Housing Rights in South Africa: Invasions, Evictions, the Media, and the Courts in the Cases of Grootboom, Alexandra, and Bredell

Marie Huchzermeyer

INTRODUCTION

Low-income residents in urban South Africa have made use of the courts to fight for what they perceive as their democratic right to a home in the city. Despite a democratic Constitution since 1996, with a Bill of Rights that includes socio-economic rights, such as adequate housing (albeit with a proviso), there is little consistency in the outcome of the route of access to the city through the judiciary. Over the past two years, three eviction-related cases that involved court applications by illegal occupiers for short periods dominated the news in South Africa, and are frequently referred to in the media. Each had a different outcome, none of them satisfactory, highlighting the limitations of the judiciary as a route to democratic access to the city.

The cases discussed in this paper raise the question as to the role of courts in a democratic, yet unequally developed country like South Africa. Due to the high level of inequality (eighteen million people, that is 45 precent of the population, have an income of up to R345/adult, which is the poverty line as defined by UNDP [2000], in Liebenberg [2001:234]), very close to half of the population requires the protection of their socio-economic rights through the Constitution. However, when called upon by the poor, the judiciary is seemingly reluctant to interfere in the affairs of the executive arm of government. It is equally reluctant to rule in favour of the poor when the economy or investor confidence is at stake. As primary informer of investor sentiment in a neo-liberal dispensation, the media is now in an increasingly delicate position where reporting on a land invasion may do more harm than leaving it ignored.

Royston (1998) analysed the strategies of low-income communities for access to the city during the late apartheid years, when the basis of exclusion was shifting

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from racially-based legislation to socio-economic processes. Despite the repeal in 1991 of legislation that determined access to land by race, many land-related laws of the Apartheid era continued well into the new democratic dispensation beyond 1994. Royston (1998) highlights the significant role of the courts in the early 1990s, a period of legal ambiguity. She notes that

> Supreme Court decisions regarding the eviction of squatters helped to lessen the draconian affects of the PISA [Prevention of Illegal Squatting Act of 1951], and it was unusual to hear of a court ordering the removal of squatters unless alternative accommodation or land was available for resettlement. (Royston, 1998:147)

On the basis of three case studies, this paper discusses the current legal situation, which has improved in terms of democratic access to the city. It also discusses the role of the courts, which instead has become more ambiguous. The three eviction cases discussed in this paper have received much media attention. The first is that of Mrs. Grootboom, who in 2000, together with some 900 other people of the Wallacedene settlement in Cape Town, challenged the Tygerberg Municipality in the High Court on the basis of the progressive constitutional right to adequate housing, and the children's unqualified right to shelter. The municipality then challenged the High Court ruling in the Constitutional Court, which again ruled for the temporary provision of shelter and services to the Grootboom community, and for an extension to the national housing programme to cater to the immediate needs of those living in intolerable conditions.

The second case occurred in the first half of 2001. A high profile Urban Renewal Programme has necessitated extensive relocation of residents from the overcrowded township of Alexandra in Johannesburg. The illegality of the eviction procedure was challenged in the High Court by one household, that of Mrs. Mqokomiso, in what is referred to as a "benchmark" application. Not only did she claim for the reconstruction of her house, but also for the loss and inconvenience caused by the dislocation. The validity of the challenge was confirmed through the out-of-court settlement that the municipality offered, and which was eventually accepted by the claimant. This, however, was followed (though apparently not as a consequence of this case) by a generous adjustment to the relocation package of the Renewal Programme.

The third case followed a month after the eviction in Alexandra. A seemingly rapid and massive land invasion on the eastern outskirts of Johannesburg caught the media's attention and within ten days all illegal occupiers were forcefully evicted, even those with rights conferred upon them due to a period of occupation that

exceeded six months. Differential rights in the eviction procedure case were ignored in an effort to demonstrate to investors internationally that the Zimbabwean land crisis was not spilling over into South Africa.

The Grootboom case is extensively documented and debated, and court applications as well as the rulings are freely available on the internet. For the other two cases, the paper draws on media articles, press statements, and a few targeted interviews.

LEGISLATION GOVERNING INVASION, EVICTION, AND RELOCATION IN THE THREE CASE STUDIES

Chapter 2 of the *Constitution of the Republic of South Africa, 1996* is a Bill of Rights. In Section 26, titled "Housing", it defines the right to housing as follows:

(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.

In Section 27, titled "Children", the Bill of Rights defines a further housing-related right:

(1) Every child has the right –
(c) to basic nutrition, shelter, basic health care services and social services.

In addition, Section 25, titled "Property", protects existing property rights, and in relation to that, provides the basis for land reform, in particular as it relates to past discrimination under apartheid. Beyond this, it states that

(4) 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.

This relates to Section 9, titled "Equality", which is defined as follows:

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

De Vos (2001) emphasises the transformative nature of the South African constitutional project. He explains that "the constitution explicitly rejects the social *and* economic status quo and sets as one of its primary aims the transformation of society into a more just and equitable place where people would be better able to realise their full potential as human beings" (de Vos, 2001:260, emphasis in the original). In relation to this vision, the state has both positive and negative obligations. The Bill of Rights then has the role of both protecting existing entrenched rights and privileges, as well as extending "the enjoyment of rights to all" (de Vos, 2001:261). In certain situations, particularly in relation to entrenched rights to property and extending access to land to the poor, this entails a conflict or contradiction, which is proving difficult to overcome.

The realisation of the right to housing, in particular the location of such housing, is inextricably tied to right to land, and is hampered by the constitutional protection of the extremely skewed existing property rights to land. The level of urbanisation in South Africa, as per the 1996 census, was 54 percent (Orkin, 1998). This means that more than half of the country's housing must be developed in urban areas. The unmet demand for housing in urban areas is demonstrated in the case studies discussed in this paper. The fact that land is invaded, or "illegally occupied" (the correct legal terminology in SA), demonstrates that access to housing for the poor is related to inequitable access to land. However, the discourse on land reform in South Africa has addressed itself exclusively to rural situations. In the case of the Bredell invasion, where the invaded land was zoned rural, the invasion occurred for the purpose of urban accommodation, and not with the intention of agricultural land-use. However, the land-related discourse triggered by this invasion was preoccupied with the slow pace of rural land reform, and comparisons with rural invasions in neighbouring Zimbabwe.

This same contradiction is reflected in the structure of government ministries. The Department of Land Affairs is responsible for rural policy, whereas the Department of Housing is responsible for urban policy. The *Urban Development Framework* of the Department of Housing (1997) entails visions for equitably structured cities, yet does not engage with the question of land rights. Only in April 2002 was an announcement made by the national Department of Housing that subsidisation of land costs by the Department of Land Affairs for urban low income housing would be considered. However, no mechanisms for such subsidisation had been developed at the time of writing this paper (June 2001).

Returning then to the sections of the Constitution spelt out above, new legislation has been enacted since 1996 to give meaning to these sections, both in the rural and the urban context. Where land outside of a formally declared township has been occupied with the consent of the owner, the *Extension of Security of*

Tenure Act of 1997 (abbreviated ESTA) applies (McLean, personal communication). Roux (2002) notes that, applying to farm workers, this Act protects the rights of some six million beneficiaries across South Africa. The Act prescribes eviction procedures, including that relevant circumstances should be considered by the court. In the case of the Bredell invasion, the appeal by one longer-term occupier of a government-owned portion of the land, who had rights in terms of that act, was based on these provisions (Snoyman, personal communication).

In other cases of land occupation and eviction, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998* (abbreviated PIE) applies. This Act, which, for the first time, criminalises unprocedural evictions, finally replaced the *Prevention of Illegal Squatting Act of 1951*. The procedure set out for eviction in PIE differs according to the length of occupation. Where this has exceeded six months, it must be considered whether alternative land "can reasonably be made available by a municipality or other organ of the state or another land owner" (Republic of South Africa, 1998:829). Where the land has been occupied for less than six months, an eviction order may only be granted "after considering all the relevant circumstances". In both cases, "the rights and needs of the elderly, children, disabled persons and households headed by women" must be considered (ibid.).

In the same Act, special procedures are prescribed for urgent eviction. These apply in cases where a) the occupation implies a danger to any person or property, b) where the owner's or any other person's hardship resulting from the occupation exceeds that of the occupier, if evicted, and c) "if there is no effective remedy available" (Republic of South Africa, 1998:831). The Act also sets out procedures relating to effective notice for eviction to the unlawful occupier. This includes an explanation of the grounds on which the eviction is required, and a statement 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" (ibid.).

Both in the cases of Bredell and the Alexandra relocation, urgent eviction orders were granted on the grounds of health. In both cases, lawyers representing the evictees challenged the seriousness of the danger/threat to the occupier's health, and challenged the eviction procedure in terms of the notice given. While the Alexandra case discussed in this paper was settled outside of court, so as not to set a legal precedent, the final High Court judgement in the Bredell case disregarded these rights and remains unchallenged.

Reflecting on the ambiguity of judgements within the post-1996 legal framework, Roux (personal communication) notes that there are three types of legal interpretations of the rights discussed in this section, and these are reflected in different judgements. First of all, there are no radical judgements. The closest a

judgement may be in supporting illegal occupiers' rights would be in a liberal sense, as exemplified by the Grootboom case. Even this legal interpretation in South Africa would refrain from requesting the government to give permanent rights to the illegal occupiers of land and to upgrade infrastructure and services, as is common practice, for instance, in Brazil (see Huchzermeyer, 2002a), as this would condone land invasions. As is seen below in the discussion of Grootboom, the state could not be easily bound even by a liberal order of court (Roux, personal communication).

The second type of judgement would be informed by the "correct" legal interpretation, which is invariably conservative. The third type of judgement is what Roux (personal communication) refers to as the "tough approach", where competitiveness is taken into account and the ruling is weighted in favour of property rights and the sentiment of investors (Roux, personal communication). This clearly was the case in the High Court ruling over the illegal occupation at Bredell

Despite these judicial ambiguities, Roux (2002) points out that the post-1996 legislation in South Africa is based on an innovation relating to security of tenure that must be recognised and acknowledged. He states that in this legal framework "judicial constraints on arbitrary eviction create a form of tenure." Provided "the legal system is accessible to the poor," tenure security is provided simply by conferring rights on a beneficiary class by statute, without expensive titling of land (Roux 2002).

It may be noted that the one Act that still contradicts Section 26(3) of the Constitution is the *Trespass Act* of 1959, which remains on the statues to date. This was applied in the Bredell invasion for the arrest of 200 of the squatters, some of whom had lived on the land for more than six months. Being behind bars meant that their procedural rights in the eviction, as set out in ESTA and PIE, were contravened. They did not receive effective notice of the demolition of their shacks and had no access to legal representation. The Trespass Act creates a reverse onus on the individual to prove his/her innocence and therefore the presumption of innocence is violated, which in turn is unconstitutional. (Snoyman, personal communication).

GROOTBOOM: A LANDMARK RULING ON SOCIO-ECONOMIC RIGHTS

Invasion and Eviction

In 1998, some 900 residents of the overcrowded Wallacedene settlement in Cape Town had illegally occupied vacant, privately owned land that was earmarked for

low cost housing. The owner made an application for eviction to the Magistrate's Court in late 1998, and it was agreed that the occupiers would vacate the land by 15 May 1999. However, their former living space in Wallacedene had been taken by others, and when the eviction was carried through on 18 May 1999 in the absence of many of the shack owners (shacks were bulldozed and building materials burnt), the evictees attempted to build temporary timber and plastic structures on a sports field in Wallacedene. These, however, were inadequate to protect their children from the elements. The group consisted of 390 adults and 510 children (276 were younger than eight years) (Davis, 1999).

A Successful High Court Application

One of the evicted people, Mrs. Grootboom, sought relief on behalf of the group by appealing to the Cape of Good Hope High Court on the basis that their constitutional right to adequate housing and their children's right to basic shelter had been denied. In winter (June), before the full hearing, a High Court judge visited the site, and issued an order that the authorities permit the children and one parent of each child to seek shelter free of charge in the Wallacedene community centre (Sunday Times, 1999, article by Rickard).

In relation to the qualified right to adequate housing (within the available resources of the state), the court considered the housing programmes of the various levels of government in order to establish whether reasonable steps had been taken to realise this progressive right. The judge was convinced that "a rational housing programme had been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources" (Davis, 1999:14). As the constitutional rights had only come into force on 4 February 1997, it could not be expected that the housing crisis already be solved. The judge raised the question, as to whether, beyond the implementation of a rational housing programme, the state was obliged to provide adequate shelter in a case such as Grootboom. The provincial and national governments had argued that this would dilute the scarce resources available for the implementation of the housing programme. The judge concluded that in terms of the qualified right to adequate housing (Section 26 of the Constitution), the applicants had no claim on the authorities (Davies, 1999).

However, in terms of the unqualified right of children to basic shelter, it was considered whether such shelter should be provided in an institution or whether the children should be sheltered with their parents, who at this stage were unable to provide shelter. It was felt that it was in the children's best interest to be sheltered with their parents. Again, the provincial and national governments argued that

providing shelter on this basis would distract scarce resources from the implementation of the housing programme, and feared a flood of demands from other squatters.

From a previous socio-economic rights case in the medical field, the judge quoted that "[a] court will be slow to interfere with rational decisions taken in good faith by political organs and ... authorities whose responsibility it is to deal with such matters" (Davis, 1999:8). However, in his ruling on 17 December 1999, the judge stated that in terms of Section 28(1)(c) of the Constitution, namely the child's unqualified right to basic shelter, the authorities were obliged to provide as a bare minimum "tents, portable latrines and a regular supply of water (albeit transported)," within a three-month period, and until such time as the parents were able to shelter their own children (Davis, 1999:26). However, this ruling was challenged by the Municipality, in the Constitutional Court.

The Constitutional Court Ruling

Five months later, pending the Constitutional Court ruling, little had changed for the Grootboom community and its children. However, there was national and international interest in the way the Constitutional Court would handle the authorities' appeal (Sunday Times, 2000, article by Rickard, 7 May).

Geoff Budlender (2001) of the Legal Resources Centre was appointed as attorney of the amici curiae ('friends of the court'—in this case, the South African Human Rights Commission and the Community Law Centre), and prepared a detailed analysis of the case. From this extensive document, I review only the aspect relating to the government's housing programme. Budlender questioned in particular the governments' excuse that meeting the housing needs of those living under the worst conditions would deflect resources from the medium- to long-term housing delivery programme. He argued in particular that the government had not bothered to assess how many people live under such conditions, and therefore had no idea of the actual cost of meeting their immediate housing needs. In contrast to the High Court ruling, Budlender argued that the magnitude of the housing backlog was no excuse for inactivity over the past three years. Instead, Budlender argued, the government should have prioritised meeting the "minimum core obligation," the needs of the most desperate and vulnerable (Budlender, 2001, para 83). Budlender further discarded as unrealistic the argument that government offices would be flooded with people claiming realisation of their progressive right to adequate housing (para 90.2).

The Constitutional Court ruling by Judge Yacoob was based on the arguments put forward by Budlender (Legal Resources Centre, 2002). It agreed with the

earlier High Court ruling by Judge Davis, in questioning whether the government's housing programme responds to the immediate and short-term needs of the most desperate. However, the ruling took issue with the government's stance that meeting these immediate needs would compromise the medium- to long-term objectives of the housing programme, in terms of resource allocation (Financial Mail, 2000, article by Laurence, 13 October). On this basis, Yacoob's ruling prescribes that the housing programme must plan not only for the medium- to long-term delivery of housing, but also for "the fulfilment of the immediate needs and the management of crises," ensuring that "a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately" (quoted in the Financial Mail, 2000, article by Laurence, 13 October). In the judgement, the court does not prescribe to the government what measures should be taken in extending the housing programme to the most needy.

The Significance of the Grootboom Case

In legal terms, the Grootboom ruling in the Constitutional Court has implications beyond housing, and applies to the realisation of all socio-economic rights. The Legal Resources Centre (2002:2,4) refers to the Grootboom constitutional ruling as

> the most important judgement to date in South Africa's post-apartheid legal history ... In years to come, "Grootboom" will occupy an important place in South Africa's fledging constitutional jurisprudence. The case will be studied by law students, the subject of interpretation by legal academics and jurists, and perhaps the basis of the creation of new social policies addressing the social and economic rights of our people. "Grootboom" is a watershed moment in our constitutional democracy—and will have a ripple effect for years to come. Its implications have not only been felt in South Africa alone, but it has become of great interest to jurists around the globe.

Analysing the implications for social assistance, Liebenberg (2001:257) comments that "the bottom line of the *Grootboom* decision is that the state is constitutionally obliged directly to assist persons who are living in crisis situations or intolerable conditions." In terms of housing policy, the ruling obliged the government to develop temporary or emergency shelter for those living under the worst conditions. It has been argued that "[t]he ruling could lead to a total overhaul of the government's housing policy" (BBC News Online, 2000, article by Barrow, 4 October). However, only in June 2002, almost two years after the Constitutional Court ruling, the national Department of Housing put out a tender for policy pro-

posals for emergency housing (Department of Housing, 2002). The municipality responsible for Wallacedene has taken almost as long to unveil a development plan for the Wallacedene settlement (this was done early in 2002). Mrs. Grootboom had long lost faith and sought accommodation elsewhere (Legal Resources Centre, 2002).

The Grootboom case has sparked a debate as to the role of the Bill of Rights and the judiciary in relation to policy-making, resource allocation and implementation. The Sunday Times (2000, article by Rickard, 7 May) pointed to a contradiction, namely that Judges like Davis, who had ruled in the High Court, had opposed the inclusion of socio-economic rights in the Constitution in 1996, arguing that these were issues of policy, to be adjudicated by politicians. The ANC had argued strongly in favour of their inclusion. Now the tables had turned, and the same Judge had ordered an ANC-led government to realise these very rights for the Grootboom claimants. The Constitutional Court ruling, then extended this government obligation to all those living in inadequate housing, though not prescribing how or by when.

Steven Friedman of the Centre for Policy Studies presented a strong view on this contradiction, arguing that

> [h]anding over policy issues to judges is an act of democratic defeatism: it signals that they are more likely to decide them wisely than those we elect. If we want policy decisions taken by judges, we must accept that they will be taken not only by those like Davis, who feel for the poor. (*Mail and Guardian*, 2000, article by Friedman, 13 October)

Friedman's view might have relevance in relation to the other cases discussed in this paper, in particular the conservative High Court ruling in the later case of Bredell, which regarded the Grootboom precedent as not applicable by disregarding certain evidence that should have ensured some of the squatters established rights to the land (Snoyman, personal communication). As the *Mail and Guardian* (2000, 13 October) commented, "government has moved away from the political foundations that informed this Constitution toward an uncritical acceptance of a free-market interpretation of the global imperative." In response to Friedman's position above, the *Mail and Guardian* (2000, 13 October) argued that "[t]he courts can only force the government to justify its policy—political activity is required to change policy if it is to truly meet the needs of the majority." *The Sunday Independent* (2000, article by Winter, 15 October) commented that the Grootboom judgement has already encouraged various NGOs to act more boldly in questioning government programmes in relation to promises made, implying that political activity, at least in the form of lobbying, might increase.

ALEXANDRA: AN ILLEGAL EVICTION CLAIM SETTLED OUT OF COURT

The Alexandra Renewal Programme Necessitates Relocation

A R1.3 billion Urban Renewal Programme for the complex township of Alexandra near the upmarket Sandton business district in Johannesburg involves the dedensification of the township. Originally planned for 70 000 people, Alexandra was believed to be the home of some 350 000 people at the launch of the renewal programme (*Mail and Guardian*, article by Zulu, Head of Communications in the Gauteng Provincial Department of Housing, 29 June).

As of February 2001, 6 000 households were evicted and relocated from the banks of the Jukskei River, where the renewal plans envisage a park, fenced in to foreclose renewed invasion. An urgent application for eviction and relocation had been granted by the High Court in March 2001, on grounds of risks of flooding and of cholera, both relating to the Jukskei River. However, the "urgent" eviction was only carried out three months later in the middle of winter, when flooding risks are lowest. Residents received only one day's notice of the pending removal and demolition (Legal Resources Centre, 2001). The 448 households registered on waiting lists for subsidised housing were to be relocated to a transit site in Extension 7 of Alexandra and would ultimately receive a subsidised house in Braamfisherville (Dobsonville, the north of Soweto, some 30km from Alexandra). Those not qualifying for subsidies, or having failed to apply, were to be relocated to Diepsloot, an unserviced area near Roodepoort on the West Rand, equally distant from Alexandra. Of these, 1 032 households vacated their homes before the relocation, and the remaining 4 051 households were eventually relocated to Diepsloot (*Mail and Guardian*, 2001, article by Zulu, 29 July).

Unique to South Africa, many of the structures in the informal settlement along the Jukskei River were built of brick and mortar/cement stone and were connected to services, therefore resembling the gradually consolidated *favelas* of many Latin American cities. The informal settlement could hardly be differentiated from the adjacent illegal construction of permanent dwellings in the large yards of old council houses in Alexandra, some of which were also earmarked for demolition, as they had originally been built within the flood-line. The demolition and relocation clearly amounted to considerable material losses. It was never confirmed that the Jukskei River was contaminated with cholera (Scheepers, 2001), despite the alarm-ringing announcement by the Minister of Water Affairs and Forestry on 18 January (*Daily Dispatch*, 2001). Nevertheless, the relocated residents of Alexandra were now saved from the dangers of flooding. One such flood had swept away

many homes in March of the previous year. The new site at Diepsloot, however, presented them in many ways with graver problems, particularly access to services and to schooling for their children. The forty-five-minute travel to Alexandra at considerable cost brought social and economic disruption to many families' lives.

Mrs. Mqokomiso's Application for Compensation

However, only one such illegal home-owner of Alexandra took to court to request compensation for loss of property and other damages related to the inconvenience of her relocation. Hernrietta Mqokomiso, who had been visited at the relocation site by veteran politician and human rights commissioner Helen Suzman, was encouraged by Suzman to seek support from the Legal Resources Centre. During the media attention on the Bredell invasion a month later, Suzmann pointed out in a letter to *The Sunday Independent* that conditions at Diepsloot were worse than in the rural resettlement areas of the apartheid government: no electricity, water supplied only by tanker, and too few portable toilets (Suzman, 2001, in *Mail and Guardian*, 8 July). The site was not prepared for habitation. The plot on which Henrietta Mqokomiso was dumped with her portable possessions was covered in rubble, and the only compensation she received for her fully-serviced house in Alexandra was some timber and corrugated iron with which to construct a shack. The site was not prepared for habitation (Legal Resources Centre, 2001).

Mrs. Mqokomiso's house in Alexandra had been constructed through an unassisted self-help process over many years (starting in 1989), in the yard of a friend of her husband. For unexplained reasons, this house had been singled out for demolition, whereas surrounding houses were left standing. Geoff Budlender, in Mrs Mqokomiso's High Court application (Legal Resources Centre, 2001:28), defined her constitutional right to housing as follows:

> ...only the gravest and most urgent circumstances would justify an organ of state destroying someone's adequate and well-serviced housing, and dumping them on the side of a road with nine poles and ten pieces of corrugated iron, in a place without adequate services, 30 kilometres from where they previously lived.

The relief sought for in the application was to have the house rebuilt in its original location or equivalently convenient accommodation provided, and compensation for the dislocation, suffering, and indignity resulting from the eviction. This application was referred to as "a landmark legal battle... Lawyers say the case will set a crucial precedent for the way the state deals with relocations and evictions in future" (*Mail and Guardian*, 2001, article by Deane, 13 July).

The official position of the Renewal Programme on this differentiated right on the grounds of having built an adequate, though illegal, house was made clear by a statement by Zulu, of the Gauteng Provincial Department:

> Many shacks and brick houses that were demolished, about 3 000 of them, had either legal or illegal connections of water and electricity and had been there for more than 10 years; that did not preclude them from the process of dedensification of Alexandra. (*Mail and Guardian*, 2001, article by Zulu, 29 February)

Nevertheless, confidence in the legal basis of this position must have waned, as the City of Johannesburg chose to settle Mrs. Mqokomiso's claim out of court. The intention presumably was to avoid setting a legal precedent. A formal house was allocated to Mrs. Mqokomiso. Although in March 2002 she was still waiting to take occupation (Legal Resources Centre, 2002), the case has now been closed (Mathabatha, personal communication). Therefore, this 'landmark' application had no legal implications for future cases. However, it received media attention, and is associated to the efforts of the Human Rights Commission, which had visited Diepsloot and had put Mrs. Mqokomiso in contact with the Legal Resources Centre. Direct adjustments to the eviction procedures of the Alexandra Renewal Programme stemmed from concerns raised by the Human Rights Commission to the Gauteng Provincial Government.

The Mitigating Role of the Human Rights Commission in Future Relocations from Alexandra

The Human Rights Commission had visited the Diepsloot relocation area, noting the complaints of the relocated residents. Though in support of the Alexandra Urban Renewal Programme as a whole, the Commission identified human rights violations in the eviction and relocation procedure. It cited in particular the inadequate consultation, unnecessary use of force, disruption of schooling, disregard for personal belongings, inadequate access to services at the relocation site, and insufficient provision of shack building materials at the relocation site. On these grounds, the Human Rights Commission (2001) requested a meeting with the Gauteng Provincial Department. The official heading the renewal programme, though stating that the case of Mrs Mqokomiso had no direct implications for the renewal programme, acknowledged that discussions with the Human Rights Commission lead to a revision of the "relocation package", which is now said to entail:

- access to a house and not only a site, irrespective of whether the household qualifies for the government housing subsidy (evidently an attempt to avoid claims such as those of Mrs. Mkokomiso);
- transportation in the relocation;
- assistance in placing children in new schools;
- shuttle transport back to Alexandra for a limited period, in cases where re-schooling is not appropriate;
- the same shuttle transport for a limited period to avoid job loss;
- a vocational training voucher to assist in the development of a new livelihood;
- and food support vouchers where livelihoods are severely impaired. (Englebrecht, personal communication)

The package was also to include a commitment not to relocate households beyond a 15km radius from Alexandra. However, a World Bank delegation subsequently advised that, by international standards, a distance of 30km to the relocation site was by no means high. Distance is not an issue in relocations, so the World Bank experts stated, the only issue is that of access to facilities (Engelbrecht, personal communication). In its frustrations with attempts to identify available land within a 15km radius, the Gauteng Provincial Government welcomed this socio-technocratic position. Very problematically though, it legitimises the segregation of Alexandra households to new townships on the urban periphery. The Provincial government can henceforth boast compliance with international standards and disregard households' efforts to access anything but the distant periphery of the city.

BREDELL: A POLITICAL DECISION TO EVICT UNLAWFULLY REMAINS UNCHALLENGED

The International Context

Following a month after the disruptive eviction in Alexandra, the invasion of unutilised land near the suburb of Bredell in Kempton Park, Johannesburg, was consistent with a trend of land invasion that is remaining largely unreported. It was the political context within which the Bredell invasion took place that drew media attention. Intense debate was taking place in the media about South Africa's position on the government-backed invasion of productive farms in neighbouring Zimbabwe. Suddenly, the seemingly massive invasion of 23 hectares of rural land referred to as 'Bredell' (the name of the neighbouring suburb) on the eastern outskirts of Johannesburg dominated the news headlines for over a week. Figures were mentioned of up to 10 000 people (Amato, 2001 in *The Sunday Independent*,

8 July). A government-owned portion of the land had already been occupied for more than six months. A gradual invasion process, which was never formally documented, grew in pace. Early in July 2001, when arrests on grounds of the *Trespass Act of 1959* took place, the invasion drew media attention.

The course of events at Bredell was inextricably tied to happenings in Zimbabwe and to the international interest in President Mbeki's response to Zimbabwean President Mugabe's much criticised position. This issue was in the spotlight due to the meeting of the African Organisation of Unity (AOU) on 9 July 2001, and its pending transformation into the African Union. Land invasion in Zimbabwe was to be debated in this forum of African State leaders (*Sunday Times*, 2001, article by Paton, 8 July; SABC, 2001). Further political attention was drawn to the invasion, when the Pan African Congress (PAC) offered support to the squatters. The PAC is an opposition party that has advocated for equitable access to land, and has criticised the ANC-led government for its slow progress on land reform. It is also know to be sympathetic of the land redistribution process in Zimbabwe, and therefore viewed with great suspicion when aligning itself with land invaders.

The Role of the Media

Land invasions in Zimbabwe and the deliberations of the OAU would not have influenced the course of events at Bredell, had the media not catapulted the Bredell invasion into international awareness. The international press had already speculated as to whether land grabbing in neighbouring Zimbabwe would spread to South Africa: "No land crisis in SA – Mbeki" (BBC News Online, 18 May 2001). In the brief period of one week in July 2001, when the Bredell invasion became known, titles that appeared in the international media were as follows:

- "SA police arrest squatters" (BBC News Online, 5 July 2001) with reference to the land crisis in Zimbabwe (notably, the arrests were made through the infamous *Trespass Act of 1959*, referred to in the introduction—Snoyman, personal communication);
- "South Africa's rumbling land issue" (BBC Online, 11 July 2001), with reference to Zimbabwe;
- "Police evict SA squatters" (BBC Online, 12 July 2001), stressing again that land distribution is highly charged in South Africa;
- "South Africa confronts landless poor and a court sends them packing" (*New York Times*, 12 July 2001), casting the Bredell case within a debate of rural land reform with reference to Zimbabwe and Namibia, rather than factually presenting it as a quest for urban accommodation or access to the city.

South African media reports were diverse. In the national weekend press, many reports were emotive, casting Bredell as a battle field. "Battle lines drawn in the dust of Bredell: from the harsh wasteland at the centre of the land invasion furore comes a wake-up call from the poorest of the poor: give us land or we'll take it" (*The Sunday Independent*, 8 July 2001), headline, with reference to Zimbabwe; "All I want is a plot somewhere" (*Sunday Times*, 8 July 2001); "'Save us from hell on earth'" (*Mail and Guardian*, 13 July 2001); "The battle for Bredell" (*Mail and Guardian*, 13 July 2001, front page); "Grotesque scene as hopes of coming home end in piles of wood" (*The Sunday Independent*, 15 July 2001).

A number of reports debated the local and international political dimensions. "PAC rejects charges of opportunism over land grab" (*The Sunday Independent*, 8 July 2001); "Bredell: Mbeki takes on Mugabe land-grab: President scores diplomatic coup by reversing OAU backing for Zimbabwe's leader" (*The Sunday Independent*, 15 July 2001). A further category of reports were reflective, asking for the causes of the invasion and pointing to the rights of the vulnerable:

8 July, *The Sunday Independent*:

- "Poor communities losing patience with slow pace of housing delivery";
- "Ill wind whistles across the arid waste of government policy on jobs and housing";
- "Bredell invasion could be resolved under constitution's commitment to land reform";
- "Land invasion fears mask pain of removals";
- "Desperate need for land requires rethink of policy", by UK Geographer Gillian Hart;
- "Nothing like Zimbabwe";

15 July, *The Sunday Independent*:

- "Different sides of the land issue fence";
- "We need credible long-term land policy, not legal sophistry";

22 July, *The Sunday Independent*:

- "Act now or people will invade like locusts";

5 August, *The Sunday Independent*:

- "There is a way to make land policies work for the landless"

27 August, *The Mail and Guardian*:

- "Land occupations are inevitable".

The Media and the Economy

The South African media's concern about the squatters and the infringement of their human rights did not enhance investors' perceptions in relation to the rule of law and levels of development in South Africa. From 4 to 7 July, the Rand dropped by 23 South African cents to the US$, stabilising thereafter. However, the only other drop for the month of July (though only of 3 cents) was on 13 July—the day of the High Court judgement opposing the squatters' appeal. Over the entire month of July, the Rand dropped only 17 cents (Oanda.com, 2001). Prior to this ruling, the minister of Land Affairs had predicted that "[w]hen the foreign investors see a decisive government acting in the way we are acting, it sends the message that the government won't tolerate such acts from whomever" (*Mail and Guardian*, 2001, article by Bulger, 8 July 2001).

James Lamont of the London Financial Times, interviewed on the SAFM programme "The Editor's" on 15 July, paints a slightly different picture of investor sentiment, one that may be more concerned with levels of development and possibly the respect for human rights than with the rule of law. This could explain the drop in the value of the Rand on the day of the tough ruling of the High Court:

> ...there are sensitivities that affect the Rand. And equally, more sentiment issues like the land issue, and seeing pictures of squatters and of landless people being moved off by policemen and by private security companies. I think those pictures, broadcast across the country and across the world, in spite of the government's resolve to get on top of this, beg certain questions about development within the country and about investor sentiment. (SAFM, 2001)

Whichever way this is interpreted, the perceived vulnerability of the Rand to speculator's confidence appears to have been one factor that pressed the South African government to demonstrate that law and order prevail in South Africa, despite chaos in neighbouring Zimbabwe. The fact that the Pretoria High Court ruling over the squatter's appeal contradicted the law in a number of ways, as discussed below, remained of minor interest to the international and the South African media.

Local Party Politics

Reports were that the invaders had first been asked to pay a small levy to the ANC (BBC News Online, article by Carolyn Demster, 12 July). At a later stage, the PAC took on the role of site allocation, and this is believed to have accelerated

the invasion process. *The Mail and Guardian* (13 July 2001:16) suggested that "the major sin of the settlers in Bredell, it seems, is to have got the support of the PAC". Its involvement in Bredell was of central interest to the media. It was then even reported that the land invaders were inspired by the land invasions in Zimbabwe (*Sunday Times* 2001, article by Donaldson and Jacobs, 8 July), again portraying the Bredell invasion as a new trend, rather than acknowledging that similar peri-urban invasions have been the order of the day on the outskirts of South African cities for at least a decade.

The occupation occurred on unutilised rural land, partly owned privately, and partly by government parastatals. It is crossed by a number of servitudes relating to a power line, a petrol pipeline, and a railway line that bordered the land. The invasion appeared to be well organised, with regular plots (225m^2, according to *Sunday Times*, 2001, 8 July) being demarcated in an orderly manner. As with the 1993 invasion of Gunguluza in the small town of Uitenhage, the 1994 invasion of Kanana in Sebokeng, Southern Johannesburg, and the adjacent invasion of Agrenette Hills in 1997 (none of which drew much media attention), the occupiers had a sense of entitlement to an equitably sized portion of land in an orderly layout (see Huchzermeyer, 2002b). The organisers of the invasion, as with the case of Kanana, had ensured that the occupation stayed clear of the servitudes (an aerial photograph showed only one shack at Bredell to be located under the powerline—Snoyman, personal communication).

However, whereas shacks were allocated free of charge in Kanana, a small fee of R25-30 (US$ 3-3.7 on that day) was requested in the allocation of plots at Bredell. This was to cover the cost of installing some form of basic service. However, the PAC arrived at the scene and offered to assist the squatters. The PAC is reported to have requested R30 from the households, and to have actively taken part in the allocation of land. Contradicting anecdotes were presented in the media. On the one hand, the PAC claimed it had collected money to cover legal fees to represent the squatters, something it considered its political responsibility (*The Sunday Independent*, 2001, article by Dube and Bulger, 8 July). On the other hand, individual households interviewed on the radio claimed to have been sold the land by the PAC (AM-Live, SAFM, 4-15 July 2001).

Debates over the PAC's involvement in the invasion and investor sentiment perhaps distracted attention from the legal questions. Political sentiment dominated the court's decision. Within a week the land was forcefully cleared by a lawful court order by the sheriff of the High Court, who had hired private security companies popularly known as the "rooi gevaar" or "red danger" (*Mail and Guardian*, 2001, article by Ngobeni, Majola and Magardi). The same had been hired in the Alex removal, and were reported to

be paid R390 for each shack demolished (*Mail and Guardian*, 2001, article by Ngobeni and Deane, 27 July). Some of the squatters had occupied a government-owned portion of the land for more than six months, therefore having the right to have suitable land alternatives considered. Land had already been allocated for their relocation (Snoyman, personal communication). However, even these were forcefully evicted. Their rights to this alternative land had been lost through government action, and by virtue of the squatters having now "scattered to the winds" they were unaware of the rights that they had forfeited (Snoyman, personal communication).

The Ambiguous Powers of the Court

As in the case of the Kanana invasion of 1994 (see People's Dialogue, 1997; Huchzermeyer, 2002b), the Bredell eviction order was granted on grounds of health risks to the invaders, as sufficient supply of potable water was not guaranteed. This ignored the fact that two water tanks existed (and were being used) on land adjacent to the government-owned portion that had been occupied for more than six months by Provincial Roads employees and some squatters living amongst them. The PAC was apparently in the process of establishing further access to water (Snoyman, personal communication). *The Sunday Times* (2001, article by Donaldson and Jacobs, 8 July) reported that some had been living on the land for more than twenty years. In the eviction order, all occupiers of the various portions of land were grouped together as "the illegal occupiers" and the same eviction notice was applied to all. Residents had also paid a fee towards the provision of services to the area. With a plot size of 225m^2 allocated to each household, sanitation could easily have been handled through on-site pit latrines, which could be dug by the occupiers. The health situation was certainly less of a hazard than the forceful eviction in freezing winter temperatures, with no alternative accommodation to move to.

"They should go back to where they came from" was the unhelpful advice of the Minister of Land Affairs broadcast on radio news (SAFM, 2001). She is also quoted to have stated that the ruling "reaffirms the democratic principles of this country" (Geomatics, 2001). The Minister of Security confidently assured the media that "They are going to move, don't you worry" (Geomatics, 2001). These statements were in direct support of the court decision to grant an urgent eviction on the legally shaky grounds of threats to the health of the occupants. Other grounds for eviction were the threat that children might run onto the train line, approximately one kilometre away (it was never shown that any trains actually run on that line), that people might be electrocuted by the electrical power lines crossing the land

(the actual danger of an electrical discharge is in fact statistically negligible), or that squatters might dig into the petrol pipe line running through the land (the authorities refused to reveal the precise location of the line "on grounds of national security", and the line was shown to actually not be in use) (Snoyman, personal communication).

As in the Alexandra case, the eviction order granted on grounds of health threats was "urgent". But unlike the Alexandra case, where eviction took place only three months later, eviction from Bredell was to be carried out within forty-eight hours. The order was handed down on Thursday night (5 July) and broadcast in several languages at the site of the invasion. After extensive legal arguments the squatters were granted permission to file opposing papers by Saturday night (7 July) in the Pretoria High Court, some 40km away. Many were not aware of this right to seek legal representation and to have their case researched and presented (Snoyman, personal communication). For the few that were aware of their entitlement to oppose the eviction, either on a provisional basis for the interim urgent eviction or a final basis to oppose the permanent eviction, it was not easy to access legal representation. The Legal Aid Board was closed over the weekend, and only replied to requests for representation many months later, after the case had been finally heard and leave to appeal refused. Most legal offices too were closed over the weekend, leaving very little time for consultation, for the preparation of opposing affidavits, and the serving and filing of the papers in Pretoria (Snoyman, personal communication).

After the handing down of the order, the site was cordoned off by the police, and even squatters that had attended the court in Pretoria on Friday were refused access until Saturday morning to the land on which they were squatting. Therefore, lawyers were effectively prevented access to their clients (except for a period of about three hours), for the writing of affidavits concerning the length of their occupation—a crucial point on which to challenge the eviction order. This denied the squatters their statutory and constitutional right to "adequate written and effective notice" (Snoyman, personal communication). As mentioned earlier, some of the occupiers had been arrested in terms of the *Trespass Act* and did not receive the notification of the intention to evict, and many were still in prison when the eviction order was served and their shacks demolished. In fact, the Sheriff serving the Notice of Intention to Eviction recorded that the typed order could not be served on any person, as the "leaders" of the squatters had been arrested (Snoyman, personal communication).

After the application for eviction was argued in court on Monday morning, 9 July, Judge Rabie gave himself five days to consider a judgement (many days longer than the indigent squatters were given to find legal representation). His

ruling on Friday 13 July dismissed the opposition to the eviction and granted an "interim order" (which by its nature was actually a final order), the terms of which the occupiers had to vacate the land. Many squatters vowed never to leave, but in the face of the "red danger", also referred to as "red ants"—the private security firms paid R390 for each demolished shack—there was no resistance. Though in agreement with the ruling (despite its unconstitutionality), religious and humanitarian organisations offered temporary tent accommodation to the homeless (South African Council of Churches, 2001a).

After the interim eviction, the lawyers (who were not being funded) continued in opposing the final eviction application. With the additional time for this application, other aspects of the irregularity of the eviction order were uncovered. One of the landowners of the group that had applied jointly for the order was the parastatal Eskom (the electricity company), which only had servitude rights—it was argued that servitude holders do not fall within the class of persons who could evict in terms of the act. This argument, however, was dismissed. The land of the other parastatal owner, Transnet (the railway company), was not occupied (*Mail and Guardian*, 2001, article by Ngobeni and Deane, 27 July). This argument was not dealt with by the court. Further, it was argued that the ruling was unconstitutional on the basis of the Grootboom precedent, as no minimum core provisions were provided for. This argument was also not dealt with by the court. In addition, it was argued on the basis of independent affidavits and documentary proof (for instance, they had registered as voters for the 1998 election) that the length of occupation was beyond six months. Further proof was in the "Bomberg Project", in terms of which the provincial authority had, through the medium of a land facilitator, investigated land alternatives for 180 squatters three years prior to the eviction. Alternative land had been purchased, but the squatters had not been relocated by the time the eviction took place (Snoyman, personal communication).

It was further argued that the procedure followed in seeking to have the squatters finally evicted from the land, as opposed to the interim eviction, was defective, as only the interim procedure had been followed. This argument was also rejected, notwithstanding authoritative case law supplied, which showed that ESTA, using the same statutory wording, required different procedures. This argument was also rejected. Finally, it was argued that it was unconstitutional and statutorily prohibited to grant a final eviction without allowing for "adequate written and effective notice" as not a single squatter was ever advised, either by way of court ruling or by notice that he/she had the right to oppose the final eviction. The only notice that had ever been given to the squatters amounted to approximately nine hours, which

was also argued not to amount to adequate notice (Snoyman, personal communication).

None of the additional evidence and argument influenced Acting Judge Ginsberg in the final ruling, even though this did not take place under the pressure of media attention. At the stage the argument was presented, there was jubilance on the part of the lawyers representing the squatter, while all the lawyers, even those representing the state, land owners, and parastatals privately conceded that on legal grounds either the squatters would win the case or the case would have to be postponed in order to allow the evictors to rectify their case. Of the approximately 120 cases cited in support of the squatter's case, not a single one was referred to in the judgement (Snoyman, personal communication). Again, the judgement appeared to be a political decision.

Implications for Future Invasions

A worrying outcome of the Bredell case was that the Minister of Housing announced a decision to tighten land invasion legislation. Whereas section 3 of the 1998 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE) criminalises only the instigation of a land invasion in return for payment, the intention was to extend this to all forms of instigating land invasions. What actually led to this announcement was that the PAC's involvement in the land invasion could not be penalised, as the wording concerning the receipt of payment of money appeared to be defective and therefore could not be enforced. Reporting on the announcement, the *Business Day* (2001, "State to outlaw land invasions", 15 June) envisaged strong opposition from the PAC and land reform lobby groups. Indeed, the National Land Committee strongly opposed this proposal (National Land Committee, 2001) and jointly with the South African Council of Churches demanded that the government convene a national land summit in 2002, to arrive at decisions over land reform in South Africa (South African Council of Churches, 2001b). Again, land reform is framed only as rural, even where reference is made to the Bredell invasion. The land summit had not taken place at the time of writing in June 2002), but nor had the proposed amendment to tightening the PIE Act been passed to date.

CONCLUSION

The three cases discussed in this paper all relate to households living under inadequate conditions, which are then exacerbated by the state through forceful eviction. None of the households have benefited from the government's housing

delivery programme. All three cases have implications for future invasions and evictions. The significance of the final Constitutional Court ruling on the Grootboom case is that it obliges the state to cater for the core minimum housing needs of these people. Instead, in both the subsequent cases of Alexandra and Bredell, people were forcefully deprived by the state of the adequate shelter they had secured through their own efforts.

The 1996 Constitution's definition of housing rights includes protection from unlawful eviction. This has been given meaning through post-1996 legislation, which defines fair procedures that should govern evictions. However, both in the cases of Alexandra and Bredell, these procedures were not followed, and when challenged in the case of Bredell, the court would not intervene. When challenged in the case of Alexandra, a settlement was sought outside of court, so as to avoid setting a legal precedent. In both these cases, government departments and, in the case of Bredell, the courts were at pains to discourage any future legal challenges on grounds of unlawful eviction. Implications of these cases for future evictions are of a different nature. In the Alexandra case, project adjustments in terms of a more generous relocation package will entice future evictees to buy into the relocation. However, this will have no implications for evictions and relocations elsewhere in the country. In the case of Bredell, the government's tough approach on land invasions and support for forceful evictions were broadcast effectively through media statements by high-ranking officials, and were directly reflected in the ruling by the judges. Prime news coverage would have spread the tough message as effectively as the news of the Brazilian World Cup soccer victory (on the day of writing) to every inadequately housed resident: the route to adequate housing in South Africa is not through the courts.

As was noted in the Grootboom case, the courts on their own cannot ensure changes in policy. What is required is political activism. Some government lobbying followed the Bredell case. However, this has been framed exclusively in terms of rural land reform. It must be recognised by activists and lobbying groups that the housing crisis that leads to land invasion on the urban periphery (be it in a rural district) is one of urban accommodation. This crisis will not be alleviated unless the land reform discourse engages with the inequitable distribution of land in urban areas.

Two recent national government initiatives must be welcomed. One is the announcement that urban land for housing will be subsidised by the Department of Land Affairs. However, according to the announcement, this will apply only to the development of well-located medium density rental housing for those with a regular income. It does not address the housing inadequacy reflected by Grootboom, the Alexandra removal, and Bredell. The other is the announcement of an intention to develop a separate housing policy mechanism for emergency housing. Here,

the question must be begged as to whether South Africa should continue treating land invasions and the resulting informal settlements as temporary housing requiring temporary emergency intervention. Is it not time that South African activists demand that permanent rights be conferred on those having occupied land for the purposes of securing adequate housing?

As yet, there is no debate in South Africa about a policy mechanism that would enable the upgrading of informal settlements into adequate permanent living environments, as has been the practice for many decades in countries such as Brazil. Instead, in South Africa, informal settlements continue to be razed to the ground and replaced (if not at a distance of more than 30km, then through a socially and economically disruptive roll-over or shack-shifting procedure) by fully standardised orderly mass-housing delivery (although the house may now be constructed through self-help). As the three cases have illustrated (in particular that of Mrs. Mqokomiso of Alexandra), government takes every effort to discourage households on informally occupied land from gradually consolidating their inadequate shacks into adequate permanent structures. Unfortunately, even liberal judges would interpret the rewarding of such activity through the conferring of permanent rights as condoning land invasion. It is on this point that a legal debate, drawing on the progressive Brazilian legal discourse, is required in South Africa.

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