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Regulating Informal Housing Practices in South Africa

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REGULATING INFORMAL HOUSING PRACTICES IN SOUTH AFRICAN

Master of Laws (LAWS7180)

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Mhlaba wakithi bo
Usemi ndawonye
Akukho mehluko kulelizwe
Qhawul' amakhamandela

Ah thin'asina voti
Silal'emikhukhwini
Akukhi mehluko kulelizwe
Qhawul'amakhamandela

Bakhona abany'abakithi
Abasibona sesikhululekile
Kodwa umshosha phansi
Uthi not yet uhuru

We! sizwe sakithi
We! qaphelani lungani
Isintu sithi
Isintu sakudala
Ilifa lezithutha (lezithutha bo)
Lidliwa ngabahlakaniphileyo
Ilifa lezithutha (lezithutha bo)
Lidliwa ngabahlakaniphileyo

To my grandmother, this degree is yours as it is mine. Enkosi. Fran, thank you for keeping me centred and pushing me. Prof Pieterse, thank you for your patience throughout this entire process.

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Mabuya! Khwebu!

ABSTRACT

This paper delves into government's failure to recognise and regulate informal housing as an acceptable form of housing. The paper in no way suggests that the regulation and recognition of the informal housing sector will solve the housing crisis nor that informal housing will replace formal housing. Instead, it calls for the government to view informal housing as a viable form of housing for many urban city dwellers. It acknowledges that informal housing in its current form may not meet the standard of 'adequate housing' but argues that with recognition, service provision and other support from the government, informal housing can meet the standard of adequate housing as required by section 26 of the Constitution. Central to this paper is the notion that informal housing needs recognition and regulation by the government as it caters to a reasonable percentage of the South African population despite formal housing being provided especially in the main cities. This notion is supported by section 26 as well as the right to the city. The existing legislative and policy framework inadequately addresses informal housing – it either calls for eradication or upgrading (which is a less aggressive form of eradication) but not recognition. This gap needs to be addressed, and it is only in addressing this gap that informal housing can be catered for. Informal housing is as important as formal housing in the South African housing framework as it houses some of the marginalised in our society and offers a unique offering which government cannot replicate.

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Regulating and recognising informal housing in South African cities

Over the past 25 years, the state has largely focused on the provision and regulation of formal housing whilst neglecting informal housing.[1] This raises fundamental questions as to the extent of the neglect, and what to do about it. Therefore, after providing an introductory background (1), I will explore the current legal situation of informal housing (2) and discuss a way forward (3). I then conclude the report (4).

1. Introductory background

In this report, I refer to the type of shelter discussed as informal 'housing' instead of informal 'settlements'. The latter could suggest that informal shelter is not a category of housing, whilst the former captures that shelter relates to housing regardless of whether it is formal or not. Moreover, the former 'others' the poor, who are already marginalised, when referring to their choice of shelter. Using the term 'housing' puts the emphasis on what the shelter does for its occupiers, i.e. the function, rather than the form of shelter, especially since the driving forces (1.2) behind informal housing (1.1) are manifold.

1.1. What are informal housing arrangements?

Informal housing refers to a myriad of housing arrangements that exist outside of the formal structures. It refers to 'settlements - albeit land, abandoned buildings, shacks, backyard dwellings, partitioned rooms etc - of the urban poor that have developed through unauthorised occupation'.[2] Informal housing arrangements span a spectrum from the extra-legal occupation of formal structures to the contractual occupation of such, from semi-formal additions to formal structures and fully informal structures. As Chenwi points out, informal settlements (henceforth referred to as informal housing) share a set

[1] L Royston 'Security of Urban Tenure in South Africa: Overview of Policy and Practice' in A Durand-Lasserve & L Royston (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165, 176.
[2] UN-Habitat 'The Challenge of Slums: Global Report on Human Settlements' (2003) 87.

of common characteristics such as 'substandard housing or illegal and inadequate building structures, lack of basic services, overcrowding and high density, poverty and social exclusion, insecure tenure (residential status), and minimum settlement size'.[3] There are some important overlaps and differences in the ways in which informal housing arrangements are positioned in relation to the law, or should be positioned. The focus of this paper is mainly on informal housing in informal settlements. This is because they are often the most precarious and the least protected – so regulations that assist their occupiers will assist most informally housed persons. However, there is still some focus on other types of informal housing.

1.2. What are the drivers behind informal housing arrangements?

There are several drivers behind informal housing in South African cities. These include historical factors (1.2.1), shortcomings of formal housing delivery (1.2.2), urbanisation (1.2.3), and tactical and strategic reasons on the part of informal dwellers (1.2.4). Below, I expand on each of these factors in some detail.

1.2.1 Historical factors: migrant labour, apartheid exclusions, and spatial structure of cities

The racialised spatial planning history[4] of South Africa has contributed greatly to the housing crisis. However, this crisis is neither new nor unique to South Africa.[5] During apartheid, the law was an important tool in maintaining geographical segregation with black people being allocated the homelands and white people being apportioned the urban areas.[6] This became the foundation of the housing crisis and gave rise to informal housing especially in the cities. Justice Yacoob best summarised the impact the apartheid system had on informal housing:

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[3] L Chenwi 'Legislative and judicial responses to informal settlements in South Africa: A silver bullet' (2012) 3 *Stellenbosch Law Review* 541, 541.

[4] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 147.

[5] JM Pienaar 'Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin American and African developments' (2002) XXXV *CILSA* 1, 1.

[6] JM Pienaar 'The role of the Western Cape Planning and Development Act 7 of 1999 in the promotion of development' (2001)12 *Stellenbosch Law Review* 450, 457, 461.



> 'The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.'[7]

This history continues to shape the South African rural and urban landscape and the relationship black people have with the city which in turn contributes to informal housing. In order to understand the relationship black people, have with the city, one must understand the historical treatment to which black people were subjected. In 1923, the Natives (Urban Areas) Act was enacted, and it shaped the spatial planning of the urban areas.[8] The crucial tenet to apartheid spatial planning was the need for dispensable black labour and influx control. Black people were needed for their labour in cities, but they had to be contained in certain areas and their population controlled.[9] The Act was enacted to ensure that 'black people's occupation of urban areas was temporary'[10] and tied to their employment. In the cities, black people were restricted to 'locations' such as the South Western Townships ('Soweto') which were (and are still) located on the outskirts of the city.[11] Black people had to carry passes on their persons at all times – these passes allowed black people to move between the 'bantustans', the locations and their places of employment without being arrested.[12]

As a result of this stringent restriction of movement to which black people were subjected, the city was never home; it was a place where one came to earn a living. Those who were employed moved to the city whilst their families remained in the

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[7] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 6.

[8] CR Cross & R Haines 'A historical overview of land policy and tenure in South Africa's black areas' in Cross C and Haines R (eds.) *Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas* (1988) 72, 84.

[9] G Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) *Unisa Press* 381, 387.

[10] JM Pienaar 'Access to housing in South Africa: An overview of dimensions and mechanisms' (2011) 36(2) *Journal for Juridical Science* 119, 121.

[11] Cross & Haines (note 8 above) 84 - 85.

[12] Pienaar (note 10 above) 122.

homelands. Black people could not own property or land in the city thus many of them regarded the city as a temporary base and the homelands remained 'home'.[13] This gave rise to the migrant-labour system; the homelands were sources and suppliers of labour for the cities and the cities were places of employment and the means by which breadwinners supported their families in the homelands. As a result, the city was and remains a place where one comes to earn a living, not to make a home. Research conducted by Charlton and Maralapeng as part of the Alexandra Renewal Project best illustrates how the relationship black people have with the city informs their decision to reside in informal housing.[14] They cite that about 46% of those surveyed in Alexandra considered 'elsewhere' home and not Alexandra.[15]

Many black people make the distinction between a house and a home (this is not unique to black people however; it is more common in black people in South Africa). Generally, the housing that one owns or rents in the city is referred to as a 'house' whilst the housing that was previously known as homelands is referred to as a home. The former is temporary, exists for a set purpose and is there to provide shelter whilst the latter has a sense of permanence and belonging and has strong ties to social relations.[16] It is for this reason that some black people have very little to no interest in investing in the city by living in formal housing. They would rather live in informal housing which is cheaper and does not require one to have strong ties to the city, while with the few resources they have, they must maintain their families and improve the homes in the homelands to which they have strong ties.[17] Arguably, this is one of the reasons why informal housing is rife in the city and not in the former homelands. Generally, the poor are a lot more invested (socially, emotionally, familial, etc) in the former homelands than they are in the cities.

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[13] Ibid.

[14] S Charlton & A Maralapeng 'Alex is not home: Discussion document for the ARP' (2008) *Unpublished report produced for the Alexandra Renewal Project*.

[15] S Charlton 'Inclusion through housing: Limitations and alternatives in Johannesburg' (2010) 21 *Urban Forum* 1, 7.

[16] S Charlton 'An overview of the housing policy and debates, particularly in relation to women (or vulnerable groupings)' (2004) *Centre for the Study of Violence and Reconciliation* <http://www.csvr.org.za/docs/gender/overviewofhousing.pdf>.

[17] Ibid.

1.2.2. Shortcomings of formal housing delivery

Over the past two decades, there has been some progress in the provision and realisation of the right to adequate housing as contained in section 26 of the Constitution. However, the demand and burden placed on government to provide housing has remained particularly high in cities. It has been estimated that the housing backlog is now higher than it was in 1994 when it stood at 1.5 million.[18] According to the Department of Human Settlement, the backlog is estimated to be at about 2.1 million housing units – this backlog covers those with no form of formal housing, be it rural (homelands) or urban areas.[19] This backlog coupled with the rate of urbanisation means the government is lagging in its attempt to provide adequate housing to all who need it particularly in urban areas.

This backlog has contributed to the prevalence of the informal housing market, which emerged partly due to the vacuum left by the state's failure to fulfil the abovementioned right in its entirety. The housing backlog has left some of the urban poor with no choice but to look to informal housing, in whatever form, for shelter. It is reasonable to assume that some, not all, of the people who live in informal housing do so because they cannot access formal housing, and if they could access such housing, they would opt for that as opposed to informal housing. Others, of course, would continue to live in informal housing even with the availability of formal housing because the former best serves their needs. For those people, an endless supply of formal housing will not address their housing needs.

Over and above the backlog, there is the matter of the limited range of housing that the government offers in its housing programmes. This limited offering often means that the existing programmes do not cater for all the intended recipients, which in turn forces them to look to the informal.

1.2.3. Urbanisation as a phenomenon more generally

[18] Department of Human Settlement *South African Yearbook 2009/10: Human Settlement* (2010) 311.
[19] Ibid; See also *South African Government Information Annexure A – For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life* (2010) 5 <http://wwwinfogov za/view/DownloadFileAction?id=135746>.

According to the City of Johannesburg, there are over 350 000 households (possibly more) that live in informal housing such as informal settlements, backyard shacks and displaced hostels in the city.[20] This number not only comprised those who would be classified as poor or indigent – it includes 'new entrants into the city'.[21] Urban migrants seeking employment and other opportunities (such as better schools for their children) in major cities often find themselves in some or other informal housing on arrival.[22] At times, these new entrants either do not qualify for government subsidies or fall into the category of those that the formal housing market is either unwilling or unable to accommodate.

Non-citizens - foreigners, refugees, and asylum seekers - are an example of this. Non-citizens, apart from permanent residents, are often excluded from housing subsidy programmes and some resort to informal housing (either by sub-leasing rooms or flats or moving to informal settlements) as a result of this. Others, however, resort to the informal housing because of xenophobic attitudes of landlords and/or the lack of understanding of their status. According to the report titled 'Migrant Access to Housing in South Africa cities', many refugees and asylum seekers struggle to secure formal accommodation because their status is often questioned by landlords in formal housing, and they are conflated with undocumented immigrants.[23]

1.2.4. Tactical and strategic reasons

At times, the decision to live in informal housing is a tactical and strategic one for the poor. The diversity of informal housing allows it to cater to the various needs and groups for which the state is unable to provide.[24] For some, ownership of formal housing is

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[20] P Harrison *New directions in the formalisation and upgrading of informal settlements* <https://www.shisaka.co.za/documents/2009111_Leadership%20Forum_CoJ_Harrison_New%20Directions%20in%20formalising%20and%20upgrading%20Informal%20Settlements.pdf>.

[21] P Lehohla *Migration and Urbanisation in South Africa* (2006) <http://www.statssa.gov.za/publications/Report-03-04-02/Report-03-04-02.pdf>.

[22] J Dugard & K Tissington 'Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg' (2013) *SERI Report* 37 < https://www.seri-sa.org/images/Minding_the_Gap.pdf>.

[23] J Greenburg & T Polzer 'Migrant Access to Housing in South African Cities' (2008) 2 *Migrants Rights Monitoring Project Special Report* 1, 10 – 11 < http://www.migration.org.za/wp-content/uploads/2017/08/Migrant-Access-to-Housing-in-South-African-Cities.pdf>.

[24] Harrison (note 20 above).

expensive – there is limited supply of affordable formal housing. Others have no willingness to make the cities home either through ownership or formal housing partly because they reside in cities on a temporary basis.

For those with multiple residences within the city, informal housing enables such persons to reduce travel time, and save some money and redirect that money to more pressing needs. For example, weekly migrants who have formal housing that is situated on the outskirts of the city away from their place of employment will often have a second informal house in which they reside during the week and then return to the formal housing on weekends.[25] In such circumstances, it is often difficult for such persons to maintain two 'formal' homes, thus informal housing becomes an easier, less burdensome and affordable option.

Moreover, informal housing allows for flexibility, especially for its dwellers who may travel between the city and rural areas regularly. In Johannesburg, it is estimated that up to 30% of informal settlements are not occupied on a full-time basis.[26] At times, these informal settlements structures are unoccupied for months on end and unlike formal housing, the residents of these structures are not expected to pay rent, and when they are, it is either reduced or negotiated between the resident and landlord.[27] This flexibility in arrangement does not exist in formal housing. An occupant of formal housing is expected to pay rent regardless of their financial standing or employment, whereas occupants of informal housing have the option to return 'home' should they find themselves unemployed due to the temporary nature of the jobs associated with unskilled labour and can still return to their 'housing' in the city upon securing employment. Formal housing does not cater to periodic tenancy which allows the tenant to live in the housing intermittently without suffering ordinary consequences of a 'lease agreement' whilst informal housing does. Periodic tenancy is hugely advantageous to

[25] See also S Charlton, M Silverman & S Berrisford *Taking stock: Review of the department of housing's programme, policies and practice 1994-2003* (2003) Unpublished report produced for the National Department of Housing.

[26] City of Johannesburg *Growth and development strategy: City of Johannesburg* (2006) 34. <http://www.joburgarchive.co.za/2006/pdfs/gds_book/chapter1.pdf.34>.

[27] See also 'Charlton (note 15 above) 10.

the poor who relocate often due to the lack of job permanency and the need to seek new opportunities.[28]

Furthermore, informal settlements, in particular, create an environment conducive to 'social support networks' such as stokvels and burial clubs which often extend to include financial and emotional support.[29] These social support networks are often built on group identities be it tribal, religious, language, gender, nationality or other shared identities.[30] Members of these networks usually support one another during times of bereavement, weddings and other important events.[31] This is not to say these social networks do not exist in other forms of housing, but they are a lot more prevalent in informal settlements and more impactful due to the 'proximity' of the community. These social support networks enable those in informal housing to share 'burdens' – for example, those who are unemployed can be tasked with watching their neighbours' children. These social support networks are not easily replaced nor are they guaranteed in other forms of housing.

1.3. Justifications for informal housing

Beyond the abovementioned drivers of informal housing, there are number of justifications for the existence of this form of housing. Of these justifications, three are the most relevant in the South Africa context. All three justification are interlinked and at times, overlap.

Firstly, the state and the urban poor prioritise different factors and it for this reason that informal housing will almost always best serve the interests of the urban poor. Proximity to such opportunities tends to influence where informal housing developments for the poor are situated – this is not always the case with low-income housing

[28] S Maass 'Rental housing as adequate housing' (2011) 3 *Stellenbosch Law Review* 759, 772.
[29] W Smith 'The impact of the transition from informal housing to formalized housing in low-income housing projects in South Africa' (2000) Nordic Africa Institute conference on formal and informal city – What happens at the interface? 1, 14.
[30] Ibid.
[31] DL Bubenzer, NB Barbour & RA Richardson 'Bittersweet connections: Informal social networks as sources of support and interference for adolescent mothers' (1991) 40(4) *Family Relations* 430, 432-433.



developments. Factors such as availability of land influence where the government locates low-income housing whereas proximity to opportunities and mobility determine the location of informal housing.[32] The informal housing sector is largely needs-driven and supports the poor's limited resources where practicality often is the decisive factor in allowing them to service their needs beyond shelter.[33] It allows for freedom of choice where permanent formal housing would restrict flexibility and mobility. Informal housing allows for a nomadic existence that encourages seizing of opportunities wherever they are – formal housing is not (and unlikely to be) as malleable to the needs of the poor.

Secondly, mobility and location are important justifications much as they are driving force. An average South African spends about a third of their salary on transport as a result this is an important factor in deciding where to live.[34] According to Smith, 67 percent of the residents of Smithfield, an informal settlement in Durban chose to live in Smithfield due to its location in relation to job opportunities.[35] Location matters for people especially the urban poor – some just need to be near the city and others need to be near specific points in the city. Where there is no formal housing that is accessible in the places people need to be, they go for informal alternatives. The formation of informal housing is subject to less restrictions when to compared to formal housing, as a result it allows its residents leeway in determining the location of their houses and guarantees some mobility.

Finally, informal housing exists because it is an integral part of the informal economy. Some of the urban poor who opt for informal housing do so because of the greater informal economy which, in many ways, is incidental to informal housing.[36] This informal economy relies on and supports the urban poor in a way that the formal economy does

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[32] S Oldfield 'The centrality of community capacity in state low-income housing provision in Cape Town, South Africa' (2000) 24(4) *International Journal of Urban and Regional Research* 858, 862.
[33] Pienaar (note 5 above) 15.
[34] Statistics South Africa *Measuring household expenditure on public transport* <http://www.statssa.gov.za/?p=5943>.
[35] Smith (note 29 above)11.
[36] K Philip 'Township economic development: A framework for the development of metro strategies' (2018) 5 *Township economic series* 1, 2-3 <https://csp.treasury.gov.za/Resource%20_Centre/Conferences/Documents/CSP%20Tools/Economic%20Development/Township%20Economies%20Series%20Paper%205.pdf>.

not. For some, it provides an avenue to supplement their earnings with a secondary income. Spaza shops, for example, are very common in informal housing. These spaza shops store everyday products like bread and milk and often operate on a 24-hour basis, thus they are almost always available for the community and are generally run by people who live in the community.[37] Shebeens, the taxi industry, and community funeral homes are other examples that form part of this economy. This economy exists and its existence is closely intertwined with informal housing (albeit not exclusively).

[37] Ibid 3.

2. The law as it stands

The right to housing for is enshrined in section 26 of the Constitution.[38] Section 26(1) guarantees everyone the right to access adequate housing and section 26(2) qualifies this right by obligating the state to take reasonable legislative and other measures, within its available resources, to progressively realise this right. Section 26(3) prohibits arbitrary interference on the part of the state or any private citizen with this right. Informal housing is not expressly provided for in section 26 nor is it excluded – the section refers to housing. In this section, I evaluate the law as it stands with reference to informal housing. I will do this in four parts. Firstly, I explore the existing policy and legislation on informal housing including cases stemming from such policy (2.1). Secondly, the notion of informal housing as adequate housing (2.2). Thereafter, I will explore informal housing as self-realisation of the right to housing (2.3). Finally, I will examine informal housing as a performance to the right to the city (2.4).

2.1. Existing legislation and policy on informal housing

To date, the government has failed to implement policy and/or legislation that addresses other forms of informal housing other than informal settlements[39]; the limited policy and legislation that exists are focused squarely on informal settlements. There is either no understanding that the informal housing market is diverse and includes other informal arrangements beyond informal settlements or the government simply does not see other forms of the informal housing as needing to be addressed. Either way, there is a void within the current legislative framework, and ignoring a reasonable section of the population puts this grouping at risk especially if this lack of legislative framework translates to lack of services and or resources which only the government can provide.

Of the existing legislation, Prevention of Illegal Evictions from Unlawful Occupation of Land Act 19 of 1998 (PIE) has afforded informal dwellers who occupy land and building structures more protection and recognition than any other legislation. This is largely owed

[38] The Constitution of the Republic of South Africa, 1996.

[39] In this section, I use the term informal settlements to refer to informal settlements as used in everyday language (informal housing comprised of shacks mainly).



to the number of prominent housing cases that have been litigated based on PIE such as *Grootboom*[40], *PE Municipality*[41], *Olivia Road*[42], and *Joe Slovo*[43]. In some ways, PIE has acted as the 'de facto' regulation that recognises the vacuum within the current legislative framework when it comes to informal housing. This is because in some of these cases, the informal dwellers have been allowed to continue to reside on land or property that is not rightfully theirs – which in some ways is recognition, albeit by the courts, that informal housing has a place in the South African housing system.

In *Joe Slovo* and *PE Municipality* alike, the court extended the protection (from arbitrary and unjustified evictions) afforded by section 26(3) of the Constitution to temporary and informal accommodation.[44] In so doing, the court acknowledged that informal housing does qualify as 'home' in terms of section 26 and should be treated as such. This includes engaging meaningfully (as required by section 6 of PIE) with residents of informal housing prior to evictions and/relocation as was the case in *Joe Slovo*.[45] Meaningful engagement is primarily aimed at 'find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing' and 'mutual understanding and accommodation of each other's' concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement'.[46] In practice, meaningful engagement is often a step in a process with an already predetermined outcome. If the state utilised meaningful engagement as was envisaged by the courts, they would be better placed to respond to the needs of informal dwellers. The volatile relationship between the state and the Abahlali baseMjondolo movement illustrates just how poorly the state engages with informal dwellers – to the point whereby leaders of the movement have had to stay in

[40] *Government of the Republic of South Africa v Grootboom* (Note 7 above).
[41] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[42] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
[43] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (note 4 above).
[44] Ibid 231; *Port Elizabeth Municipality v Various Occupiers* (note 41 above) 17.
[45] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (note 4 above) 167.
[46] Ibid 244.

hiding and in some instances, arrested.[47] This poor engagement is an indicator of the state's disregard for informal housing.

Various other policy measures have been introduced over the years culminating in the Comprehensive Housing Plan for the Development of Sustainable Human Settlements also known as 'Breaking New Ground' policy in 2004.[48] On paper, BNG marked a turning point in the state's housing policy. For one, BNG unlike previous government policies acknowledged informal settlements and explored other possibilities apart from eradication, as a possible solution to address the housing crisis especially in urban areas.[49] However, BNG did not acknowledge the possibility that there is a section of the population that has opted to live in informal housing by choice and has not accounted for such persons and the needs they may have.

BNG was one of two policies developed with informal settlements in mind, the other was the Upgrading of Informal Settlement Policy (UISP). UISP expanded on the BNG with regards to the upgrading of informal settlements. This policy was limited to informal settlements and did not extend to other forms of informal housing.[50] As a policy, the USIP policy was innovative and addresses some of the shortfalls that have been identified pertaining to housing – for one, it had a 'holistic development approach with minimum disruption or distortion of existing fragile community networks and support structures'.[51] Central to the USIP policy was the notion that government intervention should cause as little disruption as possible to the livelihood of those living in an informal settlement. However, there seems to be a disconnect between the policy and its implementation or the lack thereof. For example, the USIP policy recommended in-situ upgrading over relocation, and in instances where relocation was the only viable option, USIP required the relocation to be in a place as close as possible as the original location of the informal

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[47] D Kell & C Nizza 'Dear Mandela' (2012) <https://www.youtube.com/watch?v=G879w1zD0oY>.
[48] Department of Human Settlements *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004).
[49] Ibid 12.
[50] Department of Human Settlements *Upgrading of Informal Settlements Programme 2004* (2004) 10, 19; Department of Human Settlements *Upgrading of Informal Settlements Programme 2009* (2009) 12.
[51] Ibid (2004) 6; Ibid (2009) 13.



housing site.[52] This has not always been the case. Implementation of the state's policies have obvious gaps within the policy, where the result has differed from the desired outcome – the Joe Slovo case is an example of such a scenario.

In Joe Slovo, the government elected to do a 'roll-over' upgrade where residents were temporarily relocated to another area (Delft) for the duration of the upgrade rather than an in-situ upgrade which would not require relocation.[53] Even though the relocation was set to be temporary and necessary to facilitate the formalisation of the settlement, and the residents were provided with transportation, it was done at the expense of the livelihood of many. The residents were placed in a remote area away from the attachments and opportunities they had (i.e. the airport and surrounding industrial areas) and could easily access in Joe Slovo. Delft had similar amenities, but the disruption of people's existing networks was the main challenge with the temporary relocation. Following the upgrade, some residents of Joe Slovo who met the criteria set by the government to qualify for 'formalised' housing did return to Joe Slovo – others did not.[54] Upgrades of informal settlements are meant to cause little disruption to the livelihoods of the residents of the informal settlement, but this was not the case in Joe Slovo.

Amongst its many goals, the BNG and the USIP respectively policy was aimed at in situ upgrading of informal settlements – however, it looks like eradication (either through relocation or removal) rather than the upgrading (partial or complete) has become the focal point.[55] Granted the upgrading of informal settlements can be a welcome form of eradicating informal settlements particularly for those people who have had to resort to informal housing as a means of last resort however, it still does not cater to those who willingly live in the informally. It is for this reason that partial upgrades should be preferred over 'complete upgrades' or eradication of informal housing. Partial upgrades include but are not limited to the provision of services that the informal housing may not have access

[52] Ibid (2009) 9; Chenwi (note 3 above) 549.
[53] L Chenwi 'Upgrading of informal settlements and the rights of the poor: The case of Joe Slovo' (2008) 9(3) *ESR Review* 13, 16 -17.
[54] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (note 4 above) 57.
[55] M Huchzermeyer "Slum' upgrading and 'slum' eradication? The mixed message of the MDGs' in M Langford, A Sumner & A Yamin (eds) *The Millennium Development Goals and Rights: Past, Present and Future* (2013) 13 -14.

prior to the 'upgrade'. In instances where the upgrade is complete, the informal settlement is eradicated and replaced by formalised housing which isn't always favourably.

Policy-wise, the state seems to favour complete upgrades which are unlikely to happen in the short term and which do not cater to those who want to continue to live in informal housing. The government needs to accept that complete *in-situ* upgrades do not translate to improved economic circumstances for the beneficiaries, in fact, it may worsen them. For one, formal housing may increase the burden placed on the poor due to high costs associated with formal living (payments of services, rates, etc). Complete *in-situ* upgrades are not always ideal or desired by those in informal housing – often such upgrades come at the cost of opportunities for some.[56]

In the past, there has been inconsistencies in the state's approach and attitude towards informal housing at national and provincial level. In 2007, the KwaZulu Natal provincial government introduced the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 ('Slums Act') with the intention of eradicating 'slums'. Sections 20 and 21 of the Act made it a criminal offense to interfere or attempt to stop such evictions - a sanction that isn't even contained in PIE - and anyone found guilty of this offense may face prison time. Academics such as Huchzermeyer have likened this to the Prevention of Illegal Squatting Act 52 of 1951, an apartheid-era legislation that allowed landowners to evict informal settlers without any process.[57] The Constitutional Court declared section 16 of the Slums Act unconstitutional as it was inconsistent with s 26(2) of the Constitution and the rule of law – this finding rendered the Slums Act redundant.[58] The Slums Act shows the government's aggression and attitude towards informal housing specifically informal settlement – this aggression isn't always as overt;

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[56] M Huchzermeyer 'Informal settlements at the intersection between urban planning and rights: advances through judicialization in the South African case' in A Deboulet (ed) *Rethinking Precarious Neighbourhoods* (2016) 195, 195.

[57] Chenwi (note 3 above) 551 citing M Huchzermeyer 'Settlement informality: The importance of understanding change, formality and land and the informal economy' (2008) *paper presented at the Groupement de Recherche sur Development International workshop on Informality* 4.

[58] *Abahlali BaseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2009 (13) ZACC 127.

most times it is covert and generally takes the form of inaction on the part of the state i.e. in the failure to provide services.[59]

Finally, informal housing by virtue of being informal, and existing outside the confines of the law often clashes with aspects of the law that regulate the formal housing such as bylaws.[60] Most of the current bylaws do not cover all forms 'informal housing', therefore informal housing, particularly informal settlements, are almost always in violation of some or other bylaws. Most informal settlements, for example, are built on unoccupied land that may have been zoned for something. Government does not always enforce strict bylaws where informal settlements are concerned but at times they do – in the City of Johannesburg, the former mayor Herman Mashaba attempted to enforce strict bylaws and dispatched the infamous Red Ants to remove people who had 'occupied' various pieces of land in and around Johannesburg which led to protests in some areas.[61]

2.2. Informal housing as adequate housing

Section 26(1) guarantees everyone the right to access to adequate housing. In *Grootboom*, the court was at pains to avoid ascribing a singular concept or idea of what would comprise 'adequate housing.' Instead Justice Yacoob held that '[adequate] housing entails more than bricks and mortar'[62], and that;

> 'The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads.'[63]

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[59] See also N Banks, M Lombard & D Mitlin 'Urban informality as a site of critical analysis' (2019) *The Journal of Development Studies* 1, 4.

[60] City of Johannesburg *City of Johannesburg Land use scheme, 2018* (2018) <https://www.joburg.org.za/documents_/Documents/City%20of%20Johannesburg%20Land%20Use%20Scheme%20-%20FINAL%202018.pdf >.

[61] N Seleka 'We will teach the Red Ants a lesson they will not forget' - Chris Hani residents refuse to budge' <https://www.news24.com/SouthAfrica/News/we-will-teach-the-red-ants-a-lesson-they-will-not-forget-chris-hani-residents-refuse-to-budge-20190429>.

[62] *Government of the Republic of South Africa v Grootboom* (Note 7 above) 35 .

[63] Ibid 37.

It is clear from the above excerpt that for housing to be adequate, it needs to meet the needs of its inhabitants, taking into consideration that different groups of people have different needs. Put differently, the determination of adequate housing is contextual at best, not uniform, and largely dependent on the recipients of said housing. Notably, section 26 does not qualify adequate housing as needing to be formal nor does it expressly preclude informal housing from being 'adequate'. Therefore, informal housing can and should be considered 'adequate' (subject to basic services and 'recognition' being extended to informal housing to ensure the adequacy of self-provided housing) especially for those who have willingly chosen to live in informal housing – in such circumstances, one would go as far as saying it is the only adequate form of housing.

The right to adequate housing goes beyond providing physical structure. Scholars such as Lecke maintain that this right entails having access to infrastructure such as water, sanitation, electricity, drainage, transportation as well as security of tenure[64] - this view is supported by the courts as well.[65] At times, providing adequate housing means providing the necessary support to those in informal housing i.e. extending services to those in the informal as they do to those in formal housing and implementing legislation targeted at quasi-regulating and protecting informal housing. Extending services such as water, sanitation and other basic services does not and cannot equate to formalisation, it merely makes the housing adequate, not formal.

The case for extending services to informal housing as part of the right to adequate housing is further strengthened by obligation to 'progressively realise' this right as required by section 26(2). Service provision is a form of 'progressive realization' of the right to adequate housing. Moreover, socio-economic rights are interdependent and indivisible. [66] As a result, the right to adequate housing is closely linked to several other rights thus in order to fully fulfil this right, the state needs to fulfil other socio-economic rights such as access to water as well. Currently, the right to adequate housing is only

[64] S Leckie 'The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach' (1989) *Human Rights Quarterly* 531.
[65] *Government of the Republic of South Africa v Grootboom* (Note 7 above) 35 -37.
[66] S Soiffer & D Rowlands 'Examining the indivisibility of human rights: A statistical analysis' (2018) 17 *Journal for Human Rights* 89, 93.

seen in respect to one leg (to provide formal housing) and not the other – which is to ensure the adequacy of self-provided housing which includes informal housing.

The state's current stance on informal housing is contrary to the negative obligation of the right to adequate housing placed on the state.[67] The negative obligation requires the state to 'desist from preventing or impairing the right of access to adequate housing'[68] especially when it has failed in fulfilling the positive aspect of this obligation and is not offering viable options for those who have chosen and those who have had to resort to informal housing. The state's response has varied depending on the informal housing type. With some, such as backyards and flat sharing, the state is a lot more 'tolerant' whereas, with others, such as informal settlements, the state is more hostile. Some cities, for example, have bylaws regulating backyard dwellings but this is not uniform throughout the country. In other cities the state has continued to frustrate, criminalise and discourage the poor from securing informal housing' – the Slums Act in KwaZulu Natal is an example of this. The Abahlali BaseMjondolo movement was founded as a response to the state's hostile treatment of shack dwellers in KwaZulu Natal.[69] The recommendation to recognise and regulate informal housing as an 'acceptable form of housing' is not novel – it has been done in Brazil where the government faced a similar housing challenge.[70] Rather than isolating favelas, the government of Brazil opted to integrate favelas into the city by extending services, access to city resources and other rights.[71]

Moreover, the state's failure to recognise and regulate informal housing and extend services that formal housing is afforded is contrary to the reasonableness principle as established in *Grootboom*. As Chenwi puts it, part of reasonableness as articulated by the court, is the notion that 'short, medium and long-term provision must be made for housing needs, a significant segment of society should not be excluded, and those

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[67] *Government of the Republic of South Africa v Grootboom* (Note 7 above) 33; Maass (note 27 above) 760.

[68] Ibid 99.

[69] Abahlali BaseMjondolo 'Introduction to Abahlali BaseMjondolo' <http://abahlali.org/a-short-history-of-abahlali-basemjondolo-the-durban-shack-dwellers-movement/>.

[70] M Huchzermeyer 'A legacy of control? The capital subsidy for housing, and the informal settlement intervention in South Africa' (2003) 27.3 *International Journal of Urban and Regional Research* 591, 606.

[71] Ibid 606 – 607.



whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril cannot be ignored'.[72] The existing government policy only has what one would regard as a long term goal of 'progressive informal settlement eradication' as per the wording of the BNG policy[73] and ensure that everyone lives in formal housing thus achieving the right to adequate housing.

However, the government has no immediate plan or direction as to how to deal with millions of South Africans (and non-South Africans) who either do not want to be accommodated by the formal housing market or cannot be accommodated by the formal housing – seemingly the policy does not exist. They exist outside the system without recognition. Reasonableness requires the government's actions and plans to cater for 'people at all economic levels of our society' – the current gaps within the legislative and policy framework pertaining to informal housing means the current conditions cater for those in the formal. Generally, the informal houses the poor and neglecting to cater for informal housing means neglecting the poor, and the 'poor are particularly vulnerable, and their needs require special attention'.[74]

2.3. Informal housing as self-realisation of the right to access housing

The state's failure to fulfil the right to adequate housing has given those in informal housing an opportunity to self-realise the right to access housing. Informal housing provides a means for the affected individuals to solve their housing needs. Self-realisation of the right to housing should not be hindered or frustrated by the state. Section 26(1) and (2) not only requires the state to take legislative steps to realise the right to adequate housing but requires the state to take other measures to give effect to this right; putting measures in place to assist those who have resorted to self-help falls within the ambit of these 'other measures'. At the very least, the government can create a conducive environment for the informal housing to survive and meet the standard of adequate housing rather than being hostile towards or rendering illegal the informal

[72] Chenwi (note 3 above) 552 citing *Government of the Republic of South Africa v Grootboom* (Note 7 above) 43 - 44.
[73] Department of Human Settlement *Breaking New Ground: A comprehensive plan for the development of sustainable human settlement* (2004) 12.
[74] *Government of the Republic of South Africa v Grootboom* (Note 7 above) 35.

housing sector. After all, the right to housing is a responsibility shared by both the state and the people as expressed in *Grootboom,* where the court stated 'a right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing'.[75] The state is not only required to refrain from frustrating the citizenry's efforts to self-help with regards to the right to housing but is required to enable and support such efforts through 'legislation and other measures'.[76]

The Constitutional Court in *Grootboom* went on to clarify the state's obligations regarding self-realisation of the right to housing; it held that the state has a duty to 'unlock the system by providing access to housing stock and the legislative framework to facilitate self-built houses through planning laws and access to finance'.[77] The state has not done so with informal housing (outside of those programmes aimed at upgrading and formalising informal structures) – it has created numerous subsidy programmes for the formal housing sector and emergency accommodation but not the informal (not programmes intended to maintain the informal housing).[78] Putting measures in place to support and encourage self-help through informal housing could arguably alleviate some of the strain on the state with regards to providing housing – if the state can put measures in place to enable citizens to fulfil the right to adequate housing on their own, it decreases the burden on the state.

2.4. Informal housing as a performance of the right to the city

Lefebvre's right to the city notes that identifying informal housing as an acceptable and legitimate form of housing that is recognised by the law and supported by the government through service provision and other means is a crucial component for inclusion.[79] Moreover, Charlton stresses the importance of redefining housing to ensure

[75] Ibid.
[76] Ibid.
[77] Ibid 37.
[78] Huchzermeyer (note 69 above) 594 – 595.
[79] M Huchzermeyer 'Invoking Lefebvre's 'right to the city' in South Africa today: A response to Walsh' (2014) 18 *City Journal* 41, 44.



it is inclusive rather than exclusive.[80] Inclusion also means the right to participate in the economy of the city[81] – inclusion in the context of the city means treating all housing be it formal or informal the same way, the government needs to stop treating informal housing as an inconvenience or nuisance.[82] It exists partly because of its failure to meet the housing needs of a reasonable percentage of the population and because there are others whose needs are better catered for by the informal sector.

Inclusion, particularly spatial inclusion is an important aspect of the right to the city; the inhabitants of any city must be accepted, not criminalised or treated as unwanted for such inhabitants to take ownership of the city. At the heart of inclusion, and the right to the city is the idea that all who live within the city must be afforded access to all the city has to offer, to exploit the city's services and resources in their daily lives.[83] The residents of the city should choose how and when to access and exploit the city's resources. The residents' ability to exercise choice is crucial; the government does not need to force residents to use the resources but must create conducive environments that residents can utilise. After all, inclusion means several different things for different groups. For some, inclusion may mean being left to live in the informal without the state's interference beyond the mandatory interaction while for others it may mean simultaneously living in formal and informal housing. In both circumstances, inclusion requires the state to provide access to facilities and services (running water, sanitation and electricity) that the city has to offer.[84]

Failure to recognise informal housing as a legitimate form of 'housing' leads to exclusion from participating within the formal economy. For example, one often needs a proof of address in dealings with the state, such as for posting bail, registering to vote and open water and electricity accounts in one's own name, as well as in the private sector when opening a bank account. Municipalities tend not to assign addresses to

[80] Charlton (note 16 above) 5.
[81] Charlton (note 16 above) 2.
[82] South African Cities Network 'State of the cities report' 2004 (2004) 5 <http://www.sacities.net/wp-content/uploads/2018/01/SOCR_2004.pdf>
[83] Huchzermeyer (note 78 above) 45.
[84] S Parnell 'Constructing a developmental nation—the challenge of including the poor in the post-apartheid city' (2004) *Overcoming Underdevelopment in South Africa's Second Economy* 1, 15.

informal dwellings which then makes furnishing proof of address nearly impossible. As a result, persons residing in informal housing are excluded from participating in public and private services that those in formal housing enjoy; thus, recognising informal housing will inevitably lead to inclusion.

Moreover, inclusion, especially that of the working class and the poor is central to the right to the city.[85] The right to the city doesn't merely entail access to remote and inaccessible parts of the city; rather it entails access to the best the city has to offer in terms of resources, and facilities. The poor are often exiled to the urban periphery with limited transportation away from the economic activity in the same way black people were exiled to homelands during apartheid. Since 1994, many of the housing developments that have been built for the poor have been located a distance away from the main economic hubs.[86] It should be noted that unlike in the past, the economic hubs in cities such as Johannesburg are distributed across the city and not as centralised as they once were.[87] Low-income housing developments are generally located in places where government either owns or could purchase cheap land.[88] Proximity to opportunities or economic hubs generally does not play a role in the determination of the location for such developments and as a result, some of these developments are located a distance away from opportunities.[89] Access to reliable and readily available transportation is another way in which informal settlements can be included in the fabric of the city – public transport is an important aspect to adequate housing in the South African context.[90]

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[85] See also M Huchzermeyer 'The legal meaning of Lefebvre's the right to the city: Addressing the gap between global campaign and scholarly debate' (2017) *GeoJournal* 1, 4 – 5.

[86] K Hentze, M Napier & E Petzer 'Urban land reform: rethinking informal settlements in pre-apartheid, apartheid and post-apartheid South Africa' <https://landportal.org/blog-post/2020/01/urban-land-reform-rethinking-informal-settlements-pre-apartheid-apartheid-and-post>.

[87] M Pieterse 'Where is the periphery? Capturing urban marginality in South African human rights law' (2019) 56(6) *Urban Studies Journal* 1182, 1188.

[88] S Charlton 'Public housing in Johannesburg' in G Gotz, P Harrison & A Todes et al (eds) *Changing space changing city: Johannesburg after apartheid* (2014) 176, 186.

[89] See also J Budlender & L Royston 'Edged out: Spatial mismatch and spatial justice in South Africa's main urban areas' (2016) *Socio-Economic Rights Institute of South Africa Research Report* 1, 20.

[90] J Dugard, K Tissington & S Wilson 'The right to housing in South Africa' in Foundation for Human Rights *Socio-economic rights – progressive realisation* (2016) 1, 19.



Academics such as Pieterse have argued that the periphery is not the sole indicator of marginalisation and warned against the depicting the urban periphery as a place of 'servitude and displacement', and rightfully so.[91] However, one cannot downplay the importance of proximity to opportunities and location pertaining to the urban poor; as seen in the earlier mentioned study by Charlton, the poor follow opportunities and there are limited opportunities in the periphery. It would be disingenuous to pretend that when one argues against the poor being placed in the periphery, one is only concerned about distance; one is also concerned about lost opportunities. Further, because of the history of this country where marginalization was primarily achieved through geographical segregation, putting the poor, who are majority black, in the urban periphery, is symbolically problematic. Inclusion also means moving away from the glaring reminders of the previous regime has only added to this sense of 'unbelonging'. We ought to be careful of romanticizing the opportunities that exist in the urban periphery and should not downplay the importance of location in a country where location and mobility, or the lack thereof, can limit opportunities.

[91] Pieterse (note 86 above) 1183.

3. What to do about it?

In the penultimate section of this paper, I will look delve into what needs to be done (the reforms necessary on the part of state and its organs) to include the informal into the mainstream housing frameworks. I will do this in two parts. In the first, I will briefly touch on the reasons why its necessary to recognise and regulate informal housing (3.1). Thereafter, I will provide a way forward (possible reforms) (3.2). In the final section, I will conclude the paper.

3.1. Why is it necessary to recognise and regulate informal housing?

Informal housing is not without its challenges however, the solution lies in regulation, and improving access and services rather than eradication through formalisation. For one, eradication of informal housing is not feasible with the limited resources at the state's disposal – over the past 24 years, the state has made some inroads regarding housing delivery through numerous subsidy programs but has not been able to meet the demand. The state must accept that formal housing will not address the reasons that attract the poor to informal housing – the two are not always substitutable. They each cater to different needs and need the support of the state. Informal housing offers a unique set of conditions that cannot be replicated or replaced by formal housing.

There is quite an overlap between the arguments for regulation and for formalisation – the former being the preferred option in this paper. Regulation like formalisation will allow those in the informal to have some recourse should housing-related disputes arise in informal housing arrangements. Moreover, it should contribute to the reduction of some of the health risks associated with informal housing because only with recognition and regulating will services be provided for on a large scale for informal housing.[92] Informal housing, particularly informal settlements, are more vulnerable to infectious diseases such as tuberculosis (TB) – according to the South

[92] Dugard & Tissington (note 22 above) 11.

African National Tuberculosis Association, latent TB is most prevalent amongst 30 to 39 year-olds in informal settlements.[93]

Moreover, informal housing tends to be unplanned and located in places with poor to no infrastructure which in turn increases risks of fires and flooding.[94] For example, some informal settlements are in low laying areas prone to flooding and waterborne diseases; if they were regulated and government allocated land in certain areas, this could be avoided or reduced.[95] Due to the poor infrastructure in informal housing particularly in informal settlements, illegal electricity connections tend to be very common and these connections increase the risk of fires.[96] The connections, along with the flammable material used in the construction of some informal housing as well as the use of fuels such as paraffin for cooking and heating in cold months, increase the risk of fire as well.[97] Failure to recognise and regulate informal housing will only result in the exacerbation of some of the abovementioned issues. With regulation, safety standards and means to enforce building standards can be introduced for informal housing to reduce these risks.

3.2. The way forward

The state has failed to recognise informal housing and its offerings. At best, the state has opted to either turn a blind eye to the existence of some informal housing or call for formalisation (through upgrades). It has been argued that the government has intentionally ignored regulating informal housing in order to accommodate the poor (because it cannot be seen to condone such housing). However, this is insufficient considering the importance of the implicated right, and the role informal housing plays. In my opinion, taking positive steps to recognise informal housing as 'housing' is the only adequate form of 'recognition' as this may have positive implications for informal housing. For one, it might result in the provision of essential services. By recognising informal

[93] South African National Tuberculosis Association 'Latent TB' <https://santa.org.za/latent-tb.html>
[94] Dugard & Tissington (note 22 above) 12.
[95] M Pelling & B Wisner *Disaster Risk Reduction: Cases from Urban Africa* (2008) 113.
[96] Ibid 111.
[97] M Githahu 'Winter shack fires on the rise in Western Cape' (2019) <https://www.iol.co.za/capeargus/news/winter-shack-fires-on-the-rise-in-western-cape-28555835>.

housing, the state can reduce the extent of its responsibility towards those who live in the informal compared to those in the formal sector. Those in the informal sector still require some intervention by the state but not to the same degree as those wholly within the system.

In regulating informal housing, the state should be cautious of over-regulation to the point where the benefits attracting people to informal housing are lost. Government needs to strike a delicate balance between the regulation, and retention of the advantages of informal housing – which often means minimal interference on the part of the state. Informal housing thrives partly because it has little to no interference from the government, thus these regulations should be drafted in consultation with residents of informal housing, and the government's role should be kept to a minimum. These regulations should be aimed at fulfilling the needs of the urban poor (such as providing services, financial support) and should centre around informal dwellers.[98] Importantly, these regulations must be enacted with the intention of maintaining informal housing rather than eradicating informal housing.

Further, the state needs to extend beyond an 'ownership' centred housing approach that prioritizes formal housing towards an inclusive approach that recognizes that the state plays several roles in the provision of adequate housing goals. In some instances, the state may need to provide land, in others finance, but for the majority of the time the state is required to provide support through legislation and policy - to enable self-help on the part of its citizens and non-citizens, and basic services which only the state can provide. This requires the state to be willing to play the main and the supporting role in the quest to fulfil this right and knowing when to assume the appropriate role is pivotal – in informal housing, the state ought to play a supporting role and allow for the main players (those who live in the informal) to dictate when and how government should intervene.

[98] J Budlender & L Royston 'Edged out: Spatial mismatch and spatial justice in South African's main urban areas' (2016) *SERI Report* 1, 5, 37 < http://www.seri-sa.org/images/SERI_Edged_out_report_Final.pdf>.

The state needs to refrain from problematising and/or ignoring informal housing in order to plan for informal housing in a similar manner to the way it plans for formal housing. In planning for informal housing, the state may need to allocate land specifically for informal housing; that way the state can, to a certain degree, manage where informal housing is situated and reduce the springing up of informal housing in 'undesired' locations. Some of the land will have to be allocated as close as possible to the various economic hubs - many people who reside in informal housing are low-income families and would benefit from living as close as possible to work, school and other opportunities. Locating land designated to informal housing will reduce commute time for the city's poor which will give them time to focus on other aspects of their lives that they otherwise would not have had the chance upon which to focus.

The state should extend basic services such as water, sanitation, electricity and refuse collection to all informal houses – some of these services should be prepaid in order to allow each household to manage its own usage. These services should complement the established practices in these communities. By regulating the informal sector and extending services to this sector, the government has the potential of deriving some income from the services it issues to the informal market.

There are several other practical measures the government can take as part of recognizing the informal housing market. These include allocating addresses (going beyond the current system in some places where chiefs/ward counsellors can issue official letters confirming 'residential address')[99] to informal housing, particularly informal settlements, to enable its residents to participate in the formal economy. This has been done in some informal houses but not in others.

Further, most informal housing does not provide security of tenure to its occupants and as a result, informal dwellers are open to exploitation in some informal arrangements where the bargaining power between landlord and tenant is unequal.[100]Thus in legislating and regulating informal housing, providing some form of security of tenure should be

[99] Kouga Local Municipality *Proof of residence for traffic applications* (2016) <http://www.kouga.gov.za/article/proof-of-residence-for-traffic-applications>.

[100]See also Maass (note 28 above) 759.



paramount as weak to no security of tenure 'exacerbates poverty' – it need not be formalization; rather it could be legal presumptions contained in statute in favour of the tenant should a dispute arise for example.[101] In addition, the government could create a body tasked with administering and overseeing informal housing which would include dispute resolution – one preferably run by those who live in informal housing in partnership with the government.

Apartheid legislation is historically responsible for the housing crisis that South Africa faces; legislation was the primary tool which was used for the racially based spatial planning and thus it should be used to undo of the remnants of apartheid. Like the apartheid legislation, legislation must be the primary tool aimed at tackling the woes of the urban poor residing in informal housing. Legislation on its own is not enough to address the housing issues in South Africa cities but legislation, to the poor, gives them tangible rights which are clearly identifiable. Regulation through legislation is also a form of 'inclusion' of the informal into the city – one cannot downplay the role of law and policy in inclusion. Legislation must be supplemented by the necessary political will to guarantee implementation. Without political will, implementation will either be ineffective or non-existent. The government needs to legislate for a diverse range of housing, ranging from the informal to the quasi-formal and the formal. The legislative framework needs to be expansive enough to address the existing South African conditions - it simply cannot be aspirational or vastly different from the lived experience of a reasonable percentage of the population, particularly the marginalized.

4. Conclusion

In conclusion, the right to housing is complex and multi-layered, and *'… people do not demand houses; they demand habitats. A house is an object; a habitat is a node in a multiplicity of overlapping networks – physical (power, water and sanitation, roads), economic (urban transport, labour markets, distribution and retail, entertainment) and*

[101] A Durand-Lasserve & L Royston 'International trends and country contexts – From tenure regularization to tenure security' in A Durand-Lasserve & A Royston (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002) 17.



social (education, health, security, family, friends). The ability to connect to all of these makes a habitat valuable'.[102] Therefore, the state needs to move away from merely providing 'housing' and move towards providing 'habitats' for all its people.

Provision of formal housing will not address the reasons which attract the poor to informal housing. A shack in Alexandra does not merely provide shelter; it also serves as the point of contact with Sandton; a source of income and resources such as better schools in a way formal housing does not. Eradicating informal housing and/or ignoring its existence will not solve the housing crisis nor make formal housing attractive – it will lead to homelessness and mostly likely do away with an alternative form of housing for some of the most vulnerable members of our society.

Recognising and regulating informal housing is necessary for the state to realise the right to adequate housing for all. However, this recognition and regulation of informal housing should not be done after meaningful engagement with the affected individuals and should strike a delicate balance between regulation and retention of the advantages to informal housing.

[102] R Hausmann 'People do not want houses, they want habitats' (2013) <www.bdlive.co.za/opinion/2013/10/10/people-do-not-want-houses-theywant-habitats>.

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