

2006

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Recommended Citation

Chenwi, Lilian. "Advancing the Right to Adequate Housing of Desperately Poor People: City of Johannesburg v. Rand Properties." Human Rights Brief 14, no.1 (2006): 13-16.

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Advancing the Right to Adequate Housing of Desperately Poor People: City of Johannesburg v. Rand Properties

by Lilian Chenwi*

INADEQUATE HOUSING, THE GROWTH and overcrowding of informal settlements, and the occupation of private land and abandoned buildings are prevalent in South Africa. The result is that many of the country's most vulnerable — women, children, the elderly, and those living with disabilities — are evicted and left homeless.

In the inner city of Johannesburg, thousands of desperately poor people are forced to illegally occupy unsafe buildings (so-called “bad buildings”) because they cannot afford accommodation on the private residential housing market nor access the urban social housing units. A 2004 study by the Centre for Applied Legal Studies (CALs) and the Centre on Housing Rights and Evictions (COHRE) revealed that the occupiers of “bad buildings” are desperately poor people — most of them have either no income whatsoever or earn less than R1000 per month (less than US \$150).¹

In response to health and safety concerns, the City of Johannesburg has increasingly evicted slum residents, despite evidence that evicting the desperately poor from “bad buildings,” without alternative accommodation, does nothing to reduce the number of slum dwellings. Rather, the evictees usually move into other slums or unoccupied “bad buildings” in the area.²

CALs and COHRE, together with inner city residents, have repeatedly campaigned for the municipality to stop the evictions and focus on alternative methods of regenerating buildings in the inner city. Recently occupiers of “bad buildings” have challenged several aspects of the City of Johannesburg's practice of forced evictions. The most recent case, *City of Johannesburg v. Rand Properties (Pty) Ltd and Others*,³ affords additional protection to the desperately poor people living in “bad buildings” in the inner city of Johannesburg faced with eviction. In particular, the High Court of South Africa's interpretation that the right of access to adequate housing implies the right to live in a location within reasonable distance of employment opportunities intimately links the right to adequate housing with other critical economic, cultural, and social rights. This paper will examine the *Rand Properties* decision in the context of existing constitutional jurisprudence and international standards, highlighting this and other contributions made to the advancement of the right to adequate housing of South Africa's desperately poor.

THE LEGAL FRAMEWORK:

EVICCTIONS AND THE RIGHT TO ADEQUATE HOUSING

SECTION 26 OF THE 1996 SOUTH AFRICAN Constitution (Constitution) recognizes the right of access to adequate housing.⁴ Specifically, section 26(1) reaffirms the right of access to adequate housing, while section 26(2) requires the state to take reasonable legislative or other measures to achieve the progressive realization of this right. Section 26(3) prohibits arbitrary evictions.

In 1997, the legislature passed the Extension of Security of

Tenure Act 62 (ESTA), providing protection to unlawful occupiers who previously had some form of consent or right to occupy the land in question. Under ESTA, a landowner must get a court order before evicting unlawful occupiers.⁵ Occupiers who did not previously have the right to occupy the land in question were not protected under ESTA.

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19 (PIE),⁶ passed in 1998, enforces section 26(3) of the Constitution by prohibiting arbitrary evictions. PIE affords greater protection to desperately poor unlawful occupiers by suggesting that mediation take place prior to the eviction of individuals lacking security of tenure. Furthermore, section 4 of

“The facts of the present matter reflect the plight of thousands of people living in the inner city, in deplorable and inhuman conditions. Our Constitution obliges the State to act positively to ameliorate these conditions.”

the PIE requires the court to consider all relevant circumstances before granting an eviction order. Such circumstances include: the rights and needs of the elderly, children, disabled persons, and households headed by women; the duration of the occupation of the land; and whether land can reasonably be made available by the municipality or state for the relocation of the unlawful occupier.

While ESTA and PIE afford some protection to desperately poor tenants, the National Building Regulations and Building Standards Act, No. 103 of 1977 (NBRA) justifies evictions on the basis of the occupier's health and safety. The NBRA is an apartheid-era law granting a municipality the statutory power and duty to prevent dangerous living conditions within its jurisdiction. Under section 12(4)(b),⁷ a municipality can order the occupiers to vacate any building that it considers unsafe or unhealthy. This section is regularly used in Johannesburg to clear inner city slums or other “bad buildings.” Unlike the PIE, the NBRA provides no list of relevant circumstances to be considered by the court before the granting of an eviction order.

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In order to be valid, interpretation of section 12(4)(b) of the NBRA must be consistent with section 26(3) of the Constitution, the supreme law of South Africa.⁸ Section 26(3) encompasses both procedural and substantive protections for people facing evictions from their homes, such as the requirement that eviction orders may only be issued after consideration of all relevant circumstances, while NBRA provides for no such safeguards. In resolving issues of constitutional law, South Africa's Constitution requires the courts to consider international law when interpreting constitutional rights. In fact, the Constitutional Court of South Africa has stated that public international law would include "non-binding" as well as binding law, both of which provide a framework for interpretation.⁹



A shantytown in Soweto, South Africa

Accordingly, the courts have referred to international law when construing the right to adequate housing in eviction cases, such as article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes the right to an adequate standard of living with regard to food, clothing, housing, and the continuous improvement of living conditions.¹⁰ South Africa has yet to ratify the ICESCR, thus the weight of its authority varies from case to case. Even so South Africa's courts do cite to aspects of the General Comments issued by the Committee on Economic, Social and Cultural Rights (CESCR).¹¹

The right to adequate housing is also implicit in articles 14 (right to property), 16 (right to the best attainable state of physical and mental health), and 18(1) (protection of the family) of the African Charter on Human and People's Rights (ACHPR), which South Africa has ratified.¹² The ACHPR therefore provides a valid and useful tool for interpreting and applying the right to adequate housing that is protected in the Constitution.

THE RAND PROPERTIES CASE

THE FACTS

Relying upon section 12(4)(b) of the NBRA, the City of Johannesburg sought to evict over 300 people from six properties in the inner city. The municipality contended that the evictions would promote public health and safety and reverse inner city decay.¹³

The occupiers¹⁴ opposed the eviction for several reasons. First, they claimed they were entitled to the protections of PIE, which require the Court to consider the availability of alternative accommodation in determining whether it would be just and equitable to issue the evictions. Second, they asserted that the NBRA conflicted with section 26(3) of the Constitution by allowing for summary evictions without including any protective provisions.

Third, the claimants argued that the municipality had not afforded them a fair hearing.¹⁵

The occupiers urged the High Court to declare unconstitutional the practice of securing evictions through the provisions of section 12 of the NBRA. They also sought a declaration that the municipality's housing program fails to comply with its constitutional and statutory obligations, as it does not provide for those in desperate need. Lastly, the occupiers sought an interdict preventing the municipality from evicting them until suitable alternative accommodations were provided, bringing the municipality into compliance with constitutional obligations.¹⁶

The CALS and COHRE study of the municipality's eviction program and the socio-economic circumstances of the people living in "bad buildings" was entered into evidence in this case.¹⁷

THE DECISION

Justice Mahomed Jajbhay presided over the case brought before the Johannesburg High Court and handed down judgment on March 3, 2006. The justice focused on the right of access to adequate housing under section 26 of the Constitution, and deemed it unnecessary to address the other arguments advanced by the occupiers.¹⁸

Jajbhay dismissed the municipality's eviction application and held that the municipality's housing program failed to comply with its constitutional and statutory obligations of providing suitable relief for those in desperate need of accommodation. Jajbhay further directed the municipality to devise and implement a comprehensive and coordinated program to progressively realize the right to adequate housing for the desperately poor of Johannesburg. Finally, he issued an interdict against the municipality from seeking to evict the occupiers pending the implementation of the comprehensive housing program, or until such time as suitable adequate accommodation could be provided.

The justice drew from international sources, such as the United Nation's Housing Rights Programme (UNHRP) and international human rights law, in drafting his opinion. Accordingly, and at minimum, a state recognizing the right to adequate housing is required to immediately address the housing needs of its population, particularly those deprived of basic shelter. Failure to do so is considered *prima facie* evidence of a violation of the right.¹⁹

In determining whether the municipality was meeting the housing needs of South Africa's population, Jajbhay relied on PIE and previous constitutional jurisprudence, which always required the consideration of multiple factors prior to issuing an eviction order. Factors to be considered include the degree of emergency and desperation of the people, the length of occupation, any form of constructive consultation with the occupiers, and the availability of adequate alternative accommodation.²⁰ In sum, a municipality's declaration that the occupation of a particular building is unhealthy or unsafe does not automatically require an eviction order.²¹ Instead, Justice Jajbhay noted that the municipality had failed to consult with the occupiers and had not made any provision for suitable alternative accommodation. Thus, the eviction under these circumstances was unlawful.

Jajbhay's reasoning echoes the standards elaborated in General Comment No. 7 of the CESCR on the right to adequate housing and the procedural safeguards to be followed before issuing eviction orders.²² The procedural protections enumerated in General Comment No. 7 include the need for genuine consultation with those affected and adequate and reasonable notice for all affected persons prior to the scheduled date of eviction. Also evic-

tions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights and should not take place in particularly bad weather or at night unless the affected persons consent otherwise. The state should provide wherever possible legal aid to persons who are in need of it to seek redress from the courts.²³

Jajbhay's reasoning also clearly echoes the decisions of the South African Constitutional Court. The Constitutional Court strives to emphasize the need for mediation and the provision of alternative accommodation prior to granting an eviction against vulnerable groups. In *Port Elizabeth Municipality v. Various Occupiers*, the Constitutional Court said that evictions should only

the form of municipal grants. Such grants would enable the municipality to respond to emergencies by providing secure access to land, boosting infrastructure and basic services, and improving access to shelter through voluntary relocation and resettlement. Municipalities are encouraged to assess in advance the emergency housing needs in their areas and take concrete steps to address them. The City of Johannesburg failed to take these prescriptive steps. Accordingly, the justice found that the municipality breached its constitutional and statutory obligations to the occupiers.³⁰ The municipality was ordered to devise and implement a comprehensive and coordinated program to progressively realize the right to adequate housing for the desperately poor of Johannesburg.

“The absence of adequate housing [for the poor], and any subsequent eviction, will drive them in a vicious circle, to the deprivation of their employment, their livelihood, and therefore their right to dignity, perhaps even their right to life.”

be granted against settled occupiers if reasonable alternative accommodation will be provided, even if only as an interim measure pending ultimate enrollment in a formal housing program.²⁴ If the municipality must evict poor tenants or occupiers, court orders to evict must follow a mediation attempt to resolve the issue, which will ensure the just and equitable application of eviction orders.²⁵

Furthermore, Jajbhay applied the standard of “reasonableness review,” noting that the municipality’s constitutional duty to promote a safe and healthy public environment must be balanced against the state’s constitutional duty to ensure access to adequate housing for all people.²⁶ The “reasonableness” standard derives from the state’s duty to take legislative and other measures to progressively realize socio-economic rights. In determining whether a state or municipality’s actions are reasonable, the court will not insist that the most desirable or favorable measure be adopted. Rather, the court will assess whether state actions to progressively realize access to adequate housing have adequately considered the specific needs of the poor and destitute alongside the wider public interest.²⁷ Any measure instituted by the state can only be considered reasonable if it takes into account the needs of those in desperate circumstances or crisis situations, and whose ability to enjoy all rights are therefore most in peril.²⁸ Generally, the reasonableness of the measures is evaluated according to certain criteria including proper conception and implementation; inclusiveness; comprehensiveness; short-, medium- and long-term provisions for those in desperate need; transparency; balance and flexibility; and financial and human resources availability.

The City of Johannesburg’s municipal housing program did not provide for the needs of the inner city’s desperately poor, despite the 2004 adoption of an Emergency Housing Programme following the *Government of the Republic of South Africa and Others v. Grootboom and Others* judgment.²⁹ The emergency program aimed to assist groups of people faced with urgent housing problems, such as evictions or threatened evictions, by providing temporary assistance in

Finally, in his legal opinion, Jajbhay situated the right to adequate housing alongside the right to work and to livelihood, even though the right to livelihood is not expressly guaranteed in the South African Constitution.³¹ He stated that the absence of adequate housing for the occupiers and any subsequent eviction will



Courtesy of Wade Hattler

Residents of Soweto, South Africa

lead to the deprivation of their employment, livelihood, and hence, their right to dignity, perhaps even their right to life.³² The right of access to adequate housing therefore implies a right to a specific location within a reasonable distance of livelihood opportunities. This is the first time in South Africa’s constitutional jurisprudence that the right to adequate housing is explicitly situated alongside other rights including the right to livelihood. This finding echoes the concept of adequacy in General Comment No. 4 of the CESCR.³³

THE AFTERMATH

Justice Jajbhay's decision was not welcomed by the municipality, as it clearly indicated that the municipality had to provide alternative accommodation to poor people residing in "bad buildings" prior to evicting them. Immediately following the judgment, the municipality applied for leave to appeal to the Supreme Court of Appeal, which was granted on April 20, 2006. The municipality appealed against the judgment on 25 separate grounds with the primary argument that according to the NBRA, the municipality has the authority and power to issue the evictions in accordance with public health and safety requirements.

As noted, the High Court did not rule on the request for a structural interdict nor the constitutionality of section 12(4)(b) of the NBRA, which allows for summary evictions. Hence, the occupiers applied for leave to cross-appeal on the basis of the above two issues. This leave was also granted. The case will be heard in the Supreme Court of Appeal next year.

The Community Law Centre (CLC), a research and education organization committed to protecting and promoting human rights, together with COHRE, have been granted leave to intervene as *amici curiae* in the case. CLC and COHRE's submission will challenge the constitutionality of section 12(4)(b) of the NBRA and claim it must be interpreted consistent with 26(3) of the Constitution. The submission will also deal with the question

of the appropriate remedy, particularly whether a structural interdict should be issued and the applicability and breadth of the PIE.

CONCLUSION

THE COURT'S RAND PROPERTIES DECISION IS significant as it is not only consistent with South African constitutional jurisprudence and international standards on the right to adequate housing, but also affords additional protection to the desperately poor living in the inner city slums of Johannesburg. The conclusion that the state has an obligation to provide access to adequate housing to people unable to support themselves and their dependents³⁴ is new and significant since Jajbhay delineates a group of people that are entitled access to adequate housing.

It is clear from the judgment that South African courts increasingly view the provision of alternative accommodation as a substantial factor in determining whether the eviction of the desperately poor is justifiable or if the eviction is even a valid solution to the problem of slum dwelling. Hence, there is need for provincial governments to assess the emergency housing needs in their areas, especially as they regard desperately poor and vulnerable people, and take steps to address them. Civil society organizations and other institutions should advocate for and monitor the execution of such an assessment.

HRB

ENDNOTES: Advancing the Right

¹ COHRE, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, 17 February 2005, available at http://www.cohre.org/view_page.php?page_id=120 (accessed Oct 1, 2006). The study captures the extent and nature of Johannesburg inner city evictions and the lives of people living in "bad buildings."

² *Id.* at 64-65.

³ *City of Johannesburg v. Rand Properties (Pty) Ltd and Others* [hereinafter *Rand Properties*], 2006 (6) BCLR 728 (W), available at <http://www.constitutional-court.org.za/Archimages/5894.PDF> (accessed Oct 1, 2006).

⁴ The Constitution of the Republic of South Africa Act 103 of 1996. Other relevant provisions of the Constitution include section 28(1)(c), which guarantees every child the right to basic shelter, and section 35(2)(e) that requires adequate accommodation to be provided to detained persons, including sentenced prisoners at state expense, available at <http://www.constitutional-court.org.za/site/the-constitution/thetext.htm> (accessed Oct 1, 2006).

⁵ Extension of Security of Tenure Act 62 of 1997 s.9, available at http://www.parliament.gov.za/pls/portal/web_app.utl_output_doc?p_table=acts&p_doc_col=act_doc&p_mime_col=mime_type&p_id=51088 (accessed Oct 1, 2006).

⁶ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, available at http://www.parliament.gov.za/pls/portal/web_app.utl_output_doc?p_table=acts&p_doc_col=act_doc&p_mime_col=mime_type&p_id=590880 (accessed Oct 1, 2006).

⁷ Section 12(4)(b), NBRA: "Demolition or alteration of certain buildings. (4) If the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered – (b) order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice."

⁸ While Justice Jajbhay did not determine the constitutionality of section 12(4)(b), he did clarify that the eviction notices sent to the occupiers pursuant to section 12(1) would be subject to the due process requirements of the Constitution. See also section 2 of the Constitution.

⁹ Sections 39(1) and 233 of the Constitution. See also *State v Makwanyane* 1995 (6) BCLR 665 (CC) para 35, available at <http://www.constitutional-court.org.za/uhtbin/hyperion-image/J-CCT3-94>.

¹⁰ International Convention on Economic, Social and Cultural Rights [here-

inafter ICESCR], art. 11, opened for signature Dec. 16, 1966, available at <http://www.ohchr.org/english/law/cescr.htm> (accessed Oct. 1, 2006).

¹¹ See *Jaftha v. Schoeman & Others*, 2005 (1) BCLR 78 (CC). The Constitutional Court acknowledges that since the ICESCR has dealt with the issues of adequate housing, it must seek guidance from this international instrument, pursuant to section 39(1)(b) of the South African Constitution.

¹² African Charter on Human and Peoples' Rights [hereinafter ACHPR], Art. 14,16,18, ratified by South Africa Sept. 7, 1996, available at http://www.achpr.org/english/_info/charter_en.html (accessed Oct. 8, 2006).

¹³ *Rand Properties*, at para 5.

¹⁴ The occupiers of the inner city properties were defended by CALS, an independent, non-governmental organization in South Africa committed to promoting democracy, justice, equality, and peace through the realization of human rights, the University of the Witwatersrand Law Clinic, and Webber Wentzel Bowens Attorneys.

¹⁵ *Rand Properties*, at para 11.

¹⁶ *Id.* at para 12.

¹⁷ *Id.* at para 48.

¹⁸ *Id.* at para 25.

¹⁹ *Id.* at para 1.

²⁰ *Id.* at paras 29, 38, 47, 57, 62 & 67.

²¹ *Id.* at para 29.

²² See General Comment No 7 (right to adequate housing: forced evictions) 20/05/97, UN doc. E/1998/22, annex IV.

²³ *Id.* at paras 15 & 16.

²⁴ See *Port Elizabeth Municipality v. Various Occupiers* [hereinafter *PE Municipality*], 2004 (12) BCLR 1268 (CC), at para 28. This case concerned an application by the state for an eviction order against a number of people (including 23 children) who had illegally occupied private undeveloped land within the Port Elizabeth Municipality jurisdiction. The Constitutional Court denied the eviction order on the basis of, among other things, the length of occupation of the land, the fact that the land will not be put into some other productive use, and the lack of suitable alternative land.

ENDNOTES: Advancing the Right *continued from page 16*

²⁵ *See id.* at paras 56 & 61.

²⁶ *See id.* at para 26.

²⁷ *See Government of the Republic of South Africa and Others v. Grootboom and Others* [hereinafter *Grootboom*], 2001 (1) SA 46 (CC). This case concerned the plight of a homeless community who were evicted from the land they had unlawfully occupied. The Constitutional Court found the state's housing program to be unreasonable as it did not cater to those in desperate need of housing, such as the unlawful occupiers in the case.

²⁸ *See id.* at para 44.

²⁹ *Rand Properties* at paras 42-47. *See also* National Department of Housing, *National Housing Programme: Housing Assistance in Emergency Circumstances*, April 2004, available at http://www.housing.gov.za/Content/legislation_policies/_Emergency%20%20Housing%20Policy.pdf (accessed June 19, 2006).

³⁰ *Id.* at para 67(1).

³¹ *Id.* at para 64.

³² *Id.*

³³ General Comment No 4 (right to adequate housing) 13/12/91, UN doc E/1992/23, para 8.

³⁴ *Rand Properties*, at para 66.