Act 112 of 1991, though such right is not formally registered.

Informal right to land does not include the following rights:

- any right or interest of a tenant, labour tenant, sharecropper or employee that is purely of a contractual nature; and
- any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land, which may be withdrawn at any time by the owner or lawful occupier.

**Tribe**

Tribe includes any community living and existing like a tribe and any part of a tribe living and existing as a separate entity.

## Limitations on eviction

Under section 2(1) of the IPILRA, no person may be deprived of any informal right to land without his or her consent. This is subject to the provisions of the Expropriation Act 63 of 1975 and the situation is different where the land in question is held on a communal basis.

Where the land is held on a communal basis, a person may be deprived of such land in accordance with the custom and usage of that community.<sup>103</sup> This is, however, subject to the following conditions:

- the decision to dispose of any such right may only be taken by a majority of the holders of such rights, who have to be present or represented at a meeting convened for the purpose of considering such disposal;
- sufficient notice must be given; and
- a reasonable opportunity to participate must be afforded.<sup>104</sup>

**Important points to note**

- The holder of an informal right to land is deemed to be an owner of land for the purposes of section 42 of the Minerals Act 50 of 1991.<sup>105</sup>
- The holder of an informal right to land under the IPILRA is excluded from the definition of an occupier under PIE, ESTA and the LRLTA.

<sup>103</sup> s 2(2).

<sup>104</sup> s 2(4).

<sup>105</sup> s 1(2)(b) of the IPILRA.







# PART 12

Limitations on eviction  
under other legislation

## The National Building Regulations and Building Standards Act

In terms of section 12 of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), a municipality has the power and duty to prevent dangerous living conditions within its jurisdiction. Under section 12(4)(b), a municipality can, by notice in writing, order the occupiers to vacate immediately or within a specified time any building that it considers unsafe or unhealthy. Section 12(5) of the NBRA prohibits the occupation of a building after a notice has been served or delivered. Failure to comply is a criminal offence carrying a fine of up to R100 for each day of non-compliance.<sup>106</sup> The result has often been an eviction without a court order made after considering all the relevant circumstances.<sup>107</sup>

Section 12 has been used regularly in Johannesburg to clear inner city slums or “bad” (dilapidated) buildings. This approach has sometimes resulted in court cases.<sup>108</sup> The Constitutional Court found section 12(6) of the NBRA to be an infringement of section 26(3) of the Constitution, hence unconstitutional, as it forces people to leave their homes without a court order.<sup>109</sup>

### Important points to note

- A section 12(4)(b) notice is not a valid court order.
- A municipality will still need a court order before it can evict occupiers of unsafe buildings.
- A municipality has to take into account the availability of suitable alternative accommodation or land before issuing the notices to vacate in terms of section 12(4)(b) of the NBRA.

## The Domestic Violence Act

An act of domestic violence may include acts that prohibit a person (the complainant) from entering his or her residence. This can amount to an unlawful eviction of the complainant and his or her family.

The Domestic Violence Act 116 of 1998 (DVA) provides for the issuing of protection orders with regard to domestic violence. It is important to note that there must be a domestic relationship (defined below).

### Important definitions in the DVA

**The following definitions are contained in section 1 of the DVA except as stated otherwise.**

#### **Domestic relationship**

Domestic relationship refers to a relationship between a complainant and a respondent in any of the following ways:

<sup>106</sup> s 12(6).

<sup>107</sup> See Part 14 of this book for relevant circumstances to be considered by the courts.

<sup>108</sup> *Rand Properties* case (SCA) and the *Olivia* case (CC).

<sup>109</sup> See the *Olivia* case summarised in Part 15 of this book; see also Part 14, which highlights some of the principles in the *Rand Properties* case and the *Olivia* case.

- they are or were married to each other according to any law, custom or religion;
- they (whether they are of the same or of the opposite sex), though not married, live or lived together in a relationship in the nature of marriage;
- they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- they are family members related by blood, marriage or adoption;
- they are or were in an engagement, dating or customary relationship; or
- they share or recently shared the same residence.

#### **Domestic violence**

Domestic violence means physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence, or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

Where an act of domestic violence has occurred, section 7 of the DVA allows a magistrate to grant an order prohibiting the respondent from preventing the complainant who ordinarily lives or lived in a shared residence from entering or remaining in the shared residence or a specified part of the shared residence. If it is in the best interest of the complainant and his or her safety, the court may also grant an order to evict the respondent from the shared residence.

In granting the prohibition order the court may also order the respondent to make rental or mortgage payments, having regard to the financial needs and resources of the complainant and the respondent.

#### **Section 7 of the Domestic Violence Act**

- (1) The court may, by means of a protection order referred to in sections 5 or 6, prohibit the respondent from –
- ...
- (c) entering a residence shared by the complainant and the respondent: provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant.

The court can make a time limit for a protection order, if the matter should, in the interests of justice, be dealt with further in terms of any other relevant law, such as the Maintenance Act 99 of 1998.<sup>110</sup> The aim is to give the party concerned the opportunity to seek appropriate relief in terms of the other law.

<sup>110</sup> s 7(7)(b).

**Important points to note on the removal order**

- It is generally only granted for a temporary period, until the applicant and respondent agree on the living conditions or the applicant applies for a formal eviction order through the courts.
- Due to the qualifier in section 7 that the order must be in the best interest of the complainant, the violence has to be of a serious nature, warranting the immediate removal of the respondent.
- Other relevant factors when considering an application for removal of the respondent include evidence of acts of domestic violence against children and other vulnerable family members, and the existence of criminal charges against the respondent.<sup>111</sup>

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<sup>111</sup> See Lillian Artz 2003. *Magistrates and the Domestic Violence Act: Issues of Interpretation*. Institute of Criminology, University of Cape Town: South Africa.



# PART 13

Warrants of execution  
against immovable property

## Procedure in the magistrates' courts

When a creditor has obtained a judgment against a debtor and the debtor has not paid the debt, the creditor may obtain a warrant of execution in terms of the relevant Magistrates' Courts Rules or High Court Rules against the debtor's property to satisfy the debt. Property includes movable and immovable property.

If the debtor does not have sufficient movable assets to satisfy the debt, the creditor may execute against immovable property and sell the property. The sale of the immovable property may have a direct impact on the housing rights of the occupier as a person stands to lose his or her access to a home if the sale takes place.

In the *Jaftha* case, the Constitutional Court reinforced the constitutional protection of poor people against the loss of their homes without all the relevant circumstances being considered. This case was a challenge to the constitutionality of the Magistrates' Courts Act 32 of 1994 that permitted the sale in execution of people's homes because they had not paid their debts.<sup>112</sup> The Constitutional Court held that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26 of the Constitution.<sup>113</sup>

The Court amended section 66(1)(a) by including the consideration of all relevant circumstances by the court before the granting of a warrant.<sup>114</sup> The amended section thus reads:

*Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then a court, after consideration of all relevant circumstances, may order execution against the immovable property of the party against whom such judgment has been given or such order has been made.*

### Key points on obtaining a warrant against immovable property

- If judgment has been obtained against a debt, the creditor may apply to the relevant court for a warrant of execution.
- The warrant authorises the sheriff of the relevant court to attach the property (movable and immovable) of the debtor to satisfy the debt.
- The sheriff will demand payment from the debtor, and if he or she cannot pay, the sheriff will make an inventory of the property and it will be under attachment.
- If the debt exceeds a certain amount, the sale in execution must be advertised by the sheriff.
- If the movable asset is not sufficient to satisfy the debt, the immovable property will be sold in execution.<sup>115</sup>

<sup>112</sup> See s 66(1) of the Act; See Part 15 of this book where this case and the principles in the case are summarised

<sup>113</sup> Paras 34 and 39.

<sup>114</sup> Para 64.

<sup>115</sup> See ss 66–68, 73 and 78 (read with Rule 36) of the Magistrates' Courts Act.

**Circumstances that must be considered in terms of the *Jaftha* decision before a warrant of execution against the immovable property (such as the home) of a debtor is obtained for non-payment of a debt:**

- the circumstances in which the debt was incurred;
- any attempts made by the debtor to pay off the debt;
- the financial situation of the parties;
- whether the debtor is employed or has a source of income to pay for the debt; and
- any other factor relevant to the particular facts of the court case.<sup>116</sup>

**Important points to note**

- If the warrant has been obtained and the unlawful occupier remains in occupation, any subsequent eviction proceedings must be processed in accordance with PIE.
- The clerk of the magistrate's court may not issue a warrant of execution against immovable property without authorisation from the court.

## Procedure in the high court

When an order of execution against mortgaged (bonded) property is sought, the defendant (defaulting debtor) must be informed, in the process of initiating action, that his or her section 26 right of access to adequate housing might be implicated by such an order. This has to be done in the summons.

This rule of practice was laid down in the case of *Standard Bank of South Africa Limited v Saunderson and Others* 2006 (9) BCLR 1022 (SCA) [Saunderson]. This was a case in which a bank sought judgment against nine borrowers who had defaulted on their respective loans. In each case, the debt was secured by a mortgage bond. Hence, the bank also sought orders declaring the mortgaged property to be executable. The case began in the Cape High Court, followed by an appeal to the Supreme Court of Appeal (SCA). The SCA held that it was possible that section 26(1) of the Constitution may be infringed by execution against a mortgaged (bonded) property.<sup>117</sup> Considering that in most cases where an order for execution is sought the defendant is unlikely to seek legal advice, the Court held that the defendant should be informed, in the process of initiating action, that his or her right of access to adequate housing might be implicated.<sup>118</sup>

As ordered by the court, a creditor who wishes to act against a defaulting debtor's immovable property needs to include the following passage in the summons:

*The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will*

<sup>116</sup> See *Jaftha* paras 56–60.

<sup>117</sup> Para 19.

<sup>118</sup> Para 25.



*infringe that right it is incumbent on the defendant to place information supporting that claim before the court.*<sup>119</sup>

**Important points to note**

- The Registrar of the High Court may still declare property executable unless the debtor raises an objection to the constitutionality of the execution.
- The onus is on the debtor to show that the execution order would infringe his constitutional right – i.e housing rights in terms of section 26(1) of the Constitution.
- Once the above is shown, the creditor will have to justify the granting of the orders.
- The sole fact that the property is residential in character is not enough to establish that an infringement of section 26(1) will necessarily occur.<sup>120</sup>

Another relevant case is *ABSA Bank Limited v Xonti and Another* 2006 (5) SA 289 (C) [*Xonti*]. Before this case, an application for leave to execute or declare a property executable was a procedural matter that could be dealt with under Rule 6(11) of the High Court Rules, which only required a simple notice to the debtor or defendant advising him or her that an application would be made. This notice only informs the debtor/defendant that an application will be made on a given date and it does not invite them to respond. The application of this rule in the execution of immovable property came under scrutiny as it did not allow for a response by the defendant/debtor.

In the *Xonti* case, the Court ruled that an application for the execution of immovable property can no longer be brought under a simple notice in terms of Rule 6(11). This is because the declaration to execute immovable property is no longer just a procedural matter but now a matter of substantive law as a result of section 26 of the Constitution (the right to have access to adequate housing). The notice of motion must now call upon the parties to indicate whether they wish to oppose the matter. In addition, it has to provide them with a time within which to file any affidavits in order to place information before the court so that the court can discharge its obligation in terms of section 26 of the Constitution.<sup>121</sup>

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119 Para 27(2).

120 Para 20.

121 At 290E–F.



# PART 14

Relevant circumstances

Section 26(3) of the South African Constitution, as stated earlier, requires courts to consider “all relevant circumstances” before deciding whether an eviction should be granted. The Constitutional Court has stated that the inclusion of this requirement has a clear constitutional purpose.

*A third aspect of s 26(3) is the emphasis it places on the need to seek concrete and case-specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd. Its use in s 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has, accordingly, been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.<sup>122</sup>*

*It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis.<sup>123</sup>*

Legislation and court judgments have outlined the relevant circumstances to be considered. For circumstances to be relevant for the purposes of section 26(3), the courts have extended the meaning beyond the circumstances which were identified in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 42. This case concerned an eviction application by a private owner in respect of a tenant who had breached her lease agreement. The court limited the meaning of relevant circumstances to the very limited common law grounds for evicting an unlawful occupier. These entitle an owner seeking the eviction order to prove that he or she is the owner and that the occupier has no lawful right to be in occupation. This could include, for example, the termination of a lease agreement.

This resulted in section 26(3) being defined within the parameters of the common law rules of eviction. The SCA’s judgment in *Ndlovu v Ngcobo* 2003 (1) SA 113 (SCA) substantially changed this position as it brought all unlawful evictions under the ambit of PIE, which allowed the court to take into account circumstances previously not taken into account in common law evictions.

The courts have substantially broadened the circumstances to be considered, even beyond those provided in legislation. The circumstances that may be important for a court to consider include, but are not limited to, the following:

- the manner in which the occupation of the land was made;
- the duration of the occupation of the land;
- the availability of suitable alternative accommodation or land;
- the reasonableness of offers made in connection with suitable alternative accommodation or land;

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<sup>122</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 22 [*PE Municipality*].

<sup>123</sup> *PE Municipality* para 31.

- the time scales proposed relative to the degree of disruption involved;
- the willingness of the occupiers to respond to reasonable alternatives;
- the extent to which serious negotiations have taken place with equality of voice for all concerned (mediation or meaningful engagement with those affected);
- the gender, age, occupation or lack thereof, and state of health of those affected;
- the rights of landowners; and
- the manner of execution of the eviction order (that is, if executed humanely).<sup>124</sup>

### Points to note on “alternative accommodation”

- The courts have repeatedly emphasised that the provision of alternative accommodation for vulnerable groups (those in desperate need), even if temporary, is a significant circumstance to be considered in deciding on an eviction.<sup>125</sup>
- It is an important factor to be considered where settled occupiers are to be evicted, especially if they are not at fault, and the result of the eviction will be homelessness.
- The duty to respect and protect the right to have access to adequate housing includes a right to alternative accommodation on eviction in situations where the evictees are not able to obtain this through their own effort.<sup>126</sup>
- The provision of alternative accommodation is evaluated on a case-by-case basis, as it also depends on the number of people, their age, and whether they can provide for themselves.
- In some instances, the court may order an eviction even if it will result in homelessness. Examples include:
  - where the occupation creates a genuinely urgent or pressing danger;<sup>127</sup>
  - where a group of homeless people is chosen over another group which seeks access to the same land;<sup>128</sup> and
  - where the occupation of the land is intended to force a state organ into providing housing on a preferential basis to those who participate in such an exercise (that is, an orchestrated “land invasion”).<sup>129</sup>
- Any alternative temporary accommodation provided should consist of a place where the evicted persons can live without the threat of another eviction and in a waterproof structure that is secure against the elements and with access to basic services such as basic sanitation, water and refuse services.<sup>130</sup>
- The location of the alternative accommodation should be determined after consultation with those involved.<sup>131</sup>

124 See ss 10, 11 and 15 of ESTA; ss 4 and 6 of PIE; *Grootboom* paras 84 and 88; *PE Municipality* paras 25-30, 33 and 53; and *Olivia* para 43.

125 *Grootboom* para 91; *PE Municipality* paras 28 and 58; *Modderklip* (2005) para 68; *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA) para 78 [*Rand Properties*]; and *Olivia* para 44.

126 Budlender “The Right to Alternative Accommodation in Forced Evictions” in Squires et al (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press, 2005) 127–138 at 136.

127 *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants and Others* 2000 (1) SA 125 (T) 141 B–E.

128 *City of Cape Town and Another v The Occupiers of Erf 4832 Philippi*, Case No 5746/2000 (CPD) [unreported judgment].

129 *Grootboom* para 92.

130 *Rand Properties* para 78(2.1).

131 See, generally, the *Olivia* case.

### Excerpt from *PE Municipality* case on alternative accommodation

*[A] court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.*<sup>132</sup>

### Excerpt from *Lingwood* case on alternative accommodation

*The availability of suitable alternative accommodation or land is one of the factors, if not the most important factor for a court to have regard to in determining whether it is just and equitable to issue an eviction order.*<sup>133</sup>

#### Points to note on mediation/“meaningful engagement” with those affected

- Whether mediation has been tried with equality of voice for all concerned is an important factor in deciding whether an eviction will be just.
- Section 2(1)(b) of the Housing Act requires all levels of government to consult meaningfully with individuals and communities affected by housing development.
- The courts have noted the importance and necessity for parties involved in eviction litigation to engage in an endeavour to achieve mutually acceptable solutions.<sup>134</sup>
- The government department concerned is obliged to engage meaningfully with those affected both individually and collectively.<sup>135</sup>
- The objectives of a meaningful engagement would be to find out:
  - what the consequences of the eviction might be;
  - whether the municipality could help in alleviating the situation of those in dire need;
  - whether it was possible to make the buildings concerned relatively safe and conducive to health for an interim period;
  - whether the municipality had any obligations to the occupiers in the prevailing circumstances; and
  - when and how the municipality could or would fulfil these obligations.<sup>136</sup>
- It is unconstitutional for a municipality to evict people from their homes without first meaningfully engaging with them.
- The duty to engage meaningfully before an eviction is derived from the following constitutional obligations of municipalities and the state:
  - to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government;<sup>137</sup>

<sup>132</sup> *PE Municipality* para 28.

<sup>133</sup> *Lingwood Michael and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* Case No. 2006/16243 (WLD), judgment delivered in 2007, para 18.

<sup>134</sup> *PE Municipality* paras 39-43 and 61; *Lingwood Michael and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* Case No. 2006/16243 (WLD), judgment delivered in 2007, para 33.

<sup>135</sup> *Olivia* para 13.

<sup>136</sup> *Olivia* para 14.  
<sup>137</sup> s 152(1) of the Constitution.

- to fulfil the objectives in the Preamble to the Constitution and to respect, protect, promote and fulfil the rights in the Bill of Rights;<sup>138</sup> and
- to take reasonable legislative and other measures to realise the right of access to adequate housing.<sup>139</sup>
- Meaningful engagement has to be tailored to the particular circumstances of each situation: “the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement”.<sup>140</sup>
- The engagement process should not be shrouded in secrecy: “the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential”.<sup>141</sup>

### Excerpts from *PE Municipality* case on mediation

*[A]bsent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.*<sup>142</sup>

*One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried.*<sup>143</sup>

*Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.*<sup>144</sup>

*[The municipality’s] function is to hold the ring and to use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure.*<sup>145</sup>

*[A] court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.*<sup>146</sup>

138 s 7(2) of the Constitution.

139 *Olivia* paras 17 and 18.

140 *Olivia* para 19.

141 *Olivia* para 21.

142 Para 43.

143 Para 45.

144 Para 56

145 Para 61.

146 Para 61.





# PART 15

Selected Constitutional  
Court decisions



## ***Government of the Republic of South Africa and Others v Grootboom*** **2000 (11) BCLR 1169 (CC)**

### **Facts**

This case concerned a number of people, including children, who had moved from an informal settlement onto private land earmarked for low cost housing owing to the “appalling conditions” in which they were living. They were evicted from the private land, which they were unlawfully occupying. Following the eviction, they camped on a sports field in the area and approached the courts to enforce their right of access to adequate housing. They alleged that the state’s housing programme violated their right to have access to adequate housing guaranteed under section 26 of the South African Constitution. The respondents in this case also sought to enforce their children’s right to shelter under section 28(1)(c) of the Constitution.

### **Decision**

The Constitutional Court found the state’s housing programme to be unreasonable as it made no provision for access to housing for people in desperate need. Regarding the children, it held that the primary obligation to provide for children’s needs lies with their parents and on the state only when the children have been removed from the care of their parents.

### **Key points**

- The right to have access to adequate housing cannot be seen in isolation, as there is a close relationship between it and other socio-economic rights.<sup>147</sup>
- Rights have to be interpreted and understood in their historical, social and economic context.<sup>148</sup>
- The relevant international law can be a guide to interpretation, though the weight to be attached to any particular principle or rule of international law will vary.<sup>149</sup>
- Housing means a lot more than a roof over one’s head: “It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself”.<sup>150</sup>
- It is not only the state that is responsible for providing housing. Other people and structures within society must be permitted by legislative and other measures to provide housing. This is because the state’s duty is to create the conditions for access to adequate housing for people at all economic levels of society.<sup>151</sup>
- In any challenge based on section 26 of the Constitution in which it is argued that the state has failed to meet its obligations under section 26(2), “the question will

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147 Para 24.

148 Paras 25 and 43.

149 Para 26.

150 Para 35.

151 Para 35.

be whether the legislative and other measures taken by the state are reasonable”, and not “whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent”.<sup>152</sup>

- A reasonable housing programme must:
  - be reasonable in both its conception and implementation;
  - clearly allocate responsibilities and tasks to the different spheres of government;
  - ensure that the appropriate financial and human resources are available;
  - be comprehensive, coherent and well co-ordinated;
  - be capable of facilitating the right in question even if on a progressive basis;
  - be balanced and flexible (capable of responding to short-, medium-, and long-term needs and responding to the urgent needs of those in desperate circumstances); and
  - not exclude a significant segment of society.<sup>153</sup>
- The phrase “progressive realisation” in section 26(2) of the Constitution imposes a duty on the state to facilitate the accessibility of housing progressively by examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing must, therefore, be made more accessible “not only to a larger number of people but to a wider range of people as time progresses”.<sup>154</sup>
- The phrase “within available resources” means that “both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources”.<sup>155</sup>
- Section 26 of the Constitution does not expect the state to do more than is achievable within its available resources.<sup>156</sup>
- The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28 of the Constitution.<sup>157</sup>
- The state is also “required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27”.<sup>158</sup>
- The state has a duty to ensure that an eviction is carried out humanely. If the eviction results in possessions and building materials being destroyed and burnt, it could constitute a violation of the state’s duty to provide access to adequate housing.<sup>159</sup>
- All levels of government are required to consult meaningfully with individuals and communities affected by housing development; and municipalities are required to promote the resolution of conflict arising in the housing development process.<sup>160</sup>

152 Para 41.

153 Paras 39, 41-44.

154 Para 45.

155 Para 46.

156 Para 46.

157 Para 78.

158 Para 78.

159 Para 88.

160 Para 84.

## ***Port Elizabeth Municipality v Various Occupiers*** **2004 (12) BCLR 1268 (CC)**

### **Facts**

This case concerned an eviction application by the state – the Port Elizabeth Municipality – against 68 people, including 23 children (occupiers), who had illegally occupied private undeveloped land within the Municipality’s jurisdiction. The application was based on section 6 of the PIE, which states that an organ of state may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction. The occupiers had been living on the land for periods ranging from two to eight years. Most of them had moved onto the land after being evicted from previously occupied land. The occupiers were willing to vacate the property if they were given suitable alternative land to which they could move. However, the occupiers had rejected a proposal made by the Municipality that they move to other identified land on the basis of lack of security of tenure. If they had relocated to this land, they would have been liable to further eviction. The Municipality did not engage in any discussions with the occupiers to identify their particular circumstances or needs before seeking their eviction.

### **Decision**

The Constitutional Court denied the eviction order on, among other grounds, the basis of the length of occupation of the land, the fact that the land was not being put to some other productive use, and the lack of suitable alternative land.

### **Key points**

- Land rights and the right of access to housing and the right not to be arbitrarily evicted are closely linked – “the stronger the right to land, the greater the prospect of a secure home”.<sup>161</sup>
- There is no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. Hence, the eviction of people living in informal settlements may take place, even if it results in loss of a home.<sup>162</sup>
- However, “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme”.<sup>163</sup>
- Section 26(3) emphasises the need to seek concrete and case-specific solutions to the difficult problems that arise.<sup>164</sup>
- Where there is a clash between the property rights of landowners and the housing rights of unlawful occupiers, the courts must balance out and reconcile these

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161 Para 19.

162 Paras 21 and 28.

163 Para 28.

164 Para 22

rights in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.<sup>165</sup>

- The mere establishment of the fact that the occupation is unlawful and the structures are either unauthorised, unhealthy or unsafe does not require the court to make an eviction order. In terms of section 6 of PIE, “they merely trigger the court’s discretion”.<sup>166</sup>
- The relevant circumstances listed in section 6 of PIE (the manner in which the occupation took place, its duration and the availability of suitable alternative accommodation or land) are not exhaustive. Other circumstances that may be important include: the particular vulnerability of occupiers (the elderly, children, disabled persons and households headed by women); the extent to which serious negotiations have taken place with equality of voice for all concerned; the reasonableness of offers made in connection with suitable alternative accommodation or land; the timescales proposed relative to the degree of disruption involved; and the willingness of the occupiers to respond to reasonable alternatives put before them.<sup>167</sup>

## ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (1) BCLR 78 (CC)***

### **Facts**

This case concerned the constitutional validity of sections 66(1)(a) and 67 of the Magistrates’ Courts Act 32 of 1944, which deal with the sale in execution of property in order to satisfy a debt. The appellants were two women (Ms Jaftha and Ms Van Rooyen), who were both single, impoverished, unemployed, and had few assets. Unable to continue payments on their respective debts, they were forced to vacate their property pursuant to section 66(1)(a) of the Magistrates’ Courts Act. Both homes had been acquired with state housing subsidies and losing them as a result of a sale in execution disqualified the appellants from benefiting from future state subsidies. The appellants approached the High Court for an order setting aside the sales in execution and for interdicts to prevent the respondents from taking transfer of the appellants’ homes pursuant to the sales in execution. The High Court held that the sale in the execution process does not violate section 26 of the Constitution because that section does not contain a right to ownership. The appellants then approached the Constitutional Court, which had to consider the question whether a law which permits the sale in execution of people’s homes because they have not paid their debts, thus removing their security of tenure, violates the right to have access to adequate housing, protected in section 26 of the Constitution.

### **Decision**

The Constitutional Court found section 66(1)(a) to be unconstitutional to the extent that it permitted sales in execution against the homes of indigent debtors where they

<sup>165</sup> Para 23.

<sup>166</sup> Para 25.

<sup>167</sup> Paras 25 and 30.

lose their security of tenure and where no compensating considerations in favour of the creditor justify the sales in execution. It also failed to provide judicial oversight over sales in execution against the immovable property of judgment debtors. To remedy this defect, the Court interpreted and read words into the Magistrates' Courts Act to ensure that people's home can only be sold if a court has ordered so after considering all the relevant circumstances.

### Key points

- Any claim based on socio-economic rights must inevitably engage the right to dignity, and each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably involved.<sup>168</sup>
- The international law concept of adequate housing and its central theme of security of tenure reinforce the notion of adequate housing in section 26 of the Constitution as understood in the light of South Africa's particular history of forced removals and racist evictions.<sup>169</sup>
- The state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.<sup>170</sup>
- At the very least, any measure which deprives a person of existing access to adequate housing, limits the rights protected in section 26(1) of the Constitution. Hence, in order for a measure to deprive a person of existing access to adequate housing, the measure must be justified under section 36 of the Constitution.<sup>171</sup>
- To place poor people who have already benefited from housing subsidies in a position where they might never again acquire such assistance is a severe limitation of the right to have access to adequate housing.<sup>172</sup>
- A creditor must approach a court to request execution against the immovable property of the debtor. The court may order execution only if the circumstances of the case make it appropriate.<sup>173</sup>
- Relevant circumstances have to be considered in determining whether it is justifiable to issue a warrant of execution against immovable property.<sup>174</sup>

## ***President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others 2005 (8) BCLR 786 (CC)***

### Facts

This case concerned a private landowner's efforts to execute an eviction order granted against about 40 000 people who, as a result of overcrowding and shortage of land near

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168 Para 21.

169 Para 25.

170 Para 29.

171 Para 34.

172 Para 39.

173 Para 54.

174 See Part 12 of this book for the relevant circumstances.

their informal settlement, moved onto his land and settled there. The landowner failed to get state assistance in executing an eviction order granted by the Pretoria High Court. The SCA held that the state breached its constitutional obligation to both the landowner and the unlawful occupiers by failing to provide alternative accommodation to the occupiers upon eviction. It held that the occupiers were entitled to occupy the land until alternative accommodation was made available to them by the state or the provincial or local authority. The state appealed against the SCA decision to the Constitutional Court.

## Decision

The Constitutional Court held that by failing to provide an appropriate mechanism to give effect to the eviction order, the state violated the landowner's right to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution. The state was ordered to pay compensation to the landowner. The Court further held that the occupiers were entitled to occupy the land until alternative land was made available to them by the state or the provincial or local authority.

## Key points

- The state is obliged to take reasonable steps, where possible, to ensure that large-scale disruptions do not occur when court orders are being executed.<sup>175</sup>
- It is unreasonable for a private landowner to be forced to bear the burden which should be borne by the state of providing the occupiers with accommodation.<sup>176</sup>
- It is unreasonable for the state to stand by and do nothing where it is impossible for a private landowner to evict occupiers because of the size of the invasion and the particular circumstances of the occupier.<sup>177</sup>
- The state has an obligation to ensure access to housing or land for the homeless on a progressive basis.<sup>178</sup>
- The progressive fulfilment of access to adequate housing requires careful planning and fair procedures which must be made known in advance to those affected.<sup>179</sup>

# ***Occupiers of 51 Olivia Road, Berea Township, and Others v City of Johannesburg and Others*** **2008 (5) BCLR 475 (CC)**

## Facts

This case concerned an application by over 400 occupiers of two buildings in the inner city of Johannesburg for leave to appeal against a decision of the SCA authorising their eviction because the buildings they occupied were unsafe. According to the SCA ruling, assistance with relocation to a temporary settlement area would be provided to those

175 Para 43.

176 Para 45.

177 Para 48.

178 Para 49.

179 Para 49.

occupiers who were desperately in need of housing assistance. In seeking the eviction application, the City of Johannesburg relied on section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), which is regularly used in Johannesburg to clear residents of what the City regards as residential “sinkholes” or “bad buildings” on health and safety grounds.

## Decision

The Constitutional Court held that it is essential for a municipality to engage meaningfully with people before evicting them if they would become homeless after the eviction. The Court also held that while the City has obligations to eliminate unsafe and unhealthy buildings, its constitutional duty to provide access to adequate housing means that potential homelessness must be considered by a city when it decides to evict people. The Court also found the section in the NBRA that makes it a crime to remain in buildings after an eviction notice by the City, but before any court order for eviction, to be unconstitutional, as it infringes section 26(3) of the Constitution.<sup>180</sup> The Court thus reinforced the requirement that a court order issued after considering all the relevant circumstances must be obtained before evicting people.

## Key points

- Where people would become homeless as a direct result of their eviction, the municipality has, at the very least, to engage meaningfully with occupiers both individually and collectively.<sup>181</sup>
- In making a decision to evict that will result in homelessness, a municipality should consider the viability of alternative accommodation.<sup>182</sup>
- The various departments in a municipality have to work together. They cannot function separately, “with one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided”.<sup>183</sup>
- “Any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution”.<sup>184</sup>

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180 Para 49.

181 Para 13; see Part 14 of this book for the requirements of meaningful engagement as outlined in this case.

182 Para 43.

183 Para 44.

184 Para 49.



# PART 16

Conclusion



South Africa has been hailed for its progressive housing laws, jurisprudence, policies and programmes. There are laws and policies to provide procedural and substantive protection to people faced with evictions. The courts have handed down progressive judgments that enforce and strengthen the right to adequate housing, while balancing these rights against the owner's property rights in eviction matters.

However, evictions still occur without adherence to the relevant standards contained in the Constitution, international law and relevant legislation. The poorest and most vulnerable members of the society are often evicted without a court order or without being given an opportunity to present their case in court (or oppose the eviction) or notice of when the eviction order will be carried out. Evictions are also carried out without the provision of alternative accommodation. Greater awareness of the relevant standards on evictions would give people the necessary information to be able to challenge such arbitrary evictions and advance housing rights in the case of an eviction.



# ANNEXURE 1

“Best practice” guidelines

The subsequent points are “best practice” guidelines relating to evictions based on the Constitution, relevant international law standards and legislation. It is important to note that the guidelines are not exhaustive and much will depend on the applicable legislation as well as the circumstances of the particular case.

## Evictions in general

It is important to first identify what type of occupiers the persons facing an eviction are (that is, whether they are unlawful or lawful) in order to determine the applicable legislation.

### Prior to an eviction (notice to vacate)

- Have those to be evicted been given adequate notice of the institution of eviction proceedings?
- Is the eviction notice in writing and does it set out the grounds on which the eviction is based?
- Is the notice written in a language which the occupier understands?
- Have those to be evicted been given a full opportunity to discuss an alternative solution with the landowner or relevant government department?
- Have public hearings been held on the proposed plans and alternatives?
- Has provision been made for alternative accommodation for those in desperate need who cannot afford housing on their own?
- Has the local authority or relevant government department been approached for a possible mediation or arbitration?
- Does the occupier qualify for a state subsidy in terms of the Housing Act or any other Act? If so, has an application been made to the relevant state department for a subsidy or grant to secure alternative accommodation?

### Eviction application

- Have the necessary statutory notices been served on the occupier in terms of the relevant legislation?
- Was the statutory notice and the eviction application served and read out in a language which the occupier(s) understand?
- Have the eviction application and statutory notices been served in terms of the applicable legislation and the rules of the court?
- Do the statutory notices, among other things, advise the occupier(s) on the following:
  - in terms of which statute/legislation the notice is instituted;
  - indicate the court, the date and time when the hearing will happen;
  - set out the grounds for the eviction; and
  - state that the occupiers have a right to defend the application and are entitled to legal representation and to apply for legal aid if they cannot afford legal representation?

- Has the right to reside on the property or land been terminated in terms of the relevant legislation?
- Does the person who is instituting the eviction have the relevant locus standi (right of appearance/standing before the court) under the relevant legislation in terms of which the application is instituted to bring the application for eviction?
- Has the eviction application been served on the relevant state departments?
- Has the hearing date been set down in accordance with the prescribed statutory time period?
- Does the application comply with the relevant statutory provisions?
- Has the court requested a (statutory or non-statutory) report from the municipality and/or the relevant provincial state department highlighting, among others, access to suitable alternative accommodation, the rights of the affected parties and the rights of the children in relation to education?
- If no report has been requested, has consideration been given to whether it is necessary to join the relevant state department and/or local municipality as a party to the application to place "all relevant circumstances" before the court in relation to accessing alternative suitable state accommodation, access to subsidies, occupier's environment, among other things?
- Have mediation and/or arbitration been attempted by the parties in terms of the relevant statutory provisions?

### **During the eviction**

- Have those to be evicted been served with an eviction order by the relevant court official?
- Does the order have two dates – the date when the occupiers must vacate and the date when the relevant court official must effect the eviction?
- Are the government officials or their representatives present during the eviction?
- Is the eviction being carried out in a human and dignified manner and without violating any of the occupiers' rights?
- Are the conditions under which the eviction is being carried out ideal (that is, in good weather, not at night or on a religious holiday)?
- Are the rights of women and children protected?
- Has an opportunity been given to the affected people to decide freely whether or not to demolish their own buildings or other structures?

### **After an eviction and post settlement support**

- Has the state provided suitable alternative accommodation to those identified before the eviction in need of housing assistance?
- Has provision been made for safe and secure access to basic services such as food, potable water and sanitation at the alternative site?
- Have those evicted been involved in the planning and resettlement processes and in the distribution of basic services and supplies?

- Is the relocation site close to job opportunities and not on polluted land or close to pollution sources?
- Have the statutory subsidies in relation to housing and or relocation been accessed?
- In respect of an unlawful eviction, have criminal charges been brought against the persons who effected the eviction?

## **Warrant of execution against immovable property for a judgment debt**

With regard to a warrant of execution against immovable property in order to satisfy a debt, the following questions have to be considered:

- Was the immovable property obtained through a state subsidy?
- Is the immovable property the only asset in the debtor's estate?
- What are the circumstances under which the debt was incurred?
- Is the occupier/debtor employed?
- Was the sale advertised?
- Has the warrant lapsed in terms of the relevant court rules?
- Has the warrant been served on the occupier/debtor by the relevant court official?
- Can the debt be satisfied in a manner other than the sale of the property? If yes, have these options been explored by the creditor?
- Are there justifiable and equitable grounds or circumstances to suspend or stay the execution upon application to the relevant court?

## **Warrant of execution against immovable property pursuant to a mortgage bond**

- Did the bond holder (or creditor), in the process of initiating the action, inform the defendant that:
  - his or her right to have access to adequate housing might be affected; and
  - that the defendant must provide information to support a claim that this right will be infringed if the order for execution is granted?
- Did the notice of motion call upon the parties to indicate whether they wish to oppose the matter and indicate a time within which to file any affidavits?
- Who authorised the warrant in the magistrate court?
- Has the debtor raised a constitutional issue in the case before the high court?



## **ANNEXURE 2**

Ratification by South Africa  
of key United Nations  
and African human rights  
treaties that recognise the  
right to adequate housing

Treaty	Signature	Ratification	Relevant provisions
International Covenant on Economic, Social and Cultural Rights 1966	3 October 1994	Yet to ratify	Article 11 – The right of everyone to an adequate standard of living, including housing, and to the continuous improvement of living conditions.
International Convention on the Elimination of All Forms of Racial Discrimination 1965	29 January 1994	10 December 1998	Article 5 – Obligation on States Parties to guarantee the enjoyment of, among other rights, economic, social and cultural rights, in particular the right to housing.
Convention on the Elimination of all Forms of Discrimination against Women 1979	29 January 1993	15 December 1995	Article 14 – Obligation on States Parties to ensure to women in rural areas the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
Convention on the Rights of the Child 1989	29 January 1993	16 June 1995	Article 27 – Obligation on States Parties to take appropriate measures to assist parents and others responsible for the child to implement the child's right to an adequate standard of living, and in case of need, provide material assistance and support programmes, particularly with regard to, among others, housing.
African Charter on Human and Peoples' Rights 1981	09 July 1996	09 July 1996	Articles 14, 16 and 18 – The right to housing is not explicitly provided for under Charter. However, the African Commission on Human and Peoples' Rights has found this right, including a prohibition on unjust evictions, to be implicit in articles 14 (right to property), 16 (right to the best attainable state of physical and mental health) and 18(1) (protection of the family), read together (Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication 155/96, 2001 AHRLR 60, para 60).
African Charter on the Rights and Welfare of the Child 1990	10 October 1997	7 January 2000	Article 20 – Primary obligation on parents to secure conditions of living necessary to the child's development, and in case of need, States Parties to take all appropriate measures to provide, material assistance and support programmes particularly with regard to, among others, housing.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2000	16 March 2004	17 December 2004	Article 16 – The right of women to equal access to housing and to acceptable living conditions in a healthy environment; and obligation on States Parties to grant women, whatever their marital status, access to adequate housing.

# Evictions in South Africa

Relevant International and National Standards

The courts in South Africa have tried to enforce the housing rights of people faced with evictions. However, though legislation and policies offer protection as well, evictions that at times result in homelessness are a regular occurrence and often occur in a way that is incompatible with respect for human rights. Many poor and vulnerable people are evicted without being given an opportunity to oppose their eviction or present their case in court, without adequate notice of when the eviction order will be carried out, and in some instances, without the provision of suitable alternative accommodation.

More often than not, those faced with eviction are not aware of their rights or face obstacles in enforcing them through the legal system.

This book offers useful and accessible information on the substantive and procedural standards in international and national law that have to be respected prior to, during and after evictions. It aims to raise awareness of these standards so that people can have the relevant information to advance housing rights.

