

Informal Settlements, Legislation and Planning in South Africa

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Submitted as the dissertation component (which counts at least 50% of the degree) in partial fulfilment of the requirements for the degree of Master of Laws at the School of Law, University of Natal

Pietermaritzburg, 1996.

ABSTRACT

Informal settlements in urban areas in South Africa are a result of urbanisation and the inability of past legislation to adequately accommodate informal settlements. The unwillingness of past governments to accept and plan for informal settlements and the resultant lack of infrastructure has and continues to increase the negative impact of informal settlements on the environment.

Democracy in South Africa has heralded an era of Constitutional Supremacy. Legislation must be consistent with the constitution. A future constitution is likely to include a right to housing, as well as property and environmental rights. These rights as well as the framework provided in the Constitution for the different levels of government have important implications for informal settlements.

The government will be unable to provide formal housing for everyone. Informal settlements will therefore need to form a part of a solution to the housing crisis in South Africa. If the negative environmental consequences of informal settlements are to be minimised, and informal settlements are to provide safe and secure shelters then South Africa will require effective planning legislation.

Planning legislation in South Africa is presently fragmented and ineffective. This is also true of land and housing legislation. The Prevention of Illegal Squatting Act 52 of 1951 is a reactive piece of legislation which does not have a constructive role to play in planning for informal settlements. Relatively new legislation such as the Development Facilitation Act 67 of 1995 and the Less Formal Township Establishment Act are crisis orientated and are not alternatives to coherent long term planning legislation.

Various national discussion documents pertaining to planning, land and housing should be used to formulate comprehensive planning legislation. It must be ensured that this legislation provides for the needs of informal settlements. It should also ensure that informal settlements are the responsibility of

all three tiers of government, and local and provincial government have sufficient powers to assist in providing a solution to the problems of informal settlements. The legislation should also incorporate the concept of Environmental Impact Assessment to ensure that development is sustainable.

Present legislation is inadequate. Effective planning legislation must be established in order to ensure informal settlements are able to provide safe and healthy environments.

Preface

This dissertation unless specifically indicated to the contrary in the text is my own original work.

I would like to thank Professor Milton for his valued assistance and advice.

I would also like to thank family and friends for their assistance and patience in dealing with my frazzled nerves.

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Chapter 1: INTRODUCTORY ISSUES

1.1 Framework

This dissertation will critically examine the legislation regulating informal settlements in South Africa. The emphasis will be on examining how well the existing legislative framework provides for the planning needs of informal settlements and urbanisation in general.

Chapter One will introduce the basic concepts of informal settlements. This will include a discussion of the development of informal settlements, their environmental impact, and the role of planning law in minimising the negative environmental impacts of informal settlements and ensuring adequate housing. The Chapter will also discuss important definitions, and provide background to the challenges caused by informal settlements.

South Africa is currently in the process of moving from an interim constitution¹ to a final negotiated constitution. The proposed new constitution must be tested by the Constitutional Court against certain Constitutional Principles.²

All legislation and policy must conform with the broad framework of the constitution:

'By contrast with the situation operative under former constitutions, legislation can now be tested against the Constitution. Legislative and executive powers have to be exercised constitutionally.'³

The Constitution includes fundamental rights affecting informal settlements such as the right to housing, property rights, and environmental rights. The constitutional framework, fundamental rights and their implications for legislation and policy will be examined in Chapter 2.

A large body of national legislation regulates and controls informal settlements. This is discussed in Chapter Three. Legislation developed specifically because of informal settlements, as well as

¹ Constitution of the Republic of South Africa Act 200 of 1993 (Hereafter referred to as 'Act 200 of 1993').

² Schedule 4 of Act 200 of 1993.

³ G Erasmus 'Provincial Government under the 1993 Constitution. What direction will it take?' (1994) 9 *SA Public Law* 407 at 413; W Wendland and J de Oliveira 'The Constitution of the Republic of South Africa, 1993' (1994) 3 *Juta's Business Law* 2 at 2 and 3.

legislation developed primarily to regulate some other subject matter but which is nevertheless directly or indirectly of relevance to informal settlements is included in the Chapter. New national discussion documents of significance to informal settlements are also discussed.

Planning takes place not only at a national level, but also at the provincial and local levels of government. In fact in many instances in the case of informal settlements, lower levels of government will have more of an impact on informal settlements than national government. Thus while Chapter 3 examines National Legislation, Chapter 4 and 5 respectively examine the role of provincial and local government in planning for informal settlements and housing.

An important mechanism for planning and minimising negative environmental impacts is the use of Environmental Impact Assessments. Environmental Impact Assessment and their application to informal settlements is discussed in Chapter 6.

Finally the conclusion will try to draw together various lessons which can be drawn from the existing planning framework pertaining to informal settlements and make recommendations for the future.

1.2 Limitations

There are a number of factors that must be considered in an examination of informal settlements. This section will discuss some of the limitations of the discussion in this dissertation.

Firstly despite the focus of this dissertation on informal settlements it is important to remember that informal settlements form only one component of broader planning questions. Informal settlements must be understood in context, and not as isolated concentrations of population with a discrete set of social relationships of their own.¹ Although this dissertation will focus on informal settlements it is important that informal settlements should be considered as components of the entire settlement pattern in which they play an important part.²

Ideally an examination of legislation relevant to planning and informal settlements should examine rural and urban aspects. The traditional dichotomy between urban and rural growth is one which in itself is open to challenge.³ There is an inter-relationship between sound urban growth and healthy rural and regional development.⁴ The concept of integrated urban and rural development strategies is one which the government itself plans to commit to.⁵ Unfortunately it is beyond the scope of this dissertation to give an in depth analysis of both rural and urban planning mechanisms and legislation pertaining to informal settlements.

Urban informal settlements have been chosen as a focus. Currently 65% of South Africans live in urban areas, and this figure has been predicted to increase to 70% in ten years time. In addition urban areas produce 80% of our Gross Domestic Product (GDP), and are likely to remain key areas of growth.⁶ Strategically they are therefore of key importance to any future development plans.

1. D Hindson J McCarthy (eds) *Here To Stay: Informal Settlements In Kwazulu-Natal* (1994) 129-130.

2. Hindson and McCarthy *op cit* 7.

3. *Discussion Document: Urban Development Strategy of the Government Of National Unity* Government Gazette General Notice 1111 of 1995, 12 October 1995 (Hereafter referred to as 'the Urban Development Strategy') at 4.1.2.

4. A Bernstein in M Swilling *et al* (eds) *Apartheid City in Transition* (1991) 323. Also see the *White Paper for Housing* Government Gazette General Notice 16178 Number 1376, 23 December 1994 at 4.5.5 which stresses the need for housing policy to achieve a balance in emphasis between urban and rural needs.

5. *Urban Development Strategy op cit* at 2.1.

6. J Naidoo *Taking the RDP Forward* Report to Parliament, 8 June (1995) 11.

1.3 Formal Settlements

Before examining informal settlements in more detail it will be useful to examine what constitutes a 'formal settlement'. This section of the Chapter will therefore begin by briefly examining formal land tenure systems, home ownership and township establishment.

Subsequent sections will discuss the development of informal settlements, before examining the meaning of words such as 'squatter', 'informal settlement' and 'land invader'. The Chapter will then examine the impact of informal settlements on the environment. Planning law and the role it has in ensuring that informal settlements develop within a healthy environment will then be considered.

The phrase 'informal settlement' in itself implies the existence of a 'formal settlement'. A formal settlement would be one in which the formalities envisaged by government, be it at national, provincial or local government level, are observed in the establishment of that settlement. These formalities exist both for individual units, or homes, as well as for the establishment of the settlement or township as a whole. The formalities for the formation of the township as a whole must usually be observed before individual homes can be established.

Some legislation has developed to cope with informal settlements and provides for less onerous formalities than those discussed in this Chapter.¹ Thus while not observing all the formalities required for settlements outlined below they are not informal settlements in the sense that they are established within the framework provided by the state. This is discussed in subsequent chapters.

West outlines a number of steps which provincial ordinances provide for in the formal establishment of a township. Following the lodgement of the application for township establishment, public notices must be made inviting objections and representations to be made regarding the township. Specific notices must also be made to certain bodies requesting their commentary. The area envisaged for the township is then inspected by the township board who also hear any grievances concerning the establishment of the township. The township board then makes a recommendation about whether the establishment is desirable to the administrator who

¹ For example the Less Formal Township Establishment Act 113 of 1991.

makes a decision on the matter. If the administrator agrees to the establishment of the township the general plan of the township must be approved by the surveyor-general. Following approval of the general plan a township register is opened by the registrar of deeds, and a township proclaimed.²

Home ownership can be absolute, joint or limited. In accordance with the common law the right of ownership is in the land. However the owner of the land is also the owner of the buildings on it.³ To own a home it is therefore also necessary to have some right over the land on which the structure is established. Generally formalities required tend to regulate the land, and the transfer of land on which the housing is established.

Absolute or exclusive ownership occurs when the piece of land on which a home is built is registered in the deeds registry in the name of the owner.⁴ It is his or her sole property to use for the purposes for which he or she acquired it. Joint ownership is provided for by the Sectional Titles Act.⁵ Although there is joint ownership in a piece of land, each joint owner of the land retains exclusive or absolute ownership in a section of the building erected on it.⁶

Ownership of land is seldom acquired by original means (ie where the owner establishes the title by independent means and not from a predecessor) because, generally, all land in a country originally belongs to the state. Usually ownership of land is acquired by transfer which is a derivative form of ownership.⁷ Ownership of land must be transferred from one person to another by means of registration. The transfer of housing is often subject to formalities by virtue of the housing forming part of the land.

The formalities of registration are prescribed in the Deeds Registries Act⁸ which require a document, serving as a symbol of ownership to be signed by the registrar of deeds.⁹ The title

² A West 'Conveyancing Matters' (1992) September *De Rebus* 608 at 608 - 609.

³ WA Joubert *The Law of South Africa* Volume 11 (1981) 42.

⁴ In accordance with the Deeds Registries Act 47 of 1937.

⁵ Act 95 of 1986 .

⁶ WA Joubert *The Law of South Africa* Volume 11 (1981) 43.

⁷ WA Joubert *The Law of South Africa* Volume 14 (1981) 12 - 14.

⁸ Act 47 of 1937.

⁹ Joubert Volume 14 *op cit* 14.

deed to the land must be produced before registration can take place. Title deeds exist in respect of all land which has been the subject of registration, and the only land which may still be unregistered, is unalienated state land which has never been transferred by the state into private ownership. The first registration of a piece of land must be in accordance with a diagram or general plan of the land framed by a land surveyor and approved by the surveyor general. Subsequent registrations always refer to the diagram which remains annexed to the title deed. A register of all registered pieces of land in his or her area is kept by the deeds registrar. No transaction requiring registration including transfer may take place in respect of land to which there is no title deed.¹⁰

Limited home ownership includes lease, servitude and leasehold. A lease of immovable property confers on the lessee a limited real right in the property. As a general rule, limited real rights in land are transferable (as well as originally acquired) only by means of registration in accordance with the Deeds Registries Act.¹¹ A long lease may be constituted only by registration. Although limited real right in land in the case of a short lease is vested when possession of the land is taken, a short lease may not be transferred without the consent of the lessor.¹² A servitude is a limited real right conferring on the holder certain defined and limited rights of use over a thing belonging to another. Like other real rights, servitudes are transferable by registration.¹³

The Black (Urban Areas) Amendment Act¹⁴ formed a part of apartheid legislation. Although the provisions of this legislation varied over time, the provision for the registration of leasehold by 'blacks' was one of the few mechanisms available for 'blacks' to obtain formal rights to a home in an urban area in South Africa. The rights of a registered holder of a leasehold were set out in the Black (Urban Areas) Consolidation Act¹⁵ and included transfer in certain circumstances and the right to erect a building on the land for residential or business purposes. An administration board had the discretion to grant a leasehold, 'to a person who qualified in respect of a surveyed site in

¹⁰ Joubert Volume 14 *op cit* 23

¹¹ Deeds Registries Act 47 of 1937 Section 16.

¹² Joubert Volume 14 *op cit* 21

¹³ *Ibid* 21.

¹⁴ Act 97 of 1978.

¹⁵ Act 25 of 1945 Section 6A.

an approved Black village or location'.¹⁶ Although leasehold was excluded from the provisions of the Deeds Registries Act¹⁷, the right to leasehold did have to be registered with the registrar.¹⁸

The above brief outline reflects some of the main procedural requirements for formal settlements. Formal housing procedures were applied in a racist manner in the past. The formal requirements are cumbersome and provide a system which is inaccessible to a large percentage of the population. These factors contributed to the formation of informal settlements discussed in more detail below.

¹⁶ Joubert Volume 11 *op cit* 43.

¹⁷ Act 47 of 1937.

¹⁸ The appointment of registrars was provided for in Section 4 of the Black (Urban Area) Amendment Act 97 of 1978.

1.4 Definitional Issues

Having discussed the requirements for 'formal settlements' this dissertation will now discuss the meaning of some of the commonly used terminology associated with informal settlements. Concepts such as 'informal settlements', 'squatters' and 'land invaders' tend to have different meanings for different people. This can create confusion and in turn lead to bad planning. For example when one person refers to an 'informal settlement' they may be referring to illegal occupation of land whereas another person may be referring to unplanned housing. The words 'squatter' and 'informal settlement' are also used colloquially to refer to certain types of low income housing such as wattle and daub housing. The words 'informal settlement' and 'squatter' are also sometimes used synonymously for describing communities.¹ According to Hart this lack of clear terminology may have varying consequences ranging from poor communication to the perpetuation of negative stereotypes and the inflaming of emotions.²

In the past legislation such as the Prevention of Illegal Squatting Act³ made little attempt to define the terminology used. The meaning of the word 'squatter' is not defined in the Act, but is of special significance because the act prevents squatting and the definition of 'squatter' should therefore determine the class of persons against whom the sweeping powers of the act may be used. The Less Formal Township Establishment Act⁴ defines 'settlement' or 'settle' as meaning, '... unless the context otherwise indicates ... settlement or settle for the purposes of habitation.'⁵ The now repealed Development Trust and Land Act⁶ defined a squatter in Section 49 as any 'black' person living on land governed by the Act who was not an employee or labour tenant of the landowner, or the dependant of or woman living with such an employee of labour tenant. This wide and racist definition however is of more value in revealing the attitude of the government in the past than as a workable definition.

¹ See for example Milton and Claassen in RF Fuggle and MA Rabie *Environmental Management in South Africa* (1992) 726, as well as AJ Van der Walt 'Land Reform in South Africa since 1990 - an overview' (1995) 10 *SA Public Law* at 27.

² T Hart 'Informal housing in South Africa: an overview' (1992) *South Africa in Transition: Urban and rural perspectives on squatting and informal settlement in environmental context* 21.

³ Act 52 of 1951.

⁴ Act 113 of 1991.

⁵ Act 113 of 1991 Section 1.

⁶ Act 18 of 1936.

The term 'squatters' as mentioned above is widely used to simply refer to shack dwellers, regardless of the legality of the situation.⁷ However some writers distinguish 'informal settlements' and 'squatting' on the basis that 'squatting' refers to people who are in illegal occupation of land or dwellings which is not the case with all informal settlements.⁸ The meaning of the word was also discussed in *Vena v George Municipality*.⁹ Relying on the dictionary definition of the word Friedman J held that the Prevention of Illegal Squatting Act is not aimed at a person who is lawfully occupying land, and such a person is not a squatter.¹⁰

The word 'informal' may be defined as, 'Not formal. 1. Not done or made according to a regular or prescribed form; not observing forms; not according to order; irregular; unofficial, disorderly.'¹¹ A 'settlement' is '1. The act of fixing (a person or thing) in a secure or steady position; the state of being so fixed. b. Establishment in life, in marriage, in an office or employment, in a permanent abode...'.¹² A 'squatter' may be described as: '1. a settler having no normal or legal title to the land occupied by him, esp one thus occupying land in a district not yet surveyed or apportioned by the government. b. An unauthorised occupant of land or premises.'¹³ The word 'squat' means, 'to settle upon new, uncultivated or unoccupied land without any legal title and without payment of rent'.¹⁴

It is clear that the words 'informal settlements' may include a wide range of meanings, and describe a diverse range of urban dwellings. According to Hart:

'Informal housing is essentially housing which is established unconventionally.'¹⁵

This definition can be a useful indicator, but it is submitted, is too broad in itself to constitute a definition. Hindson and McCarthy use a slightly narrower definition, defining informal settlements as:

⁷ H Mashabela *Mekhukhu: Urban African Cities of the Future* (1990) 9.

⁸ Hart *op cit* 22.

⁹ 1989 (2) SA 263 (A).

¹⁰ For a discussion of the definition of the word 'squatting' see G Budlender 'South African legal approaches to squatting' (1988) February *De Rebus* 161.

¹¹ The Shorter Oxford English Dictionary.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Hart *op cit* 21

'... dense settlements comprising communities housed in self constructed shelters under conditions of informal or traditional land tenure. The term covers a range of different kinds of settlements in terms of shelter type, forms of informal tenure, degrees of official recognition and location in the rural-urban spectrum.'¹⁶

Informal settlements may be subdivided into various categories. For instance, spontaneous housing and free standing informal settlements may be contrasted with site and service informal housing (which offer some form of formal tenure).¹⁷ Another subdivision of informal settlements could be the use of outbuildings such as garages, sheds or backyard rooms as housing. Although these may be constructed of conventional materials they are used unconventionally and as such have been used by organisations such as the Urban Foundation in their research.¹⁸ Byerly and McIntosh¹⁹ identify several categories of informal settlements based on spatial categorisation. These include shack settlements on tribal land; shack settlements on black freehold land; shack settlements in townships; backyard shacks in townships; settlements on state owned land; and settlements on white smallholdings or farmland on the urban edge.

Hindson and McCarthy point out that there is a common misconception that all informal settlements comprise no more than flimsy, unhealthy dangerous shacks, whereas in fact settlements differ in terms of structures erected, their durability and the internal and external environments they create.²⁰ An important factor for planning is to acknowledge the variation of conditions and standards within and between informal settlements.

It is also important to keep in mind that although an attempt may be made at a universal or common definition of informal settlements, informal settlements themselves are dynamic. As conditions and perceptions change so does the nature and function of the informal settlements themselves.

Another important concept is the word 'housing' itself. The Housing White Paper takes a positive approach by defining housing as:

¹⁶ Hindson and McCarthy *op cit* 1

¹⁷ Hart *op cit* 21 - 22.

¹⁸ Hart *op cit* 22.

¹⁹ M Byerly and A McIntosh in Hindson and McCarthy *op cit* 167 - 168.

²⁰ Hindson and McCarthy *op cit* 22.

'...a variety of process through which habitable, stable and sustainable public and private residential environments are created for viable households and communities. This recognises that the environment within which a house is situated is as important as the house itself in satisfying the needs and requirements of the occupants.'²¹

The draft Housing Bill²² does not provide a definition of informal settlements but defines 'housing development' as the establishment and maintenance of habitable, stable and sustainable public and private residential environments for viable households and communities in areas allowing convenient access to economic opportunities, and health, educational and social amenities in which all, '... citizens and permanent residents of the Republic will, on a progressive basis, have access to - (a) permanent residential structures with secure tenure, ensuring privacy and providing adequate protection against the elements; (b) potable water, adequate sanitary facilities, waste disposal and domestic electricity supply.'²³

It is important to distinguish use of the word informal in the context of settlements, and in the context of land tenure. Land tenure refers to the mode of holding rights in land. Although the issue is described in more detail above, informal tenure systems are *de facto* arrangements for holding, using and transferring land on terms defined by the informal landholders themselves.²⁴ Although frequently there is a correlation between informal settlements and informal land tenure this is not always the case, and in some cases informal settlements do have formal tenure such as in the case of site and service schemes. As part of the planning process to address informal settlements, the question of land tenure must also be addressed as the two are closely linked.

Another distinction which is sometimes made is between an established 'informal settlement' and 'land invaders'. The term 'land invaders' is frequently used interchangeably with the word 'squatters' when referring to the illegal occupation of private property.²⁵ However the term may also be used to

²¹ White Paper for Housing Government Gazette General Notice 16178 Number 1376, 23 December 1994 Clause 4.5.

²² Government Gazette 17321 Number 885, 12 July 1996.

²³ Section 1.

²⁴ Hindson and McCarthy *op cit* 177.

²⁵ See 'Squatters delay RDP housing' (1995) March *Financial Mail* 86.

refer to organised new invasions of land or housing.²⁶ Land invasion is a process whereby communities who have been involved in the development of plans for the use of land which they are to acquire are halted by land invaders who then illegally occupy the earmarked land.²⁷ The Housing White Paper lists increasing land invasions as a constraint on timely housing delivery²⁸ and the Department of Land Affairs has committed itself to take steps against those who illegally occupy land. It is important that the words 'land invaders' do not merely become a 'politically correct' synonym for informal settlements in an attempt to justify forced removals and the curtailment of rights.

The lack of clearly defined terms may continue in new legislation and policy. For example the government White Paper on Housing contrasts urban formal housing with both urban informal housing and squatter housing. The document makes no attempt to explain the difference between or to clearly distinguish informal settlements and squatters.²⁹

It will be important in the future that the uncertainty outlined above is not perpetuated and that terminology used is clearly defined. This should help to increase certainty and allow for more effective planning.

²⁶ The Green Paper on Land Reform refers to land invasions as, 'the organised unlawful occupation of land' in what it terms the 'Readers Guide to terms and abbreviations' Department of Land Affairs (1996) *Green Paper on Land Reform* 85.

²⁷ Green Paper on Land Reform *op cit* Clause 3.5. Also see Box 3.3. 29. The term land invasion was first heard as part of a proposed UDF (United Democratic Front) campaign to occupy unused land. Internationally as well as in South Africa, land seizure has been one of the most effective systems of accessing land for the poor. T Wolfson in Swilling *op cit*.

²⁸ Housing White Paper *op cit* Clause 3.3.6.

²⁹ Housing White Paper *op cit* Clause 3.1.3. (a) and (b).

1.5 The Development of Informal Settlements

'Mekhukhu'¹ are characterised by an air of desperation and uncertainty, and a culture of poverty. They lack services and amenities. They are the product of both population growth and old government policy which halted provision of housing in urban African areas in an attempt to arrest further African urbanisation.²

Much of the legislation and policy in South Africa both past and present can be better understood in its historical and political context. This section will therefore briefly outline some of the factors causing urbanisation and informal settlements in South Africa, as well as outlining the extent of homelessness and informal settlements.

Urbanisation

Urbanisation is a pervasive and powerful dynamic affecting the Southern African region.³ Urbanisation can be attributed to a number of factors acting collectively. These factors include economic factors⁴, landlessness, ecological and environmental factors⁵, social factors⁶ and political factors⁷.⁸ Although rural-migration is one component of urban growth, the main component of urban growth is derived from natural population increase i.e. population growth in the urban areas themselves.⁹ Urbanisation patterns and planning in South Africa are complicated by the influence of circular migration, caused by those people who regularly move between urban and rural areas.¹⁰

Despite the above statistics, South Africa has a balanced urban hierarchy, with the relative sizes of urban settlements from largest to small corresponding with international norms. Similarly the rates of

¹ Shack settlements .

² H Mashabela *Mekhukhu: Urban African Cities of the Future* (1990) 11.

³ M Venter *Prospects for Progress: Critical choices for Southern Africa* (1994) 278.

⁴ Many rural dwellers can not support themselves on the land and seek employment in urban areas.

⁵ Pressure on land and poor management practices have led to a declining resource base.

⁶ The perception of urban lifestyles as 'superior' among some youth.

⁷ Including regional conflict and an urban bias in investment priorities.

⁸ Venter *op cit* 283-284.

⁹ M Ramphela and C McDowell (eds) *Restoring the land: Environment and Change In Post-Apartheid South Africa* (1991) 91; Also see Urban Foundation *Policies for a New Urban Future, Population Trends* (1990) 6 - 7, 12, 30 .

¹⁰ Swilling *op cit* 44.

growth also appear to be normal.¹¹ The Urban Development Strategy discussion document therefore stresses that there is little reason for government to favour policies that may artificially induce or restrain growth in a particular tier or region, and there is no justification for interventionist approaches that prevent urbanisation.¹²

Apartheid Policy

According to Ramphela:

‘Historically, the management of South African cities has been driven by the ideology of “separate development” rather than by a concern to create a healthy, viable, urban environment.’¹³

Urbanisation in South Africa was consciously manipulated by the state.¹⁴ The interventions, as well as at times the inaction of the state, have had a significant effect on the formation of informal settlements. It is therefore necessary to briefly outline some of the government policies and inadequacies in the past which have resulted in and exacerbated the problems of informal settlements.

The approach of the government has not always been uniform. At times tensions in the approach developed because of the conflicting requirements of settlers. On the one hand there was a need for cheap labour reserves in the towns and cities, and on the other there was a strong social and political will to prevent a build up of ‘black’ African people in the urban areas. Attempts were therefore made to distinguish between urban ‘insiders’ who should be absorbed and urban ‘outsiders’ who should be excluded.¹⁵ Rutsch and Jenkin distinguish between the policy before and after 1948 when the Nationalist Party came to power characterising the change as a change of policy:

¹¹ Urban Foundation *Policies for a New Urban Future, Population Trends* (1990) 10, 30, 32, 33, 35. Also see the Urban Development Strategy *op cit* Clause 4.1.1.

¹² Urban Development Strategy *op cit* Clause 4.1.1.

¹³ M Ramphela and C McDowell (eds) *Restoring the land: Environment and Change in Post-Apartheid South Africa* (1991) 91. Also see the White Paper on Housing *op cit* Clause 5.2.7.

¹⁴ Venter *op cit* 285-286.

¹⁵ Venter *op cit* 285-286.

'... from one of crude exploitation to a ruthless, ideological crusade with the ultimate target of total separation of the races in the social, residential, cultural and political arenas.'¹⁶

Mechanisms of the apartheid urbanisation policy included homeland development (and homeland urban growth as part of the industrial decentralisation policy), pass laws and control over the movements of TBVC (Transkei, Bophutatswana, Venda and Ciskei) citizens coupled with statutory residential segregation¹⁷, as well as segregated amenities, facilities and institutions. The policy also included forced removal policies.¹⁸ All of the above policies had a devastating effect on established 'black' housing and contributed to homelessness.

One aspect of the government's policy that must be highlighted is the land policy. The housing crisis has historically been rooted in the land question.¹⁹ The Land Acts²⁰ contributed to the exclusion of 'Africans' from ownership and occupation of large portions of the South African land area.²¹ At the same time the formal land tenure system resulted in a vast legislative labyrinth based on racial zones and a complex system of administrative authorities.²²

'The fact of the matter is that the best land has been used for white settlement and what is left are either developed areas that are too costly for the poor to penetrate, or undeveloped land that is itself either too expensive if it is strategically located, or, if it is located far from centres of employment, is also effectively too expensive if transport costs are calculated into the equation.'²³

After the repeal of influx control measures in the mid 1980's the urban situation in South Africa moved from a situation of total control to one of almost no control.²⁴ This period was characterised by a lack of firm national leadership, the *ad hoc* adoption of old policies to try cope with rapidly changing

¹⁶ P Rutch and F Jenkin (eds) *The New Land Laws of South Africa (LRC-Dbn)* (1992) 6.

¹⁷ Group Areas Act 41 of 1951.

¹⁸ For example the Natives Re-Settlement Act 19 of 1954.

¹⁹ Swilling *op cit* 202, 232.

²⁰ Including the Native Land Act 27 of 1913, the Black Administration Act 38 of 1927, and the Native Trust and Land Act 18 of 1936.

²¹ Swilling *op cit* 323-324.

²² P Rutch and F Jenkin (eds) *The New Land Laws of South Africa (LRC-Dbn)* (1992) 1. The issue of land tenure is discussed in more detail below.

²³ Swilling *op cit* XVI.

²⁴ Venter *op cit* 287.

situations, fragmented and confusing administrative and government structures, and the absence of any vision by government.²⁵

Another significant shift in government approach can be noted in 1991 with the advent of a new government White Paper. The White Paper had as its points of departure access to land as a basic human need and the mechanisms of free enterprise and private ownership to fulfil the need.²⁶ The White Paper resulted in laws²⁷ which had a radical effect upon statutes concerning land, land tenure, development, property, and the plethora of racially based legislation.²⁸ Rutsch and Jenkin note that:

'The planned immersion of the poorest, most disadvantaged and largest sector of the population into the cruel sea of the property market was not only cynical in the extreme but presented a scenario which was open to both corrupt officialdom and sharp entrepreneurs.'²⁹

Olivier also notes that the new 1991 legislation failed to introduce a new land control system, or to provide for the formulation and implementation of a development policy and strategy.³⁰

Another important area to highlight is the duplication and weakness of local government in the past. For instance, at one stage five separate administrations, each with their own departments were responsible for the administration of different areas in Durban.³¹ The problem was aggravated because when 'black' authorities took over control from the then administration boards they were not in a position financially to provide housing, while at the same time 'white' local authorities were strictly speaking excluded from needing to meet the needs of 'black' South Africans.³²

The Urban Foundation notes:

²⁵ Swilling *op cit* 325.

²⁶ N Olivier 'Settlement and development: land reform at the crossroads' *South Africa in Transition: Urban and Rural Perspectives on Squatting and Informal Settlements in Environmental Context* (1992) 11.

²⁷ These included the Abolition of Racially Based Land Measures Act 108 of 1991, the Upgrading of Land Tenure Rights Act 112 of 1991, and the Less Formal Township Establishment Act 113 of 1991.

²⁸ Rutsch and Jenkin *op cit* 30, 31.

²⁹ Rutsch and Jenkin *op cit* 30.

³⁰ Olivier *op cit* 12, 13; Also see AJ Van der Walt 'Informal housing and the environment: land rights in transition' *South Africa in transition: Urban and rural perspectives on squatting and informal settlements in environmental context* (1992) 68.

³¹ Ramphele *op cit* 104.

³² Mashabela *op cit* 12.

'...previous policy frameworks for the management of urban, rural and regional development and, indeed, development in general, must be regarded as a failure.'³³

Rapid urbanisation coupled with the past government's disastrous apartheid policies and its inability and unwillingness to deal with the challenges of urbanisation resulted in high levels of homelessness. It also forced people to move beyond established government procedures and resulted in the formation of informal settlements.

Extent of informal settlements

There is presently no comprehensive source of information on housing. This in itself is a problem because it means that the extent of urbanisation, homelessness and informal settlements can not be properly quantified.³⁴ However various estimates have been made.

Present estimates of the urban population vary between 19.6 million (48%) and 26 million (65%). Present growth patterns indicate that by 2020, 75% of the population will live and work in these urban areas.³⁵

According to the Housing White Paper approximately 1.5 million urban informal housing units exist in South Africa at present. This translates to roughly 7.4 million people and 18% of all households in South Africa.³⁶ The White Paper also estimates that approximately 13.5% of all households (around 1.06 million) live in squatter housing nationwide.³⁷ The Weekly Mail estimated the number of people living in informal settlements in and around major urban centres in South Africa at over nine million.³⁸

The number of informal settlements is increasing because of low rates of formal housing delivery. The current rate of delivery is estimated by government to be approximately 150 000 new houses

³³ Urban Foundation *op cit* 39.

³⁴ Housing White Paper *op cit* Clause 3. Present available figures also vary because of differing definitions of 'urban', 'peri-urban' and 'rural'.

³⁵ Urban Development Strategy *op cit* Clause 1 and Clause 4.1.1.

³⁶ Housing White Paper *op cit* Clause 3.1.3 (b). This figure includes 620 000 serviced sites delivered by the old Provincial administrations and through the Independent Development Trust as well as 100 000 unused serviced sites. The figure also includes what the report describes as 'squatter settlements, backyard shacks or in over-crowded conditions in existing formal housing in urban areas, with no formal tenure over their accommodation.'

³⁷ Housing White Paper *op cit* Clause 3.1.3 (d). In this context although ambiguous, it appears the Paper is not referring to illegal informal settlements.

³⁸ *The Weekly Mail* 27 January 1989. Also see Swilling *op cit* 246.

per year.³⁹ The housing backlog itself was estimated at 1.5 million units in 1995.⁴⁰ In order to merely keep the housing backlog at 1994 levels the Government of National Unity committed itself to building a million houses over a period of five years. In addition the government has yet to prove it can achieve the targets it sets itself.⁴¹

The above statistics suggest that even if the government achieves the targets set, homelessness and informal settlements are not short term problems and will remain for years to come. The statistics also indicate that the mere provision of formal housing is not a solution and emphasise the need for innovative planning legislation.

³⁹ Housing White Paper *op cit* Clause 3.1.3.

⁴⁰ Housing White Paper *op cit* Clause 3.2.1.

⁴¹ M Kromberg and C Molele 'Housing - a lengthy process' (1994) 7 *RSA Review* 1 - 2. According to Cobbett the Director General of Housing, over the last few years housing production has been substantially less than 50 000 units a year, and the target of 300 000 in one year is unlikely to be reached .

1.6 Impact of Informal Settlements on the Environment

Rapid urbanisation and inadequate government policy resulting in informal settlements have resulted in many stresses on the environment. This section will set out some of the environmental problems caused by informal settlements. The meaning of the word 'environment' will be interpreted broadly to include the human environment.

The backlog in housing, reflected in informal settlements, crowding and 'land invasions', causes a high degree of individual and communal insecurity and suffering.¹ Overcrowding and poverty associated with informal settlements contribute to problems such as violence, conflict and crime.² Six key contexts for violence can be identified in and around informal settlements. These are conflict within the informal settlements themselves; conflict between formal townships and informal settlements; conflict with hostel dwellers; conflict with high income neighbours; conflict between high income residents and authorities and conflict between authorities and residents of informal settlements themselves.³

According to Ramphela, urban systems make three key demands on their natural surroundings. These include an extractive demand caused by the daily needs of the people in terms of air, food, clean water, minerals and energy, an absorptive demand through activities carried out within them such as the generation of waste which must be broken down and absorbed by the environment, and finally an expansive demand to accommodate growth.⁴ These demands placed on the environment are exacerbated in the case of informal settlements by the lack of infrastructure provided to cope with the demands.

Generally informal settlements are badly built. This means they are unable to withstand the natural elements. Areas in which informal settlements are situated also tend to lack basic infrastructure such as electricity, roads, fresh water supply, ablution facilities and storm drainage. Non-existent refuse

¹ Housing White Paper *op cit* Clause 3.2.1.

² Swilling *op cit* 330.

³ Hart *op cit* 33.

⁴ Ramphela *op cit* 92.

disposal, as well as a lack of fresh water and sanitation, make the areas a health hazard to residents and those who live in surrounding areas.⁵

If urban water supplies are not provided people tend to gravitate towards the water ways. Some houses are flooded in heavy rains. This results in death, destruction of homes and property and downstream pollution.⁶ Often coal is the only form of energy available resulting in air pollution.⁷ Soil erosion due to wind and rain often takes place because of untarred roads.

One result of the government's approach to informal settlements in the past which has resulted in a particularly negative impact on the environment is urban sprawl. Urban sprawl was caused by informal settlers moving to inaccessible areas to avoid harassment from authorities.⁸ Urban sprawl makes city administration and the provision of efficient, viable transport difficult. It also hinders the creation of economic, commercial, social and cultural services necessary for positive urban development, and results in the loss of agricultural and natural resources.⁹ Describing the informal settlements in Durban, Minnaar comments that the hilly, and inaccessible terrain hinders the building of roads, and the installation of flood drains, sewerage pipes, electrical lines and water points.¹⁰

It is clear that the relatively new government has inherited a huge legacy in terms of bad planning, and completely inadequate provision of land, housing and infrastructure.

According to Ramphele:

'The good news is that the threats need not worsen: the urbanisation process currently occurring can be one of the most positive dynamics in the history of the country. What is required is an honest recognition of the problem; bold and creative planning, and the political

⁵ A Minnaar *Squatters, violence and the future of the informal settlements in the Greater Durban region* (1992) 27; The hazards posed by the waterways in Durban in terms of increasing possibilities of epidemics cholera, gastroenteritis, dysentery, parasitic infections, typhoid and bilharzia is also noted by Ramphele *op cit* 96.

⁶ Ramphele *op cit* 108.

⁷ Ramphele *op cit* 97.

⁸ Ramphele *op cit* 93.

⁹ Ramphele *op cit* 94; Also see Swilling *op cit* XIV, XV.

¹⁰ Minnaar *op cit* 27

will and institutional structures necessary to mobilise adequate resources and energies to manage it.¹¹

The Urban Foundation outlines some of the key challenges as being the upgrading of services and conditions, expanding employment and economic growth, promoting compact city growth and a spatial balance between the location of work opportunities and the zones of rapid residential growth, and more co-ordinated metropolitan planning.¹² Policy changes should be gender sensitive ensuring the principle of equity.¹³

High and usually justified expectations increase the need for the government to act quickly in terms of delivery of housing, land and infrastructure. Many of the negative environmental consequences of informal settlements discussed above could be reduced or even eradicated by proper planning and therefore the provision of adequate infrastructure. This therefore makes it imperative to ensure that innovative and effective planning legislation exists in South Africa.

¹¹ Ramphela *op cit* 101. The Urban Foundation also note that not only is urbanisation inevitable, but it is desirable *Policies for a New Urban future, Population Trends* (1990) 37; Also see Swilling *op cit* 329.

¹² Urban Foundation *Policies for a New Urban Future, Population Trends* (1990) 30; Also see Swilling *op cit* 248, 333.

¹³ Venter *op cit* 263.

1.7 Planning Law

The discussion so far has identified a key factor resulting in the development of informal settlements as the inadequate, and inappropriate planning of the past. It has also tried to make it clear that a prerequisite for finding a solution to the negative environmental consequences of informal settlements will require effective planning. The need for effective planning law and some of the present inadequacies of our law with regard to adequate planning emerge throughout this dissertation. This section will briefly discuss what planning law is.

In the Oxford English dictionary, 'planning' is defined as, 'a formulated or organised method according to which something is to be done, a scheme of action'. Fuggle and Rabie stress that the goal to be achieved by planning is to, '... improve the quality of life and the general welfare of the community concerned. This embraces the creation of better living environments, which is achieved through both development and conservation.'¹

Planning law is a developing field of law. The concept is defined by J Van Wyk as:

'That area of the law which provides for the democratically based creation and implementation of comprehensive plans to regulate land use, with the purpose of ensuring the health, safety and welfare of society as a whole and taking into account environmental factors.'²

However she qualifies this definition as one which is not hard and fast since the parameters of the definition are still emerging.

Planning law is a multi-disciplinary subject which straddles both private and public law. It must take into account factors such as transport, economics, politics, and the environment. Social issues such as population growth, and the environment play a pivotal role in planning law. In South Africa tremendous pressure on the planning system is caused by ever-increasing urbanisation, informal settlements and homelessness.³

¹ PE Claasen and JRL Milton in RF Fuggle and MA Rabie (eds) *Environmental Management in South Africa* (1992) 715.

² J Van Wyk 'Planning law - Will Cinderella emerge a princess?' (1996) 59 *THRHR* 3.

³ Van Der Walt *op cit* 70-71

Planning law concerns the relationship between the state, the individual owner of land, and third parties in the form of neighbours, the community or society. Each of the parties operate as separate entities as well as in relationship with each other.⁴

At present it is submitted there is no specific piece of law which deals with all the planning needs of South Africa. However many pieces of legislation fall into the realm of planning law as defined above. It is this legislation and specifically how it regulates and caters for the planning needs of informal settlements in South Africa which forms the focus of this dissertation.

⁴ Van Wyk *op cit* 12 - 13.

Chapter 2: CONSTITUTIONAL FRAMEWORK

2.1 Introduction and Constitutional Sovereignty

The constitution of South Africa ranks as Supreme Law. Informal settlements must therefore be regulated and planned for in accordance with the provisions of the constitution. The constitutional developments leading to and since the adoption of the constitution of the Republic of South Africa Act 200 of 1993 heralded a decisive break from the past in which the state was allowed to implement its disastrous policies virtually unchecked by the courts. A discussion of legislation and planning regulating informal settlements would therefore be incomplete without a discussion of the relevant constitutional provisions which provide the framework to which they must conform.

At the time of writing there is a certain amount of uncertainty about what the final provisions of the constitution will be. The constitution which is in force is the Constitution of the Republic of South Africa Act 200 of 1993.¹

Act 200 of 1993 is an interim constitution and includes provisions outlining the process for a new constitution to be adopted. The body with the task of formulating a new constitution is the Constitutional Assembly chaired by Cyril Ramaphosa. On 8 May 1996 the Constitutional Assembly adopted new text for a final Constitution. The new text was then forwarded to the Constitutional Court for approval. However on considering the text proposed by the Constitutional Assembly, the Constitutional Court held it was unable to adopt the proposed text for a new constitution (hereafter referred to as the 'proposed New Text'), for reasons discussed in more detail below.²

Although the Constitutional Court held it was unable to accept the text proposed to it the court held:

'... the CA [Constitutional Assembly] has drafted a constitutional text which complies with the overwhelming majority of the CPs [Constitutional Principles]...'³

¹ Hereafter referred to as 'Act 200 of 1993'.

² *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC).

³ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1399 G.

The wording of the proposed New Text is useful in determining the parameters which the final constitution accepted by the Constitutional Court is likely to have. This dissertation will therefore focus on both the wording in Act 200 of 1993 and the wording used for the proposed New Text.

Act 200 of 1993 and the proposed New Text, have a number of essential features in common, which distinguish them from South African constitutions prior to 1993.

One of the most important of these features is the concept of the constitution as 'supreme law'⁴ According to Wendland and Oliveira:

'The principle of constitutional supremacy signifies a radical departure from the doctrine of parliamentary sovereignty of the past, according to which Parliament was the supreme authority and which, in effect, gave previous governments the power to pass legislation incontestable even when it negated human rights. Under the new constitutional dispensation, the exercise of powers by Parliament, the executive, and the judiciary is subject to the Constitution.'⁵

According to Van Wyk the Act 200 of 1993 has significant consequences for planning law on three levels. Firstly, at the structural level in terms of providing a regional dispensation and specifying competencies for the provinces, secondly in terms of establishing fundamental rights, and finally because of the underlying value system it includes.⁶ The effect of the constitution is not limited to public law, but also has important implications for private law and the relations of private individuals.⁷

This Chapter will begin by examining the Constitutional Principles. Following this the provisions in the Bill of Rights of importance to informal settlements in various ways will be discussed. Finally the framework providing for the division of powers and administrative functions between national, provincial and local government will be examined.

⁴ Clause 2 of the proposed New Text states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.'

⁵ W Wendland and J De Oliveira 'The Constitution of the Republic of South Africa, 1993' (1994) 3 *Juta's Business Law* 2 - 3.

⁶ Van Wyk *op cit* 6.

⁷ AJ Van der Walt and GJ Pienaar *Introduction to the Law of Property* (1995) 406, 407, 413.

2.2 Relevant Constitutional Principles

The thirty-four Constitutional Principles in Schedule 4 of Act 200 of 1993¹ serve two functions. On the one hand they are indicative of the values and future direction envisaged for the constitution and on the other they are the principles with which the final constitution must comply in order to be acceptable to the Constitutional Court.² This section of the dissertation will focus on those principles which will impact on aspects of the Constitution of importance to informal settlements.

The Principles provide the foundation for a new constitutional dispensation by guaranteeing the entrenchment of the sovereignty of the constitution³, the separation of authority between legislative, executive, and judicial branches of government with appropriate checks and balances⁴, and the protection of fundamental rights and freedoms in a bill of rights⁵. The Principles also stress the importance of self determination⁶ and democratically elected representatives at each level of government.⁷

The content and extent of provincial powers is likely to be the focus of intense debate in the process to a final formulation of the constitution. Constitutional Principle XIX expressly provides for concurrent and exclusive powers for the provinces, while Principle XXII provides:

'The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.'

Political compromise resulted in an amendment⁸ to the constitutional principles,⁹ in terms of which Principle XVIII was amended to guarantee the present range of constitutional powers and functions as a

¹ Hereafter referred to as 'the Principles'.

² G Erasmus 'Provincial government under the 1993 Constitution. What direction will it take?' (1994) 9 *SA Public Law* 419.

³ Principle IV.

⁴ Principle VI.

⁵ Principle II. For a discussion of the Principles see B De Villiers *Birth of a Constitution* (1994) 41, 42, 43.

⁶ Principle XII.

⁷ Principle XVII.

⁸ The Constitution of the Republic of South Africa Amendment Act 2 of 1994

minimum with which any future constitution should comply.¹⁰ In its judgement the Constitutional Court in fact held that the proposed New Text failed to comply with Principle XVIII because the powers and functions provided for provinces were substantially less than and inferior to those provided in Act 200 of 1993.¹¹

Local government is provided for in Principles XVI, XVII, XX, XXIV, XXV and XXVI. Principle XXIV calls for the setting out in the constitution of a framework for local government powers, functions and structures. Local government is one of the functional areas of the provinces and provincial legislatures, and in certain circumstances parliament itself may make laws applicable to local government.¹² Local Government was another area in which the Constitutional Court held the proposed New Text did not comply with the Principles.¹³

It remains to be seen what the content of the new text for a constitution agreed to by the Constitutional Assembly will be. Even if the Constitutional Court agrees that the text complies with the Principles, the Principles may remain as important factors to be taken into account in the interpretation of the Constitution.¹⁴

⁹ M Beukes 'Governing the regions: or regional (and local) government in terms of the Constitution of the Republic of South Africa Act 200 of 1993' (1994) 9 *SA Public Law* 393 at 393, 394.

¹⁰ Erasmus *op cit* 418; S Lombard 'Effective Provincial government ensures a winning nation' (1995) 8 *RSA REVIEW* July 27

¹¹ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1399 E - F.

¹² IM Rautenbach and EFJ Malherbe *What does the constitution say?* (1994) 52.

¹³ See the discussion of Local Government below.

¹⁴ G Erasmus *op cit* 419.

2.3 Relevant Provisions from the Bill of Rights

Introduction

Planning law, and laws pertaining to the establishment of informal settlements, residents of informal settlements, and their property, as well as to neighbours of informal settlements, must be consistent with the rights in the Constitution. This will therefore form the focus of discussion in this section.

According to Chapter Two of the proposed New Text a Bill of Rights should form a, '... cornerstone of democracy in South Africa.'¹ It should apply to all laws and bind the legislature, the executive, the judiciary, and all organs of state.² In order to give effect to the rights in Chapter Two the courts should develop the common law to the extent that legislation does not give effect to the right.³

When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. International law and foreign law should be considered.⁴ The Constitutional Court has stressed that although there is no single 'objective' meaning to words, words can also not mean whatever you want them to mean.⁵ When interpreting rights the underlying purpose of the right as well as the social and historical purpose of the right should be taken into account.⁶

Some of the clauses in Chapter Two appear to apply directly to informal settlements, while others apply indirectly. Those which appear to have the most significance for the purposes of this dissertation include the *locus standi* provisions, the property clause, the right to housing, environment, administrative justice, life, freedom and security of person, privacy, health care, food, water and social security, as well as children's rights.

¹ Clause 7(1).

² Clause 8(1).

³ Clause 8(3)(a).

⁴ Clause 39(1).

⁵ *S v Zuma and Others* 1995 (2) SA 642 (CC) at 6521 J; Also see SBO Gutto 'The Constitutional Courts Opening Salvo in Confronting the Fundamental "Mischief" of the Past and Sowing Seeds for the New South African Jurisprudence: *S v Zuma and others* CCT/5/94; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA)' (1996) 12 SAJHR 47

⁶ *S Jagwanth 'Constitutional Application'* (1995) 8 SACJ 68 at 73; *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC); *S Jagwanth 'Constitutional Application'* (1996) 9 SACJ 106

Locus Standi

As with the *locus standi* provisions in Section 7 of Act 200 of 1993, Chapter Two of the proposed New Text⁷ extends *locus standi* beyond the common law requirements to allow anyone listed in the provision to:

'...approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.'

Locus Standi includes someone acting in their own interest⁸, a person acting on behalf of a person who cannot act in their own name⁹, someone acting as a member of, or in the interests of group or class of persons¹⁰, an association acting in the interests of its members¹¹, as well as anyone acting in the public interest.¹² Although the *locus standi* provisions are extended it may be that the extension is only with regard to Chapter Two rights.¹³ Nevertheless the extension of *locus standi* will mean that representative structures such as residents associations or Civics will be able to represent their members or constituencies in court when their rights are affected. The courts may have to interpret the phrase 'anyone acting in the public interest' narrowly.

Property

The property clause and its inclusion in the proposed New Text attracted wide spread media attention and was fiercely debated in the Constitutional Assembly. The clause in Act 200 of 1993¹⁴

⁷ Clause 38.

⁸ Clause 38(a).

⁹ Clause 38(b).

¹⁰ Clause 38(c).

¹¹ Clause 38(e).

¹² Clause 38(d).

¹³ See TP Van Reenen 'Locus Standi in South African Environmental Law: A reappraisal in international and comparative perspective' (1995) 2 SAJELP 121 at 144.

¹⁴ Section 28 of Act 200 of 1993 provides: Section 28(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the right permits, to dispose of such rights; S 28(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law; S 28(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

has received criticism because of its ambiguity¹⁵, and the possibility that it could stifle reform and redistributive measures.¹⁶

Van der Walt submits that Section 28(1) of Act 200 of 1993 creates an institutional guarantee of private property and as such the possibility of acquiring, holding and disposing rights in property is protected against state interference.¹⁷ Chapter Two¹⁸ of the proposed new text did not adopt the explicit positive guarantee of Section 28(1). However it is submitted the protection offered by the wording in Clause 25(1) and Clause 25(2) of the proposed New Text implicitly included an institutional guarantee. The Constitutional Court held that no universally recognised formulation for the right to property exists. As such it held that the negative formulation of the right in the proposed New Text did not fall short of the Constitutional Principles.¹⁹

Ownership has frequently been regarded as the most important patrimonial right.²⁰ The status of ownership will be important in the determination of the extent of the Property Clause. Ownership in South Africa is often regarded as a superior right which overshadows all other land rights, and is

¹⁵ Van Wyk *op cit* 8.

¹⁶ M Chaskalson 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131 at 136, 137.

¹⁷ AJ van der Walt 'Towards a theory of rights in property: explanatory observations on the paradigm of post-apartheid property law' (1995) 10 *SA Public Law* 303.

¹⁸ The proposed New Text provides,

'Clause 25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application- (a) for public purposes or in the public interest; and (b) subject to compensation, the amount, timing and manner of which must be agreed or decided or approved by a court.

(3) The amount, timing and manner of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including-(a) the current use of property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of state investment and subsidy in the acquisition and beneficial capital improvement of the property; the purpose of the expropriation.

(4) For the purposes of this section- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an act of parliament, either to tenure which is legally secure, or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from provisions of this section is in accordance with the provisions of section 36(1).'

¹⁹ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1287 C - I.

²⁰ Van der Walt 'Squatting and the right to shelter'(1992) *TSAR* 64.

seen as the pinnacle of a pyramid of patrimonial rights.²¹ The description of ownership as a basically unrestricted and absolute right, and as the most important real right:

'... is historically unfounded, theoretically unsound and morally untenable.'²²

Milton argues that, '... the rights of ownership in land are not purely egotistical but involve an altruistic element of social obligation.'²³

It is possible that the property clause of the Constitution²⁴ provides the conceptual and normative framework within which property rights have to be judged.²⁵ The Constitution does not exclusively recognise ownership but refers to 's rights in property'. A new system of rights in property might alter the traditional hierarchy of property rights with the result that ownership might lose its doctrinal position as the most important property right.²⁶ If this is the case it enables diverse new rights, capable of constitutional protection, to be recognised and created to suit whatever the need of a person or community might be.²⁷ This could include new categories of limited real rights.²⁸ An example of this is the Interim Protection of Informal Land Rights Act,²⁹ which extended protection of property to labour tenants in certain circumstances.

This is of special significance to informal settlements:

'Non-rights of a residential nature (such as exercised by squatters or inhabitants of informal settlements), which are unlawful because they are not recognised by existing law, cannot be

²¹ *Ibid.*

²² *Ibid* 67.

²³ JRL Milton 'Planning and Property' (1985) *Acta Juridica* 275.

²⁴ Section 28 Act 200 of 1993.

²⁵ Van der Walt 'Towards a theory of rights in property: explanatory observations on the paradigm of post-apartheid property law' (1995) 10 *SA Public Law* 298 at 301.

²⁶ Van der Walt *op cit* 314.

²⁷ Van der Walt *op cit* 317; M Chaskalson 'The Property Clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131 at 132.

²⁸ Van der Walt *op cit* 317

²⁹ Act 31 of 1996.

regarded as rights in property, but they might be converted into lawful, protected rights in property by legislation.³⁰

Where people have access to housing, but either their use and occupation of the premises is criminalized by legislation, or their rights are weak and insecure, the rights in question can be bolstered so that they are lifted above the threshold of constitutionally recognised and protected rights in property. This could be done by legislation providing the required security of tenure.³¹

Like Section 28(2) and Section 28(3) of Act 200 of 1993, Clause 25(1) and Clause 25(2) of the proposed New Text draw a distinction between an 'expropriation' and a 'deprivation' of property. In the USA there is a, '... great difficulty in distinguishing satisfactorily between takings for which compensation is obligatory and exercises of police power for which no compensation is payable.'³²

Caution should be taken in interpretation of the property clause in South Africa to avoid making the mistakes of the USA, and to ensure a clear distinction is drawn between deprivations and expropriations. In the Constitution expropriation is seen as a particularly category of deprivation requiring further controls in that the expropriation should be for public purposes and against compensation.³³

A deprivation on the other hand must merely conform with the due process requirement in that it must be, 'in terms of law of general application'. In the absence of expropriation compensation need not be paid.³⁴

'State interference with property rights which does not involve acquisition of those rights is not compensable, irrespective of the extent of the interference.'³⁵

³⁰ Van der Walt *op cit* 323.

³¹ Van der Walt *op cit* 323.

³² Van Wyk *op cit* 14.

³³ Van der Walt *op cit* 310.

³⁴ Chaskalson *op cit* 134.

This distinction empowers the state to regulate the use of property without the fear of incurring liability to property owners whose property rights are infringed in the course of regulation.³⁶ Some examples of deprivations (as opposed to expropriations) include planning mechanisms such as zoning,³⁷ building regulations, health regulations, and environmental conservation regulations.³⁸ The distinction is important in the context of informal settlements, because if compensation is payable by the state to wealthy property owners in areas where an informal settlement is planned because of property devaluation, appropriate planning for informal settlements could be severely hampered.

According to Chaskalson: '...by identifying as factors relevant to the quantum of compensation the use to which the property is put, and the history of its acquisition Section 28(3) opens the way for compensation at less than market value to be recognised as just and equitable in appropriate cases.'³⁹ A similar provision was included in the proposed New Text.⁴⁰

There was originally concern that because of the particular wording used an expropriation for the benefit of a private individual might infringe Section 28 of Act 200 of 1993. This would have major implications for land reform in South Africa.⁴¹ It seems that Clause 25(4) of the proposed New Text attempted to address this shortcoming by expanding the definition of public interest for the purposes of the section to include land reforms and reforms to bring about equitable access to all natural resources in South Africa. Clause 25(8) explicitly specifies that no provision of the clause may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination. This is of importance to informal settlements because of the strong link between the land crises and the housing shortage.

Housing

³⁵ Chaskalson *op cit* 135.

³⁶ Chaskalson *op cit* 134.

³⁷ Van Wyk *op cit* 8, 13. For a discussion of this also see Lyster *op cit* 146-153; Milton *op cit* 273-276.

³⁸ Van der Walt *op cit* 310.

³⁹ Chaskalson *op cit* 138.

⁴⁰ Clause 25(3).

⁴¹ Chaskalson *op cit* 136, 137.

Unlike the Interim Constitution the proposed New Text includes a right to housing.⁴² Housing forms part of what have been termed second generation or socio-economic rights. Three major arguments have been raised against the inclusion of second and third generation rights in the constitution. These relate to the incompatibility of third generation rights with the absolute nature of rights, the question of negative duties, and problems of impracticability and enforcement.⁴³

On the other hand the so-called division of rights between first, second and third generation rights has been argued to be an artificial division, and a distorted view of rights. The symbolic importance of the inclusion of such rights has also been stressed.⁴⁴ The right to housing could also be interpreted as an aspirational, or programmatic political statement, as a commitment to use for the benefits of all people, and the progressive improvement of their lives.⁴⁵

The Constitutional Court held that although socio-economic rights are not universally accepted this did not preclude their inclusion in the Constitution.⁴⁶ The court stated that many other rights also had budgetary implications and the inclusion did not breach the separation of powers required by the Constitutional Principles.⁴⁷ The court was of the view that the rights, '... are, at least to some extent, justiciable.'⁴⁸

A strong view is that socio-economic rights can at least place a negative obligation on the legislator.⁴⁹ A right to housing can operate as a 'constitutional presumption' against homelessness and this could be used to determine the validity of administrative acts and statutes. A constitutional right to housing

⁴² Clause 26(1) provides that everyone has the right to have access to adequate housing. Clause 26(2) provides the state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of the right. Clause 26(3) states that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. In addition the Clause states no legislation may permit arbitrary evictions.

⁴³ DM Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 SAJHR 477.

⁴⁴ DM Davis 'The Case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 SAJHR 475 at 476.

⁴⁵ G Budlender in Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 50.

⁴⁶ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1289C.

⁴⁷ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1289D - 1290D.

⁴⁸ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at 1290D.

⁴⁹ G Budlender 'Towards a Right to Housing' in AJ Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 45.

would then provide an overarching policy framework against which the exercise of administrative discretion could be tested.⁵⁰

Although on the face of it Clause 26(2) of the proposed New Text appears to intend to place a positive duty on the state it is submitted that in practise the right is more likely to be negatively interpreted. Budlender gives the example that in the context of a right to housing it would be unconstitutional to enact the Prevention of Illegal Squatting Act.⁵¹ Clause 26(3) of the proposed New Text appears to be a negative right in that it places no duty on the state but expressly excludes evictions carried out without a court order and consideration of 'all relevant circumstances.' Relevant circumstances might include factors such as the availability of suitable, or equivalent alternative accommodation, the rights of and interests of the property owner, whether compensation should be paid for the structures erected on the land, and the past conduct of the parties.⁵²

The inclusion of a right to housing in the constitution or a bill of rights does not necessarily provide citizens with an effective right that can be enforced against the state and the question is whether it is possible to give the right to shelter any practical and meaningful content.⁵³ However the inclusion of a right to housing in the constitution should strengthen the position of those who live in informal settlements, particularly against the threat of arbitrary evictions.

Another role government could play would be to create an environment which assists people in the release of their energies and creativity.

'Many people do not require that the state should build a house for them - what they require is land, access to clean water and decent basic services, and an administration which encourages rather than obstructs their efforts to create a home for themselves.'⁵⁴

⁵⁰ Budlender in Van der Walt *op cit* 48, 49: Also see A Sachs *Affirmative Action and Good Government* (1991) 28.

⁵¹ G Budlender in 'Towards a Right to Housing' in AJ van der Walt *Land Reform and the Future of Landownership in South Africa* (1991) 45. See below for a discussion of the Prevention of Illegal Squatting Act.

⁵² Budlender in Van der Walt *op cit* 47.

⁵³ AJ van der Walt 'Squatting and the right to shelter' (1992) 1 TSAR 41.

⁵⁴ Budlender in Van der Walt *op cit* 50.

It will thus be important that in the interpretation of the right to housing the right is not interpreted as simply the provision of formal housing by the state, but includes in its ambit the provision of infrastructure and allows regulations and legislation only to the extent in which the creation of housing by individuals or communities is not unduly or unnecessarily interfered with by the state.

Environment

Commenting on the environmental provision in Act 200 of 1993⁵⁵ Glazewski states:

'This clause will further environmental law by providing the courts with authority to include environmental criteria in judicial decision-making...'⁵⁶

The phrasing of the environmental right in the proposed New Text⁵⁷ expands the ambit of the clause by imposing a number of specific duties on the state. Clause 24(a) of the New Text is negatively phrased. This implies a right to a minimum standard of environmental quality rather than guaranteeing a limitless and thus unrealistic right to environmental integrity and is:

'... thus potentially more relevant to the Khayelitsha squatter rather than the Sandton resident.'⁵⁸

The negative wording makes the section more of a shield than a sword, allowing aggrieved people to challenge any legislation or administrative action that threatens or harms their health or well-being.⁵⁹

The provision in Act 200 of 1993 does not include a duty on the state. The clause in the proposed New Text appears to attempt to remedy this criticisms and imposes a duty on the state to take,

⁵⁵ Section 29.

⁵⁶ J Glazewski 'The Environment And The New Interim Constitution' (1994) *SAJELP* 4.

⁵⁷ Clause 24 of Chapter 2 of the proposed new text provides that: 'Everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

⁵⁸ Glazewski *op cit* 5.

⁵⁹ J Campanella 'Environmental rights and the new Constitution' (1995) 3 *Juta's Business Law* 5.

'reasonable legislative and other measures' to protect the environment for the benefit 'of present and future generations'⁶⁰. The qualification of 'reasonable legislative and other measures' appears to be an attempt to achieve a balance between what is environmentally the most desirable and what can be achieved.⁶¹

There was disappointment in some sectors with the final wording of the proposed New Text. This was because the words 'future generations' and thus the concept of sustainability apply only to Clause 24(b). In addition the right in Clause 24 is still negatively phrased. It is also possible that the factors listed in Clause 24(b) will be interpreted to exclude other factors. There is also no provision referring to a general duty with regard to the environment which would have had the important effect of clearly binding environmental offenders other than the state.⁶²

One tension which may arise in the future may be between development and the right to an environment. A manifestation of this could be between informal settlements and the environment.

'Environmentalists might argue that the inhabitants of informal settlements cause a lot of environmental damage, while the homeless might counter with the argument that basic housing rights should take priority over environmental concerns.'⁶³

One manifestation of this is highlighted by Glazewski who stresses that development decisions such as for example the location of an informal settlement should also take into account environmental factors.⁶⁴ The Less Formal Township Establishment Act⁶⁵ empowers the Administrators of the various provinces to disregard environmental and other criteria in establishing such settlements.⁶⁶ The provision could now be challenged if the applicant can show that his or her case falls within the

⁶⁰ This therefore includes the important environmental concept of inter generational equality.

⁶¹ T Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 1 SAJELP 95.

⁶² D Archer 'Letter to the Constitutional Assembly on behalf of Workshop on the Constitution and the Environment' (1996) 1 SAJELP 1. Also see 'The Environmental Right in the New Constitution' (1996) 1:1 *Environmental Law Monitor* 2.

⁶³ AJ Van der Walt 'Squatting and the right to shelter' (1992) 1 TSAR 40 at 76.

⁶⁴ Glazewski *op cit* 9.

⁶⁵ Act 113 of 1991. This is discussed in more detail below.

⁶⁶ Section 12.

purview of the environmental clause and is not a permissible limitation under Section 33.⁶⁷ In this instance there does seem to be a conflict between the potential effect on the environment and the need for the speedy development of shelters and release of land for settlement purposes. However, arguably it is in the interest of the future residents of the informal settlements that environmental factors are taken into account.

Van der Walt contends that the apparent conflict is an oversimplification and that both are aspects of the same problem, the need for rational planning and control of land use in terms of a suitable and responsible land-use ethic. The solution to the housing crises and the environmental threat should therefore both be worked out together.⁶⁸

In the light of the discussion above it is important that future planning legislation ensures that development takes place on an environmentally sustainable basis. If this is not the case it may be held to be inconsistent with the Constitution.

Just Administrative Action

A large number of decisions pertaining to informal settlements are administrative decisions. These include decisions of location, zoning decisions, allocation of housing, and even decisions to make forced removals. Referring to the administrative clause in Act 200⁶⁹ Van Wyk comments:

'These provisions should introduce a culture of justification, fairness and accountability into administrative decision-making.'⁷⁰

The administrative justice clause should rectify the situation in the past whereby *ad hoc* planning decisions were made and there was no obligation to provide reasons for decisions made.⁷¹ A number of pieces of legislation are open to challenge in terms of the clause.

⁶⁷ Glazewski *op cit* 9.

⁶⁸ Van der Walt *op cit* 76; Also see S Ebrahim 'Environmental Rights are Human Rights' (1993) 2 *Rights: A Lawyers For Human Rights Publication* 43.

⁶⁹ Section 24.

⁷⁰ AJ Van der Walt 'Land Reform in South Africa since 1991 - an overview' (1995) 10 *SA Public Law* 1 at 8.

⁷¹ Section 33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair; S 33(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; S 33(3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

Although the administrative action clause⁷² of the proposed New Text used a slightly different formulation to Act 200 of 1993⁷³ the effect of the clause would be similar to that outlined above. Although it remains to be seen how the courts will interpret the provision in the case of informal settlements the effect of the clause will probably be to ensure administrative decisions taken are fair and accountable.⁷⁴

Life; Freedom and security of the person; Privacy; Health care, food, water and social security; Children

All of the above rights have implications for informal settlements and will be briefly discussed.

A number of Indian cases have interpreted the right to life to include the right to livelihood. In the case of *Tellis and Others v Bombay Municipal Corporation and Others*⁷⁵, the court held that pavement-dwellers who were forcibly evicted and had their dwellings demolished by the municipality could not be deprived of the right to life, and thus livelihood, except according to procedure established by law, which must be fair and reasonable. On constitutional grounds the applicant should have been given a fair opportunity to be heard.⁷⁶

A number of other rights could have implications for residents of informal settlements. The right to freedom and security of person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way would for instance presumably regulate forced removals, and demolition of homes as is the case with the right to privacy. Access to health care services, sufficient food and water, social security and the obligation on the state to achieve the progressive realisation of each of these rights were included in the proposed New Text as were the rights of children. These all have important consequences for residents of informal settlements.⁷⁷ According to the Sunday Times the

⁷² Clause 33.

⁷³ For an in depth discussion of the Clause see E Mureinik 'A bridge to where? Introducing the Bill of Rights' (1994) 10 *SAJHR* 31 at 41, 42.

⁷⁴ AJ Van der Walt 'Land Reform in South Africa since 1991 - an overview' (1995) 10 *SA Public Law* 1 at 8.

⁷⁵ Quoted in Budlender in Van der Walt (ed) *op cit* 49.

⁷⁶ Budlender in Van der Walt (ed) *op cit* 47, 48. The case also has implications for the administrative justice clause.

⁷⁷ However the discussion of socio-economic rights discussed above in relation to the right to housing would also apply to these rights.

Legal Resource Centre in Durban has begun an action to test the validity of the Illegal Squatting Act claiming that the law discriminates on grounds of 'race, security, dignity and privacy' as well as children's rights 'since they are often the worst affected by evictions and demolitions'⁷⁸.

Limitation of rights

'The rights in the Bill of Rights are not framed as absolutes, with which anything that collides is automatically annulled.'⁷⁹

Rights must be tested against the limitations clause which will probably be at the heart of most pieces of constitutional litigation.⁸⁰ Tests established in terms of the limitations clause should give some concrete meaning to the broadly worded terms of the clause. They should also reflect the genuinely salutary purpose of the limitations clause and acknowledge that constitutional rights are subject to legitimate limitations that allow for open and candid consideration of real state, governmental, public and private interests that are at stake.⁸¹

The regulation of informal settlements and planning law in general is therefore subject to the rights outlined above as qualified by the limitations clause in the Constitution.

⁷⁸ *Sunday Times KZN* June 16, 1996.

⁷⁹ Mureinik *op cit* 33.

⁸⁰ S Woolman 'Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitations clause' (1994) 10 *SAJHR* 60.

⁸¹ Woolman *op cit* 90.

2.4 Section 126 and Provincial Powers

According to O'Regan in the case of planning and development of informal housing the doctrine of parliamentary sovereignty of the past gave overwhelming powers to the central legislature and its bureaucratic servants. A democracy needs the establishment of representative government at all levels of decision-making.¹ This section will discuss the constitutional framework providing for the role and powers of provincial government.

Act 200 of 1993 created a new government structure. It replaced the four former provinces, TBVC states, and six self governing territories with nine provinces, each with their own legislature, empowered to make laws subject to the constitution.² According to Wendland and Oliveira:

'The Constitution appears to contemplate a hybrid system of government, which is neither fully federal nor fully unitary, for aspects of both types of system are inherent in the constitution. The question of the division of powers between the central and provincial government is complex and controversial.'³

The Constitutional Court held that the powers and functions included in the proposed New Text were substantially less than and inferior to the powers and functions of Act 200 of 1993.⁴

In Act 200 of 1993 provinces exercise legislative powers with respect to functional areas listed in Schedule 6. The list of topics allocated to provinces is reminiscent of the topics traditionally entrusted to provincial authorities.⁵ Land, housing and informal settlement related functions in Schedule 6 include roads, health services, agriculture, environment, soil conservation, housing, regional planning, urban and rural development, consumer protection and public transport.⁶ A government commission examining provincial government concluded that generally the allocation of powers and functions to the provinces in the 1993 Constitution was appropriate to serve the interests of good government in South Africa.⁷

¹ C O'Regan 'Informal housing, crisis management and the environment' (1993) 8 *SA Public Law* 192.

² Wendland and Oliveira *op cit* 3.

³ Wendland and Oliveira *op cit* 3. Also see Erasmus *op cit* 417.

⁴ *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at 1399 E - F

⁵ Beukes *op cit* 398.

⁶ See Green Paper on Land Reform *op cit* 10.

⁷ Lombard *op cit* 24.

The legislative competencies of the provinces are presently determined by Section 126 of Act 200 of 1993, which is a vitally important provision.⁸ An Act of Parliament will only prevail in circumstances set out in Section 126(3), and must apply uniformly everywhere in the Republic.⁹ Section 126(3) applies when a matter can not be regulated 'effectively' by provincial government, where the matter requires uniform norms and standards, or minimum standards across the nation for the rendering of public services, for the maintenance of economic unity, or national security, the protection of the environment, the promotion of inter-provincial commerce, or protection of the common market. National legislation will also prevail if the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.¹⁰

The equivalent provision in the proposed New Text is Clause 104. The text provides that the provincial legislature may pass legislation with regard to functional areas listed in Schedule 4, and 5 of the constitution, as well as for matters outside the functional areas, expressly assigned to the province by national legislation¹¹, or when legislation is reasonable necessary for or incidental to the effective exercise of a provision listed in Schedule 4. Clause 146 applies to conflicts between national and provincial legislation for functional areas listed in Schedule 4. National legislation which applies uniformly with regard to the country as a whole prevails provided one of the conditions in which Clause 146(2) applies. However as stated above the Constitutional Court did not accept the formulation of Provincial powers outlined in the proposed New Text.

According to De Villiers during the negotiation surrounding provincial powers for Act 200 of 1993:

'...issues requiring urgent attention, such as intergovernmental co-operation and co-ordination, were to a large extent neglected. This could be detrimental to the medium and long term functioning of the future provincial dispensation...'¹²

Concerns such as those expressed above could have resulted in the inclusion of Chapter Three in the proposed New Text, which outlines principles of co-operative government. The chapter stresses

⁸ Beukes *op cit* 397.

⁹ Section 126(4).

¹⁰ Rautenbach *op cit* 48; De Villiers *op cit* 156 - 160.

¹¹ Clause 104(1)(b).

¹² De Villiers *op cit* 271, 276.

that all three tiers of government are, '...distinctive, interdependent, and interrelated'.¹³ Clause 41(1) of the proposed New Text outlines a number of duties of all spheres of government, which include the duty to co-operate with each other in mutual trust and good faith by, amongst other things, fostering friendly relations, assisting and supporting each other co-ordinating their actions and legislation with each other, and avoiding legal proceedings with each other.¹⁴ The clause also provides guidelines for an act of parliament to promote and facilitate inter-governmental relations, and settle disputes.¹⁵

Although at this stage it is difficult to foresee what the exact divisions of powers between national and provincial government will be, the judgement by the constitutional court does stress that the powers in Act 200 of 1993 can not be substantially diminished.¹⁶ It is therefore likely that in the case of the regulation and management of informal settlements and planning, although policy may be determined at a national level in general the provincial level of government will prevail.

¹³ Clause 40(1).

¹⁴ Clause 41(1)(h).

¹⁵ Clause 41(2), (3).

¹⁶ *In Re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) at 1399 E - F.

2.5. Delegation and Assignment

Although Section 126 and Schedule 6 of Act 200 of 1993 provide the framework for provincial and national powers, an important mechanism for devolution to the provinces is delegation and assignment in terms of Section 235 of the Constitution. The condition for transfer rests on if the province has the administrative capacity to perform the powers and functions in question.¹

‘Provinces have already received certain powers, but the administrative capacity or infrastructure of some of the provinces is inadequate to handle these functions. Therefore, a province's capability has to be taken in account before devolving powers to that provincial administration.’²

Delegation was also included in the proposed New Text and was regulated by Clause 97 and 99. Assignment to the provinces is provided for in Schedule VI of the New Text.

Various proclamations have been made by the president to assign functions in terms of Section 235(8) of the Constitution, including for instance the Transport Deregulation Act 80 of 1988.³ An example of the delegation process can be seen by the delegation of the administration of the Less Formal Townships Establishment Act⁴ to provincial authorities.⁵ In terms of Section 235(8) of Act 200 of 1993, 195 Ordinances of the former province of Natal, and 20 Laws of the former Laws of the Kwazulu Legislative Assembly were assigned to the province of Kwazulu/Natal.⁶ These included for instance The Municipal Ordinance 11 of 1918, The Howick Township Ordinance 12 of 1925, the Edendale (Transfer of Trust Lands) Ordinance 11 of 1946, Town Planning Ordinance 27 of 1949, the Local Authorities Ordinance 25 of 1974, and the Prevention of Environmental Pollution Ordinance 21 of 1981.

Government documents reflect the desire to devolve powers. In the Urban Development discussion document certain key functions are envisaged as taking place at a local level, including the moulding of provincial specific policies, regulating the local development planning process, building local

¹ Section 235(8); Also see Rautenbach and Malherbe *op cit* 48.

² Lombaard *op cit* 28.

³ *Gazette* No. 17116, Proclamation No 22, 1996-04-26.

⁴ Act 113 of 1991.

⁵ Proc R 159 Government Gazette 16049 of 31 October 1994 (Regulation Gazette 5418).

⁶ *Gazette* No 15813 Proclamation No 107, 17 June 1994.

government capacity, and the evaluation and prioritisation of infrastructure costs that will require government funding.⁷

‘The GNU does not wish to control every single aspect of the Urban Strategy...The implementation of an integrated Urban Strategy will thus require a fundamental reorganisation of the way government works. Greater emphasis will be placed on interdepartmental coordination, and on cooperation between these line departments and their counterparts through the different tiers of government...’⁸

According to the Housing White Paper, ‘The critical policy challenge for housing is to facilitate maximum devolution of functions and powers to provincial and local government tiers through concurrence between national and provincial governments, while at the same time, ensuring that national policies essential to an effective and equitable housing sector are in place.’⁹ Envisaged roles for the provinces include setting of provincial housing delivery goals, determining provincial housing policy, monitoring delivery, overseeing and directing activities of provincial bodies and liaison and negotiation with the National Ministry.¹⁰

The draft Housing Bill¹¹ provides that one of the general principle applicable to housing development is to adhere to the principle that a higher sphere of government, ‘shall perform only those functions which cannot be performed effectively at a lower sphere of government.’¹²

The process of delegation must take place in order to ensure that the most effective planning and regulation of informal settlements takes place. Although the process has begun uncertainty as to which what the responsibilities of the various levels of government is will probably continue until a final constitution is accepted.

⁷ Urban Development Strategy *op cit* Clause 6.5.4.

⁸ Urban Development Strategy *op cit* Clause 6.5.5.

⁹ White Paper for Housing *op cit* Clause 4.4.1.

¹⁰ White Paper for Housing *op cit* Clause 5.2.2.

¹¹ Government Gazette No 17321 Vol. 373 12 July 1996.

¹² Clause 2(2)(b).

2.6. Local Government.

'Local government directly involves the inhabitants of each town and city in government processes since it deals with matters that affect their daily lives. For the first time in South Africa local government is recognised and entrenched in the transitional constitution as a fully-fledged level of government.'¹

Local government plays an important role in the implementation of planning law and the regulation of informal settlements. Although the degree of autonomy of local government is a possible source of conflict,² it is important to briefly outline the constitutional parameters of local government.

The provisions pertaining to local government in Chapter 10 of Act 200 of 1993 applied only after the first local government elections were held. Section 174(3) of Act 200 of 1993 grants express constitutional recognition to the autonomy of local authorities subject to limits prescribed by law. Parliament may not encroach on the powers, functions and structure of local government to the extent that the fundamental status, purpose and character of local government are compromised.³ Proposed legislation affecting the status powers and functions of provincial powers must be published in the Gazette for comment so that interested parties may make written comment before the adoption of legislation.⁴

The powers of local government set out in Act 200 of 1993 are fairly general.⁵ They include, '... the maintenance and promotion of the well-being of all persons within its area of jurisdiction'.⁶ Local government must also make provisions for access by all to water, sanitation, transport, electricity, primary health services, education, housing and security.⁷ The Commission on Provincial government was of the opinion that, '... the extent to which National and Provincial legislatures may encroach on the terrain of local government should be clarified.'⁸

¹ Rautenbach and Malherbe *op cit* 51.

² De Villiers *op cit* 308.

³ Section 174(4).

⁴ Section 174(5).

⁵ Beukes *op cit* 396.

⁶ Section 175(2).

⁷ Section 175(3).

⁸ Lombaard *op cit* 32.

Although Chapter Seven and Schedule 5 of the proposed New Text did include details regulating local government than Act 200 of 1993 they did not satisfy the requirements of the Constitutional Court. The Constitutional Court held that the proposed New Text failed to comply with the Constitutional Principles pertaining to local government because it did not adequately provide a framework for the structures of local government. In addition it did not provide formal legislative procedures to be adhered to by legislatures at the local government level or appropriate fiscal powers and functions for different categories of local government.⁹

It will be important that any new legislation regulating informal settlements or planning respects the autonomy of local government within the limits prescribed and does not infringe the powers of local government included in the Constitution.

⁹ *In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC) at 1399 C - E.

2.7 Continued Enforceability

Section 229 of Act 200 of 1993 provides that subject to other provisions in the constitution, all laws which, were in force immediately before the commencement of the constitution, stay in force until the repeal of the law by a specific 'competent authority'. Section 229 also contained a mechanism whereby certain laws remaining in force by virtue of Section 229 could be assigned by the President to various authorities, dependent upon whether the laws were regarded as matters falling within the functional area of Schedule 6 (provincial government functions) of the Constitution or not.¹

The fragmentation of apartheid legislation was therefore carried through into the new dispensation. For example different rules for registering land and title deeds apply in different provinces. In the Province of the Northern Transvaal there are four different methods of land registration because three different homelands form part of the new province.² The duplication has resulted in the development of Acts such as the Development Facilitation Act³, in an attempt to standardise land registration, and provide secure land tenure.⁴

The same duplication and fragmentation caused by the continued enforceability of apartheid legislation has occurred in the housing sphere. Acts such as the Housing Arrangements Act 155 of 1993, and the Housing Act 4 of 1966, had to be amended to extend the application of these provisions (such as for instance for housing subsidies), to the areas of the former self-governing territories and the former TBVC states to which they did not apply.⁵

Despite the problems associated with the continued enforceability of past legislation, Section 229 was necessary to provide legal certainty, and continuity. The equivalent provision in the proposed New Text is contained in Schedule 6 which provides for Transitional Arrangements. Clause 2 of the Proposed New Text provides for the continuation of existing laws, which will continue in force subject to amendment, repeal and consistency with the Constitution. Old order legislation (defined in Clause 1 as legislation enacted before the previous constitution Act 200 of 1993 took effect) has the same application territorially and otherwise as before Act 200 of 1993 took effect unless subsequently

¹ Rutsch *op cit* 27.

² M Kromberg and C Molele 'Housing - a lengthy process' (1994) 7 *RSA Review* 1 at 8.

³ Act 67 of 1995.

⁴ Kromberg and Molele *op cit* 8.

⁵ Kromberg and Molele *op cit* 9, 10.

amended, and will continue to be administered by the same authority as when the New Constitution took effect.

As described the continued enforceability has resulted in fragmentation and duplication of many areas of law pertaining to informal settlements and planning. Although the process of consolidation of legislation and reform has begun it will take years before all legislation is rationalised and consolidated.

Chapter 3: NATIONAL LEGISLATION

3.1 National Planning Legislation

Chapter Three will discuss the main provisions and features of planning law and regulations presently regulating informal settlements. Initially it will discuss planning legislation in South Africa in general. Both relatively new measures such as the Development Facilitation Act¹ and the Less Formal Township Establishment Act² will be discussed as well as older legislation such as the Prevention of Illegal Squatting Act.³ The dissertation will also discuss national housing and land legislation as well as land tenure issues. Finally more recent government policy documents will be examined.

This section of the Chapter will discuss the existing planning framework and legislation in South Africa. This will include a brief examination of the Physical Planning Act.⁴

Present planning legislation and approaches to planning can be criticised as burdensome, overly resource intensive and inappropriate in the South African context.⁵ The inability to release suitable land for housing caused by inadequate planning provisions is a major constraint to timely housing delivery.

Historically South Africa has tended to rely on static planning models. This can be contrasted with the more modern concept of planning as an ongoing process achievable over a period of time. This view sees planning as responsive to changing social and economic policy, and easily adjusted to temporary needs, changing to take account of new information.⁶

Planning legislation has also tended to overlook the needs of women arising from their subordinate position in society.⁷ According to Venter in the past in South Africa:

¹ Act 67 of 1995.

² Act 113 of 1991.

³ Act 52 of 1951.

⁴ Act 125 of 1991.

⁵ Housing White Paper *op cit* Clause 3.3.6.

⁶ JRL Milton 'Planning and Property' (1985) *Acta Juridicae* 269; Food and Agricultural Organisation of the United Nations (FAO) *Guidelines for Land Use Planning* (1989) 5.

⁷ Venter *op cit* 254.

Planning was dominated by ideas, procedures and regulations imported from Britain, Europe and the United States: the separation of land uses and the promotion of the suburb as opposed to the city; the promotion of very low unit densities; the assumption that the motor car would be the main form of transport and should therefore be the major determinant of urban scale; rigid and very high standards for space and building; and restrictions on informal activities and structures.⁸

Any future planning must reverse the effect of the distortions brought about by the unnatural needs and results of apartheid that made productive utilisation of land and other resources impossible.⁹ According to O'Regan we also need to distinguish between crisis management and long-term planning decisions.¹⁰

One of the main pieces of legislation presently addressing planning needs in South Africa is the Physical Planning Act.¹¹ The Act was a result of the acknowledgement of the dire need for co-ordinated and proper development in both urban and rural areas.¹² The objectives of the Act appear to be twofold. Firstly to provide a framework whereby effect can be given to policy and strategy for rural areas, and secondly to promote the orderly physical development of the country in the national, regional and urban context.¹³

Chapter One¹⁴ of the Act provides the overall physical development structure of the country. This entails the division of the country into development regions. These development regions may in turn be divided into regional development areas.¹⁵ Chapter II¹⁶ provides for the compilation and rectification of national and regional policy plans. The preparation of local urban structure plans and the powers of Administrators to make regulations in this regard are contained in Chapter III.¹⁷

⁸ Venter *op cit* 286 - 288. These planning and urban management systems are described by Venter as entirely inappropriate for South Africa.

⁹ Rutsch and Jenkin *op cit* 36.

¹⁰ O'Regan *op cit* 204.

¹¹ Act 125 of 1991.

¹² Rutsch and Jenkin *op cit* 36.

¹³ Rutsch and Jenkin *op cit* 36, 400.

¹⁴ Section 1 to 3.

¹⁵ Rutsch and Jenkin *op cit* 401.

¹⁶ Sections 4 - 21.

¹⁷ Sections 22 - 26.

Chapter IV¹⁸ provides the legal consequences and effect of the commencement of an Urban Structure Plan.

In terms of Section 28 of the Act¹⁹ any lesser plan is valid only so long as it is consistent with a greater plan. The Act thus provided for a hierarchy of policy and structure plans.²⁰ Chapter V²¹ provides for miscellaneous provisions including the administration of committees established in terms of the Act²² and the power of the Minister to make regulations.²³

According to Fuggle and Rabie the main objects of the Act include establishing responsibility for physical planning at the various levels of government by the removal of uncertainty regarding responsibility for regional planning, and the promotion of public participation in the preparation of plans.²⁴

The Act also seeks to ensure that in the preparation of plans proper consideration be given to the potential for economic, socio-economic and development needs of the population. Factors such as existing and future transport needs, physical factors that may influence development, and the possible influence of future development upon the natural environment should also be taken into account.²⁵

According to Van Wyk the Act has an uncertain future because of '... the negative features of the system it represented as well as the fact that it does not fit into the new constitutional system...'²⁶ These sentiments are echoed by Rutsch and Jenkin who state the Act was, '... bedevilled, to a certain extent, by an apartheid legacy.'²⁷ The view that the Planning Act²⁸ is not suited to the provision of a planning framework in South Africa is reflected by the Green Paper on South African Land Policy which provides:

¹⁸ Sections 27 - 30.

¹⁹ Act 125 of 1991.

²⁰ Van Wyk *op cit* 12.

²¹ Sections 31 - 38.

²² Sections 31 - 32.

²³ Section 33.

²⁴ Fuggle and Rabie *op cit* 729, 730.

²⁵ Fuggle and Rabie *op cit* 729, 730.

²⁶ Van Wyk *op cit* 12.

²⁷ Rutsch and Jenkin *op cit* 36.

²⁸ Act 125 of 1991.

‘Current legislative incoherence must be transformed into an integrated, efficient and equitable planning and development system that establishes a balance between the public interest and private property rights.’²⁹

It is submitted the commitment outlined above to transforming the planning and development system is welcome, however it is likely that there will be disagreement as to what the correct content of the system should be. At the same time debate about the content should be tempered by the knowledge of the urgent need of the system. Only when a new planning system is implemented can effective long term planning for informal settlements begin.

3.2 The Development Facilitation Act

According to the Urban Development Strategy the Development Facilitation Act¹ is a response to the extraordinarily complex, internally contradictory and incoherent existing planning system.² The Act³ intends to create a new policy framework for land development and simplify the complex web of procedures that have to be followed to develop a piece of land. One important objective of the Act is to expedite the development of low-cost housing.⁴ The Development Facilitation Act is therefore of fundamental importance to planning and informal settlements in South Africa and will form the focus of this section.

The Development Facilitation Act⁵ is an urgent interim measure aimed at cutting through red-tape and avoiding bureaucratic and technical delays. It also strives for greater transparency and community involvement. This is reflected by for instance the legal requirement for structured interaction and consultation between various departments of government.⁶ The major immediate purpose of the Act⁷ is to expedite land development projects and bypass bottlenecks in existing regulations, especially those impeding the delivery of serviced land for low-cost housing.⁸ It should be stressed that the Act⁹ is not a replacement for comprehensive and integrated development planning. However it does serve to reinforce a strategic approach to development, requiring objectives to be set against socio-economic analysis and consultation, and strategies to be formulated accordingly.¹⁰

A framework is provided for co-ordinated and integrated land development. This is attempted to be done without losing sight of the general requirements of development standards, financing, security of the registration procedure, environmental conservation and related aspects of physical planning. At the same time alternative and new procedures are provided to promote, accelerate and facilitate

¹ Act 67 of 1995.

² Discussion Document *Urban Development Strategy of the Government of National Unity* General Notice 1111 of 1995, 12 October 1995 Clause 6.1.1. (hereafter referred to as 'the Urban Development Strategy').

³ Act 67 of 1995.

⁴ *Financial Mail* (1994) November 'Plugging the Loopholes' 25.

⁵ Act 67 of 1995.

⁶ Anonymous 'New Bill could change the face of SA's development industry' (1995) *May Housing in Southern Africa* 6. Also see M Kromberg *op cit* 8, and the Green Paper on South African Land Policy *op cit* 62, 63, 64. Also see generally Van der Walt and Pienaar *op cit* 441, 442, 443.

⁷ Act 67 of 1995.

⁸ 'New Bill could change the face of SA's development industry' (1995) *May Housing in Southern Africa* 6.

⁹ Act 67 of 1995.

land development, at a lower cost. This is envisaged as contributing to the goal of providing access to land and housing to the millions of people deprived of land throughout the decades of apartheid.¹¹

The definitions section of the Act¹² defines a 'beneficial occupier' as meaning, '...in relation to the occupation of land in a land development area where land development takes the form of upgrading an existing settlement, any person who has been in peaceful and undisturbed occupation of such land for a continuous period of not less than five years.'¹³ This definition therefore includes many categories of informal settlements.

The Act¹⁴ provides for a number of general principles which will apply throughout the Republic¹⁵ including at the local government level.¹⁶ The principles should serve to guide the administration of any physical plan, transport plan, guide plan, structure plan, zoning scheme or any similar plan or scheme.¹⁷ They should also serve as guidelines by which authorities exercise discretion, or take decision in terms of the Act¹⁸ or any other law dealing with land development.¹⁹ The principles therefore have relatively wide ranging application in terms of administrative law.

The general principles themselves are set out in Section 3 of the Act.²⁰ Section 3 (a) deals specifically with informal settlements and states:

'Policy, administrative practice and laws should provide for urban and rural land development and should facilitate the development of formal and informal, existing and new settlements.'

Despite the explicit recognition of informal and new settlements the Act²¹ provides that policy, laws and administrative practices should discourage the illegal occupation of land, '...with due recognition

¹⁰ Urban Development Strategy *op cit* Clause 6.1.1.

¹¹ AJ Van Der Walt 'Land Reform in South Africa since 1991 - an overview' (1995) 10 *SA Public Law* 1 at 24.

¹² Act 67 of 1995.

¹³ Section 1.

¹⁴ Act 67 of 1995.

¹⁵ Section 2.

¹⁶ Section 2(a).

¹⁷ Section 2(b).

¹⁸ Act 67 of 1995.

¹⁹ Section 2(c).

²⁰ Act 67 of 1995.

²¹ *Ibid.*

of informal land development processes.²² The principles also provide for the integration of the social, economic, institutional and physical aspects of land development. 'Urban sprawl' is discouraged and environmentally sustainable land development practices and policies promoted.²³ Members of communities affected by land development should actively participate in the process of land development²⁴ and security of land tenure is encouraged.²⁵

The Act contains procedures and principles for conflict resolution and decision making. These apply to any decision concerning an application to allow land development, or in respect of land development which affects the rights, obligations or freedoms of any person or body both in terms of the Act or in terms of any other law.²⁶ The provisions would therefore seemingly apply to any development for informal settlement purposes such as in terms of the Less Formal Township Establishment Act,²⁷ as well as when for instance neighbours complain that their common law rights are being infringed by the development of an informal settlement. The section also applies to a number of more specific instances including any decision on the question of whether any illegal use of land should henceforth be regarded as lawful.²⁸ In many instances the Act²⁹ will therefore be applicable to informal settlements.

Chapter II of the Act provides for the establishment of a Development and Planning Commission.³⁰ This body will advise both the national and provincial governments.³¹ The Commission is, amongst other things, charged with the long term, and sensitive challenge of a fundamental review of all planning and related legislation in South Africa.³² Provincial commissions are also envisaged.³³

The Commission has wide terms of reference and can advise the Minister on matters including the appropriate scope of planning,³⁴ the level of government at which planning should be carried out,³⁵

²² Section 3(b).

²³ Section 3(c)(i), (ii), (vi), (viii).

²⁴ Section 2(d).

²⁵ Section 3(1)(k).

²⁶ Section 4(a).

²⁷ Act 113 of 1991

²⁸ Section 4(b)(i).

²⁹ Act 67 of 1995.

³⁰ Section 5.

³¹ Section 6.

³² Urban Development Strategy *op cit* Clause 6.1.1; White Paper for Housing *op cit* Clause 7.2.2.

³³ Section 11.

³⁴ Section 14(a)(i).

and the integration of environmental conservation with planning at different levels of government.³⁶ They must also advise in terms of measures to identify, assemble and release land for land development³⁷, national uniform policy and laws relating to the cadastre, tenure types, security of tenure, and registration procedures.³⁸

Chapter Three of the Development Facilitation Act³⁹ deals with the establishment and composition of development tribunals. These are appointed by the Premier with approval from the provincial legislature.⁴⁰ One of the powers of the tribunal includes the granting of exemption from any or all of the provisions for land development procedures⁴¹ to a local government or any other interested person or body. This includes a group of persons in respect of an area or proposed land development area which is already settled by persons and which is intended to be upgraded into a fully established land development area over time,⁴² or which is intended to be settled by persons on an urgent basis prior to completing the land development in the area, with the intention that the area will be upgraded over a period of time.⁴³ These circumstances will often include informal settlements. The granting of exemption from the provisions could be a cause of concern if the exemption is granted at the expense of environmental degradation. The tribunal also considers, and may refuse, accept, or impose conditions of establishment for land development applications.⁴⁴ Where settlement takes place in contravention with any provision, or the object of the Act, or any other law governing the establishment of land development areas, the tribunal may grant or decline to grant an exemption for that area.⁴⁵ The tribunal thus has immense powers and can over ride laws which would ordinarily apply. A range of factors to be considered by the tribunal in making their decisions are included in Section 42(4) and include the health and safety of the public generally⁴⁶, the feasibility of providing rudimentary services and upgrading services over time,⁴⁷ the suitability of

³⁵ Section 14(a)(ii).

³⁶ Section 14(a)(vi).

³⁷ Section 14(b).

³⁸ Section 14(d).

³⁹ Act 67 of 1995.

⁴⁰ Section 15.

⁴¹ Chapter V.

⁴² Section 30(1)(a).

⁴³ Section 20 (1)(b).

⁴⁴ Section 33.

⁴⁵ Section 42(3). This section applies to Chapter V which provides for land development procedures excluding procedures relating to the development of small-scale farming.

⁴⁶ Section 42(4)(a).

⁴⁷ Section 42(4)(b).

the area for residential settlement.⁴⁸ The feasibility of providing occupants with appropriate security of land tenure,⁴⁹ and erecting permanent dwellings over a period of time,⁵⁰ as well as the rights of any person in respect of the area,⁵¹ and environmental sustainability⁵² must also be considered.

Chapter V and VI provide the procedural frameworks for the development of land in the urban and rural contexts respectively. The provisions in Chapter V would have application parallel to that of existing planning laws administered by the provinces, and provides alternative routes in order to promote the production of developed land in the urban areas at a lower cost and a faster rate than the present.⁵³

Chapter VII provides for land tenure matters relating to physical planning and development of land. The Development Facilitation Act⁵⁴ is relatively revolutionary in that it creates a new form of statutory ownership which can be acquired and burdened with a mortgage bond even before the development of the land is complete.⁵⁵ Although the initial owner enjoys most of the normal entitlements of an owner the right of disposal is restricted to discourage speculation.⁵⁶ The Act also provides for land development by the upgrading of an existing settlement, informal or unregistered tenure arrangements in Section 63.⁵⁷

The Department of Land Affairs has published a set of regulations and rules in terms of the Act⁵⁸ for comment.⁵⁹ In terms of the regulations land development applicants must include in the application an initial environmental evaluation which must accord with the integrated environmental management requirements issued by the Department of Environmental Affairs and Tourism.⁶⁰

⁴⁸ Section 42(4)(e).

⁴⁹ Section 42(4)(f).

⁵⁰ Section 42(4)(g).

⁵¹ Section 42(4)(k).

⁵² Section 42(4)(l).

⁵³ Van der Walt *op cit* 23.

⁵⁴ Act 68 of 1995.

⁵⁵ Section 54 and Section 55; See Van der Walt 'Towards a theory of rights in property: explanatory observations on the paradigm of post-apartheid property law' (1995) 10 *SA Public Law* 298 at 333.

⁵⁶ Van der Walt *op cit* 333.

⁵⁷ Also see Green Paper on South African Land Policy *op cit* 30.

⁵⁸ Sections 26(3), 46(3), and 59(3) of Act 67 of 1995.

⁵⁹ *Government Gazette* Number 17042 Notice 309 of 22 March 1996.

⁶⁰ Clause 27. The contents of the initial report are outlined in Clause 27(5).

The Development Facilitation Act⁶¹ is a much needed response to the planning and land development problems in South Africa. However it is important that the exemption powers of the tribunal as described above are clearly defined to ensure sustainability and prevent environmental degradation. It is also important to remember that the Act⁶² is only a temporary measure and not a long term solution.

⁶¹ Act 67 of 1995.

⁶² Act 67 of 1995.

3.3 Prevention of Illegal Squatting Act

Describing the Prevention of Illegal Squatting Act¹ in 1992 Van der Walt comments:

'The fact that the Prevention of Illegal Squatting Act 52 of 1951 has not been repealed (even though it seems to be applied infrequently) means that the legal system's largely negative attitude towards informal housing rights has not yet changed...'²

In 1997 the continued failure to repeal the Act³ might lead one to conclude that the same negative attitude still prevails.

The Prevention of Illegal Squatting Act⁴ provides primarily for four related matters. These are the criminalization of 'squatting',⁵ summary procedures for demolition of structures,⁶ procedures for the removal of 'squatters'⁷ and procedures for the management of 'squatter areas'⁸.

The procedures for demolition are draconian and are now largely the result of the many ad hoc amendments to the Act including the Prevention of Illegal Squatting Amendment Act.⁹ This removed the requirement that seven days notice must be given before a removal could take place (now no notice is required). The Act¹⁰ also attempted to exclude the courts by ousting their jurisdiction except in cases where the applicant first proved, on a balance of probabilities, a title or right to the land on which the building structure was situated. However the Appellate Division has interpreted the ousting of the courts' jurisdiction narrowly.¹¹

¹ Act 52 of 1951.

² AJ Van der Walt 'Informal Housing and the Environment: Land Rights in Transition'(1992) *South Africa in Transition: Urban and Rural Perspectives on Squatting and Informal Settlements in Environmental Context* 64.

³ Act 52 of 1951.

⁴ Act 52 of 1951.

⁵ Section 1.

⁶ Sections 3A and 3B.

⁷ Section 3(1)(b) and 3(2).

⁸ Section 6(A). See G Budlender 'South African legal approaches to squatting' (1988) February *De Rebus* 160 at 161, 162, 163.

⁹ Act 72 of 1977.

¹⁰ Act 72 of 1977.

¹¹ See *Msiqi v Trebbie* 1994 (2) SA 136 (A) at 142 B-C. Also see CG van der Merwe and JM Pienaar 'Law of Property' (1994) *Annual Survey of South African Law* 347, 348.

The amendment to the Act in 1989 excluded the discretion of the magistrate not to evict a person upon their conviction in terms of Section 1.¹² Prior to the amendment guidelines for the exercise of discretion by magistrates of a similar provision in the Group Areas Act¹³ provided by Goldstone J included taking into account such factors as, '...the nature of the areas concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested landlord; the prospects of a permit been issued for continued lawful occupation of the premises; the personal hardship which such an order may cause and the availability of alternative accommodation.'¹⁴ These criteria were effectively sidelined by the amendment.

The ambit of the Act¹⁵ is very wide.

'At face value, for example, if a house-owner in an urban area builds an addition to his home, without having the plans first approved, the local municipality can simply demolish it without giving him any notice whatsoever.'¹⁶

Despite the wide powers conferred by the Act it has not always proved effective. For instance in the context of forcibly removing entire communities technical difficulties are often faced by the state in obtaining convictions, as well as with the administrative difficulties of a large-scale programme of prosecutions.¹⁷

Although in general the courts apply a narrow interpretation to the Prevention of Illegal Squatting Act¹⁸ this is not always the case. In a recent decision Booysen J referred to Sections 1, 3, 3A, 3B and 6 of the Prevention of Illegal Squatting Act.¹⁹ The case involved an application by thirty-one applicants (mostly industrialists, and businesses) against the Pietermaritzburg-Msunduzi Transitional

¹² Budlender *op cit* 162, 163.

¹³ Act 41 of 1951.

¹⁴ *S v Govender* 1986 (3) SA 969 (T) at 971.

¹⁵ Act 52 of 1951.

¹⁶ Budlender *op cit* 162, 163. Also see RJ Purshotam 'A burning question: demolition and removals in terms of the Prevention of Illegal Squatting Act' (1993) 8 *SA Public Law* 125, 126, 17.

¹⁷ C Murray and C O'Regan (eds) *No place to rest. Forced Removals and the law in South Africa* (1990) 164, 165, 166.

¹⁸ In this regard see C O'Regan 'No more forced removals? An historic analysis of the Prevention of Illegal Squatting Act' 5 *SAJHR* 361.

¹⁹ *Executive Suite and others v Pietermaritzburg-Msunduzi TLC* (1996) 3 All SA 127 (N) at 137j - 140 f.

Local Council. A number of would be squatters had moved into property under the control of the respondent in an area officially zoned as an industrial area.²⁰

Surprisingly no reference was made in the case to the constitutionality of the Prevention of Illegal Squatting Act by either the applicants or the respondents. The court held that within the meaning of Section 3A of the Act the respondent was the owner of the land concerned.²¹ Although the court never sought to define 'squatting' it held that it was, '....quite clear from the papers that some squatting has taken place on that land and that the land is threatened with further squatting activity, in the sense that some structures are in the process of erection...'²²

The court held that the respondent local authority had knowledge of intended unlawful erection and occupation of buildings and structures on property which it controlled and had evinced a clear intention not to take steps to prevent further invasions of the same nature, but merely to deal with these invasions once they have taken place.²³ The court held:

'It is quite clear that steps should be taken to house homeless persons, but at the same time care should be taken to ensure that once proper areas have been declared, structures are erected only on those areas under the supervision and within the terms of the bylaws made by the Respondent.'²⁴

The Respondent council was therefore ordered to take, 'such steps as are necessary', including the engaging of the assistance of the South African Police Services and the South African National Defence Force if necessary, to prevent further erection or completion of buildings or other structures and the occupation thereof by any unauthorised person unless the relevant legislation pertaining thereto is complied with.²⁵

The judgement is made in the absence of the representation of those that it ultimately orders to remove. This clearly demonstrates the shortcomings of our judicial system when it comes to

²⁰ *Ibid* at 130 g-i.

²¹ *Ibid* at 140h.

²² *Ibid* at 141 j - 142 a.

²³ *Ibid* at 141 i - 142 1.

²⁴ *Ibid* at 142 d-e.

²⁵ *Ibid* at 142 h - 143 b.

polycentric problems with a range of different parties and interests. According to O'Regan decisions about planning and housing are classically 'polycentric' decisions, and are therefore not easily resolved through adjudication.²⁶ In seeking to promote development that will be environmentally sustainable we need to build legal processes which do not favour one group of interests to the exclusion of others.²⁷

The impact of the new constitution on the Act²⁸ has yet to be assessed by the courts. Budlender comments that a right to housing could at least place a negative obligation on the legislator. It would thus provide that the legislator may not enact legislation which will have the effect of making people homeless, except under the most limited circumstances and, 'In shorthand, it will be unconstitutional to enact the Prevention of Illegal Squatting Act.'²⁹ Any provision authorising summary demolition of housing would be unconstitutional, and the court would have to first consider a range of issues along the lines of those outlined by Goldstone in *S v Govender*.³⁰

Measures taken by the government in the past and which in some cases continue to be taken such as the criminalization of making a home, and depriving people of shelter, will do little to ameliorate the housing crisis and the appalling conditions in which so many people in South Africa are forced to live. Instead, they will cause grave hardship to millions, and bring our legal system into disrepute.³¹ Even where the courts adopt a socially sympathetic and morally sensitive approach to the Prevention of Illegal Squatting Act³², '...the question remains whether it can make any positive contribution towards the effective resolution of the housing crisis.'³³

However the threat of land invasions can not be ignored. The Land Green Paper describes land invasions and the resultant conflict as, '... fast becoming one of the key causes of civil instability and uncertainty in relation to property rights.'³⁴ Although the Department of Land is considering options in

²⁶ C O'Regan 'Informal Housing and the environment' (1993) 8:1 *SA Public Law* 196, 202, 203.

²⁷ C O'Regan 'Informal housing, crisis management and the environment' (1993) 8 *SA Public Law* 192 at 196.

²⁸ Act 52 of 1951.

²⁹ Budlender in Van Der Walt (ed) *op cit* 47. Also see the discussion on the constitution above.

³⁰ 1986 (3) SA 969 (T) at 971; Also see Budlender in Van der Walt (ed) *op cit* 47.

³¹ C Lewis 'The Prevention of Illegal Squatting Act: The Promotion of Homelessness?' (1989) 5 *SAJHR* 233 at 239.

³² Act 52 of 1951.

³³ Van Der Walt *op cit* 48.

³⁴ Green Paper on South African Land Policy *op cit* Clause 3.5.

response to the land invasion problem such as, '...the provision of workplaces and land that can be developed', the 'old-fashioned style concept of a transit camp is absolutely rejected...'³⁵

According to Gordon governments, housing agencies and large contractors have a tendency to invent schemes which remove squatters from their shacks. This ignores the simple facts that new housing on reticulated sites is unaffordable at the scale required and for every shack removed another will take its place. According to Gordon rather than remove squatters from their shacks where possible informal dwellings should be upgraded, and regional and urban planning criteria be used to establish existing and possible future locations for informal settlements should be established.³⁶

It is submitted that this approach coupled with ordinary legal remedies is far preferable to the maintenance and use of the Prevention of Illegal Squatting Act.³⁷

³⁵ Kromberg and Molele *op cit* 15.

³⁶ G Gordon 'We should transform , not demolish squatter housing' (1995) *Housing in Southern Africa* 18.

³⁷ Act 52 of 1951.

3.4 Less Formal Township Establishment Act¹ ("LEFTY")

The Less Formal Township Development Act² has three main objectives. These are to provide procedures for the designation, provision and development of land, procedures for the establishment of 'less formal' residential settlements or less formal townships which may be upgraded at a later date, and finally to permit the establishment of residential settlement areas on communally or tribally owned land. The implementation of the Act is placed squarely on the shoulders of the Provincial Administrators.³

Chapter 1 of LEFTY⁴ enables a provincial administrator⁵ to designate land for informal settlement when satisfied that persons have an urgent need to obtain land on which to settle.⁶ According to O'Regan this causes the Act to, by definition, be one which provides for dealing with crisis situations and not with long term planning decisions.⁷

The aim of the Chapter is to create a shortened procedure for township development to accommodate the high tempo of urbanisation and to combat unlawful squatting by making land available for rudimentary yet adequate upgradeable housing.⁸ The procedures of the Act simply require the developer to prepare a plan for approval by the surveyor-general. Thereafter it must be lodged with the deeds office and the registrar of deeds opens a township register in respect of the land.⁹ Settlement of residents is permitted even before the survey is complete and the transfer of plots is done by means of a 'certificate of ownership' which can be processed as soon as a township register is opened in the relevant deeds Registry.¹⁰

The provisions of LEFTY¹¹ empower the administrator to suspend any other law which may be seen to have a dilatory effect on the development of the settlement.¹² The only limits on the planning and

¹ Act 113 of 1991.

² Act 113 of 1991.

³ Rutsch and Jenkin *op cit* 35. Provincial Administrators no longer exist and the powers would now be devolved upon Provincial Premiers who may delegate the powers to the relevant Minister in their administration.

⁴ Act 113 of 1991.

⁵ As outlined above this would now be the Provincial Premier or the relevant delegated Minister.

⁶ Section 10(2).

⁷ C O'Regan 'Informal housing, crisis management and the environment' (1993) 8 SA Public Law 192 at 197

⁸ West *op cit* 609.

⁹ O'Regan *op cit* 198.

¹⁰ Rutsch and Jenkin *op cit* 37

¹¹ Act 113 of 1991.

development process are provided for in Section 4 of the Act which stipulate that the planning must take place, 'in accordance with the requirements deemed necessary by the administrator to make the speedy and ordinary settlement of persons in terms of section 8 possible'. In addition the administrator must ensure that planning and development takes place in a manner that will make subsequent upgrading of services possible.

'It is quite clear that this process prioritises the need to provide land for people to live on in cases of urgency and does not build in any 'environmental' constraints other than the need to ensure that the land can be upgraded.'¹³

While the first Chapter deals with the designation of land for residents of informal settlements themselves, the second procedure referred to in the Act is the process for the establishment of actual less formal townships. The procedures provided are quicker and cheaper than those provided in town planning ordinances, or under the Black Communities Development Act^{14,15} The application for the establishment of a township must provide a plan of the proposed township, a geotechnical report, and a memorandum. Section 5 of the regulations governing the application procedure provides that the memorandum must give information on how the township will affect and be affected by topography, geotechnical conditions, existing and proposed transportation systems, sewerage disposal works, as well as pollution and environmental factors.¹⁶ There is thus a mechanism in the Act for environmental factors to be noted, although LEFTY¹⁷ is less specific about how the factors should be taken into account.

The shortened procedures for LEFTY can be illustrated by contrasting them with conventional procedures for the establishment of a township. According to West,¹⁸ provincial ordinances presently provide for the following steps to be taken for the establishment of a township:

- I. Lodgement of the township establishment application
- II. Public Notice with the invitation to lodge objections and make representations.

¹² Section 3(5); O'Regan *op cit* 198.

¹³ O'Regan *op cit* 198.

¹⁴ Act 4 of 1984.

¹⁵ O'Regan *op cit* 198.

¹⁶ O'Regan *op cit* 199.

¹⁷ Act 113 of 1991.

¹⁸ West *op cit* 609.

- III. Specific notice to certain bodies requesting their commentary.
- IV. Inspection of the area by the township board.
- V. The hearing of grievances by the township board.
- VI. Recommendations by the township board to the administrator regarding the application.
- VII. A decision by the administrator.
- VIII. Approval of the general plan by the surveyor-general.
- IX. Opening of the register by the registrar of deeds.
- X. Proclamation of the township.

Chapter Two of LEFTY¹⁹ enables the administrator to expedite the township development procedure by consenting to the bypassing of steps II-VI above.²⁰

Chapter Three of the Act deals with the controlled and orderly settlement and habitation of land by members of indigenous tribes. A detailed discussion of this is beyond the scope of this dissertation.

A number of important points on the interpretation of LEFTY, and the courts approach to informal settlements emerged in the *Diepsloot Residents and Landowners Association* case.²¹ In the case the Diepsloot Residents' and Landowners' Association brought an urgent application for an interdict preventing the administration of the former Transvaal Province from proceeding with moving the Zevenfontein squatting community to Diepsloot. The administration had acted in terms of the provisions of LEFTY.²² The application for a temporary interdict was granted by De Villiers J. However McCreath J followed a different approach in his judgement on the return day, dismissing the application for a final interdict. The Judge argued that the administrators actions in establishing the settlement was in accordance with the powers and duties provided for them in LEFTY. Any discomfort or even restriction of rights therefore had to be borne by the neighbours without compensation as a result of normal state regulation.

The judgement then went on appeal. According to Van der Walt in his judgement Smalberger JA, '... concentrated upon the technical question of whether the provincial authorities were acting within their statutory powers in establishing the settlement near Diepsloot... The crucial question, according to

¹⁹ Act 113 of 1991.

²⁰ *West op cit* 609.

²¹ *Diepsloot Residents & Landowners Association v Administrator TVL* 1993 (3) SA 49 (T); *Diepsloot Residents & Landowners Association v Administrator TVL* 1994 (3) SA 336 (A).

²² Act 113 of 1991.

his view, was whether such a drop in property values would be unlawful and an actionable wrong, which would in turn depend upon the question of whether statutory authority existed for the interference.²³

In the circumstances of the case the learned Judge held that although there was no express provision authorising interference in the rights of the Diepsloot Residents, it was apparent from a number of sections in LEFTY²⁴ that Parliament contemplated the settlement of large numbers of impoverished persons in an informal manner within urban areas as part of the resolution of the squatter problem.²⁵ The settlement of possibly 'sub-standard' settlements in close proximity to residential areas would have an adverse affect on surrounding areas,²⁶ and it was accordingly held that the exercise by the Administrator of his powers in respect of the housing of homeless people might result in interference with the common law-rights of third parties. Statutory authority for such interference was thus inherent in the granting of the powers.²⁷ The administrators discretion in choosing the site was only open to challenge on the grounds of gross unreasonableness which was found not to be the case in this instance.²⁸

The judgement was made before the adoption of the Constitution.²⁹ The judgement therefore did not discuss the constitutional right to property discussed in this dissertation above. However it is submitted that the courts are likely to find that the provisions in LEFTY³⁰ are reasonable limitations on the right to an individuals private property. This is particularly so in the light of the urgent need for LEFTY found by the court in the Diepsloot judgement discussed above.

Legislation such as the Less Formal Township Establishment Act is more appropriate to informal settlements than previous legislation. However there are also a number of criticisms which can be levelled at LEFTY.

According to O'Regan the legislation bestows substantial discretion on officials. However it contains no guidance from parliament as to the issues relevant to the exercise of discretion other than, in the

²³ AJ Van der Walt 'Land Reform in South Africa since 1991 - an overview'(1995) 10 SA Public Law 28.

²⁴ Act 113 of 1991.

²⁵ *Diepsloot Residents & Landowners Association v Administrator TVL* 1994 (3) SA 336 (A) at 349 D - E.

²⁶ *Ibid* at 349 F-G.

²⁷ *Ibid* 349 H-J.

²⁸ *Ibid* 351 G-H.

²⁹ Act 200 of 1993.

³⁰ Act 113 of 1991.

case of informal settlements, the reference to the 'speedy and orderly settlement' of people and the desirability of upgrading in the long term.³¹

LEFTY also does not provide for consultation. Mayet comments:

'The planning and establishment of shelters without the input of those who are housed therein, is unlikely to respond to the needs either in terms of providing adequate shelter or services.'³²

Although the Act does provide for interested parties to inspect the details of applications and proposed steps, the Act does not include any provision for disputes or appeals.³³ Finally a factor severely hampering progress in terms of the LEFTY has simply been a lack of funding.³⁴

Despite the shortcomings of LEFTY³⁵ outlined above and the crisis oriented nature of the Act it does represent a significant improvement on the states previous response to informal settlements. To be effective however it is necessary that effective medium and long term planning is also implemented.

³¹ O'Regan *op cit* 200.

³² M Mayet *Integrating Environmental Impact Assessment in the Planning and Establishment of Informal Settlements in South Africa* (1994) University of the Witwatersrand 37

³³ Rutsch and Jenkin *op cit* 30.

³⁴ Rutsch and Jenkin *op cit* 36.

³⁵ Act 113 of 1991.

3.5 Other National Housing Legislation

This section will examine some of the legislation concerning and regulating the provision of housing. This will include an examination of the Housing Act,¹ the Housing Arrangement Act,² the Slums Act,³ the Trespass Act⁴ and the draft Housing Bill.⁵

In the past housing policy, law and administration was divided along racial lines. A separate formulation for whites, blacks, so called 'coloureds' and Indians was used. For instance the Development and Housing Act⁶ applied to the 'white' House of Assembly, while the Housing Development Act⁷ applied to the 'Indian' House of Delegates, and the Housing Act⁸ applied to the 'coloured' House of Representatives.⁹ All three provided *inter alia* for the establishment of Housing Boards and a Housing Fund.

The institutional framework governing housing has resulted in numerous constraints to housing delivery in South Africa. Factors such as the duplication of housing institutions and funding mechanisms, an inability to carry out responsibilities due to the inadequate resourcing of some authorities, the lack of an overall housing strategy and a multiplicity of legislation governing housing, land and services have all contributed to the housing backlog.¹⁰

The Housing Act¹¹ has been amended 23 times since it came into effect. The Act attempted to consolidate the laws relating to the construction of dwellings and the carrying out of housing schemes, as well as to consolidate the laws providing for the creation of a National Housing Fund, and the establishment of a National Housing Commission.

¹ Act 4 of 1966.

² Act 155 of 1993.

³ Act 76 of 1979.

⁴ Act 8 of 1959.

⁵ Government Gazette Number 17321 Volume 373, 12 July 1996.

⁶ Act 103 of 1985.

⁷ Act 4 of 1987.

⁸ Act 2 of 1987.

⁹ These acts were both slightly amended by the Development and Housing Amendment Act 198 of 1993, and the Housing Development Amendment Act 199 of 1993 respectively; See Van der Merwe and Pienaar *op cit* 299.

¹⁰ Housing White Paper *op cit* Clause 33.3 and Clause 3.3.4.

¹¹ Act 4 of 1966.

The case of *Govender v Pretoria City Council*¹² dealt with a particularly harsh provision in the Housing Act.¹³ Chapter VIII of the Act allows for summary ejectment. The court held that the provisions applied to all local authorities,¹⁴ and the council in question did have the power to summarily eject illegal occupants from dwellings acquired by it. This was despite the Judge finding that the provision was an extraordinary remedy of a drastic nature which, '... really amounts to a local authority taking the law into its own hands...' The judge held that he was unable to interpret the section restrictively because he was '... convinced that Parliament intended the consequences set out in this judgement.'¹⁵

It is submitted that measures such as the one outlined above do not play any positive role in solving the housing crisis. They add to the perception that the state is more interested in destroying peoples homes than in providing houses. There is also no reason why special powers are required in circumstances such as these over and above normal criminal and civil remedies.

The Housing Arrangement Act¹⁶ amended the Housing Act¹⁷ and introduced major changes to the existing housing law regime. The Act aimed to ensure that housing provision could proceed in the interim phase, while detailed plans for the future were been developed and implemented.¹⁸ The process of rationalisation of state assets and liabilities was begun with the bringing together of five statutory (previously own affairs) funds under central control.¹⁹ A National Housing Board and Regional Housing Boards were established on the one hand and existing Housing Boards such as the National Housing Commission abolished on the other. The Act also made provision for the repeal and amendment of certain acts.

The Housing Arrangement Act²⁰ and the Housing Act²¹ were amended²² to facilitate effective implementation and administration of public housing assistance schemes and to extend the

¹² 1993 (4) SA 825 (T)

¹³ Act 4 of 1966.

¹⁴ Van der Merwe 'Law of Property (Including Mortgage and Pledge)' (1993) Annual Survey of SA Law 336.

¹⁵ 1993 (4) SA 825 T perat 829C per Eloff JP, Van der Walt J and Heyns J concurring.

¹⁶ Act 155 of 1993.

¹⁷ Act 4 of 1966.

¹⁸ Housing White Paper *op cit* Clause 3.5.1.(b).

¹⁹ Van der Merwe and Pienaar *op cit* 298; Also see Housing White Paper *op cit* Clause 5.2.3 and Clause 3.5.1(b).

²⁰ Act 155 of 1993.

²¹ Act 4 of 1966.

²² Housing Amendment Act 8 of 1994.

application of their provisions, including for instance those pertaining to housing subsidies, to the areas of former self-governing territories and the erstwhile TBVC states.²³

Another piece of legislation regulating housing is the Slums Act.²⁴ The Act places a duty on local authorities to, '... take all necessary and reasonably practicable measures so as to, '... prevent or remedy any nuisance within its district'²⁵.

The Act also provides for the establishment and constitution of slum clearance courts²⁶, the reporting of nuisance by the medical officer of health,²⁷ declaration of a premises to be a slum,²⁸ as well as providing orders to remove nuisances or demolish buildings.²⁹ According to the Act a 'slum' is any premises declared to be a slum under Section 6.³⁰ Demolitions may be ordered to the owner if the, '... slum clearance court is satisfied that any dwelling comprised in the slum is so dilapidated or so defectively constructed or so situated that repairs to or alterations of the dwelling are not likely to remove the nuisance...directing him to demolish such dwelling...'³¹

According to Budlender it is noteworthy that only the landowner has a statutory right to appear before the slum clearance court³² (and not the inhabitants of the dwellings *per se*) and that notice is given to the occupiers only after the slum clearance court has made its declaration.³³ Where any person is convicted of unlawfully occupying or entering upon a declared slum, the court is obliged to order his or her ejectment.³⁴

The Trespass Act³⁵ although not pertaining to Housing *per se* could also be of relevance to the question of squatting. The Act makes it an offence to enter or be upon any land or building without lawful reason, unless one has the permission of the lawful occupier, owner or person in charge.³⁶

²³ Kromberg and Molele *op cit* 9, 10; Also see Housing White Paper Clause 3.5.1(c).

²⁴ Act 76 of 1979.

²⁵ Section 3(a).

²⁶ Section 4.

²⁷ Section 5.

²⁸ Section 6.

²⁹ Section 7.

³⁰ Section 6(8)(a).

³¹ Section 7(b).

³² In terms of Section 6(5).

³³ Budlender *op cit* 163.

³⁴ Section 25(1).

³⁵ Act 6 of 1959.

‘The requirement of individualised judicial process and the absence of eviction procedures, make it unlikely that the State will rely heavily on the Trespass Act where large numbers of "squatters" are involved and in particular if they are likely to have access to legal representation.’³⁷

The draft Housing Bill³⁸ proposes extensive modifications to the existing Housing law regime. The draft Bill³⁹ proposes the repeal in the whole of many acts including the Housing Act,⁴⁰ the Slums Act,⁴¹ the Development and Housing Act,⁴² the Housing Act,⁴³ the Housing Amendment Act,⁴⁴ and the Housing Arrangements Act⁴⁵ as well as the amendment acts of the aforementioned acts.

Chapter I of the draft Bill⁴⁶ outlines general principles applicable to housing development. Chapter II defines the role, duties and responsibilities of national government in Housing Development, including the functions and powers of the Minister,⁴⁷ a National Housing Code,⁴⁸ and the establishment of a South African Housing Board.⁴⁹ The duties and responsibilities of provincial government and local government are set out in Chapter III and IV respectively. Chapter V deals with the financing of housing, including the continued existence of the South African Housing Fund. Finally Chapter VI outlines procedures for the winding up of the affairs of the National Housing Board, and the termination of previous housing arrangements, while Chapter VII provides for general provisions.

³⁶ Section 1.

³⁷ Budlender *op cit* 163.

³⁸ *Government Gazette* Number 17321 Volume 373 12 July 1996.

³⁹ *Ibid.*

⁴⁰ Act 4 of 1966.

⁴¹ Act 76 of 1979.

⁴² Act 103 of 1985.

⁴³ Act 2 of 1987.

⁴⁴ Act 101 of 1993.

⁴⁵ Act 155 of 1993.

⁴⁶ *Government Gazette* Number 17321 Notice 885, 12 July 1996.

⁴⁷ Section 4.

⁴⁸ Section 5.

⁴⁹ Section 6.

The draft Housing Bill is a welcome development and when enacted should go some way in consolidating housing legislation in South Africa.

3.6. Land Tenure Issues

The Housing White Paper identifies insecure tenure as one of the salient features and causes of the housing crisis in South Africa.¹ The Director General of Housing also states, 'I am of the opinion that the primary consideration in terms of housing, should be security of the tenure relating to that housing.'² Land tenure issues and the suitability of present tenure systems for the needs of informal settlements will form the focus of this section.

According to Van Hooren and Taylor present tenure delivery legislation do not accommodate some of the unique characteristics of informal settlements.³ In the past in South Africa there was a somewhat narrow approach to tenure, with individual home ownership identified as the only legitimate option.⁴ The view of a hierarchy of land rights with freehold title at the top reflects a privatisation ideology, and ignores the rich diversity of tenure forms in South Africa.⁵

The inaccessibility of the Deeds Registry, and expensive and complex registration procedures provide a strong disincentive for informal settlement residents to take cognisance of the conventional system.⁶ A serious obstacle in implementing conventional procedures and forms of tenure relates to the fact that an informal land transfer market already exists in informal settlements. This takes no account of formal registration of title or transfer of ownership, and is based on *de facto* site occupation which is often perceived to translate into *de facto* security for site occupants.⁷

It can be argued that the relaxation of controls over informal settlements has been an important factor in facilitating access to housing by the urban poor, and has contributed to the collapse of rental tenancy by undermining the control of landlords over urban land.⁸ Even if a conventional system is established where individual sites are surveyed and title is registered as legislatively required, the system is vulnerable to potential collapse upon first point or ownership transfer, since the likelihood

¹ Housing White Paper *op cit* Clause 3.2.2; This view is also echoed by M Swilling, R Humphries and K Shubane *Apartheid City in Transition* (1991) 239.

² Kromberg and Molele *op cit* 14.

³ B Van Hooren and R Taylor 'Besters: In-Situ Upgrading of Informal Settlement' (1993) December *Monitor* 9.

⁴ Kromberg and Molele *op cit* 14.

⁵ L Steyn (ed) *Closing The Door. The implication and implementation of the 1993 Land Legislation* (1994) 1.

⁶ Van Hooren and Taylor *op cit* 9.

⁷ Van Hooren and Taylor *op cit* 9; Also see Hindson and McCarthy *Here to Stay: Informal Settlements in KwaZulu-Natal* (1994) 177.

⁸ Hindson and McCarthy *op cit* 187.

of future ownership transfers being formally recorded is not high.⁹ There is also recent research on informal settlements indicating that the poor are usually unable to keep control of upgraded housing with formal title, which transfers through the market to people with higher incomes. 'The research challenges the ruling planning assumptions about housing upgrading and freehold tenure (Urban Foundation) as the points of departure in assisting the poor and stabilizing urban communities.'¹⁰

On the other hand a more formal system could promote more stable communities and facilitate effective urban planning.¹¹ Insecure tenure results in residents being vulnerable to arbitrary power, '... whether that of authoritarian local administration, warlords or unaccountable civic leadership...'¹² The system of informal land transfer can also lead to abuses in respect of the inability of members of a community to enforce an abstract right to property in the face of community pressure, and the fact that customary tenure systems tend to discriminate against women.¹³ Mechanisms to provide secure tenure can contribute to stabilising populations in informal settlements, which can help reduce violence associated with informal settlements, as well as help generate settled leadership and negotiation patterns which in turn enhance the delivery of goods and services in settlements.¹⁴

According to the Housing White Paper any policy regarding land registration and tenure systems which fails to recognise the enormous importance of the informal land transfer systems operating in South Africa would be incomplete.¹⁵ Some level of formalisation sufficient to provide security of tenure and to facilitate the operation of the existing informal land market can be delivered fairly easily, without attempting to provide a full land survey or all the requirements of legal title.

The variety of tenure forms which have emerged spontaneously within settlements need to be incorporated, along with private tenurial forms into upgrade programmes.¹⁶ It can even be argued that: 'Urban informal tenure draws its philosophical basis from African social thought, and calls for appropriate consideration as a tenure system in its own right.'¹⁷ The recognition of a variety of tenure

⁹ Van Hooren and Taylor *op cit* 9.

¹⁰ C Cross 'Informal Settlements in the Durban Metropolitan Area' Winter (1996) *Regional Research Facilitation Function Review* Winter 2.

¹¹ Hindson and McCarthy *op cit* 188.

¹² Hindson and McCarthy *op cit* 28; Also see Minnaar *op cit* 57.

¹³ Housing White Paper *op cit* Clause 5.7.4.2

¹⁴ Hindson and McCarthy *op cit* 35.

¹⁵ Housing White Paper *op cit* Clause 5.7.4.2.

¹⁶ Hindson and McCarthy *op cit* 34.

¹⁷ Hindson and McCarthy *op cit* 178.

options by the Housing White Paper, all of which are treated as equal and secure tenure is described by Van der Walt as, "... a radical departure from the traditional ownership-dominated civil-law approach, and must be welcomed as a positive development."¹⁸

A wide range of options for the rapid attainment of secure tenure could have a highly significant and positive impact on the propensity of individuals and communities to commence with the process of investing in their own housing conditions.¹⁹ The recognition of a wide range of forms of tenure is therefore a positive development for informal settlements which were excluded from formal and secure tenure systems in the past.

¹⁸ AJ Van der Walt 'Land Reform in South Africa since 1991 - an overview' (1995) 10 *SA Public Law* 26.

¹⁹ Housing White Paper *op cit* Clause 3.2.2.

3.7 Relevant National Land Legislation

This dissertation can not comprehensively discuss all land legislation¹ but will attempt to focus on more recent legislation, and in particular, land legislation applicable to housing and informal settlements. Land reform measures need to form a part of resolving the settlement crisis in South Africa.

The repeal of racist land legislation was begun with the Abolition of Racially based Land Measures Act.² This began a process of repealing a number of statutes that formed the legal foundation for land segregation.

More recently the government has begun a process of land reform measures. The programme includes redistribution, restitution, land administration reform, institutional changes to the department of land affairs, and land tenure reform.³

Redistribution is taking the form of the Land Reform Pilot project, and the establishment of district offices. The Provision of Certain Land for Settlement Act⁴ seeks to ensure access to land for rural settlement.⁵ The Act was aimed at allowing people to obtain land for occupation and beneficial use, and also provided for the provision and development of state land for the purposes of settlement, and the provision of land by private land-owners for those purposes.⁶ The Act provided for the provision and development of the Development Facilitation Act,⁷ seen as a mechanism to assist in land redistribution, and to provide for 'staged' tenure.⁸

Restitution is guided by The Restitution of Land Rights Act,⁹ and aims at the restitution of land rights to those dispossessed of land in terms of racially based policies of the past. Members of the Land Claims Court have already been appointed.¹⁰

¹ For a more comprehensive discussion of Land Legislation see P Rutsch and F Jenkin (eds) *The New Land Laws of South Africa (LRC-Dbn)* (1992); Also see WA Joubert (ed) *The Law of South Africa* Volume 14 (1981).

² Act 108 of 1991.

³ Green Paper on South African Land Policy *op cit* Box 1.2 4.

⁴ Act 126 of 1993.

⁵ Green Paper on South African Land Policy *op cit* 4.

⁶ Van der Merwe *op cit* 299.

⁷ Act 67 of 1995.

⁸ Green Paper on South African Land Policy *op cit* Box 1.2 4; Also see Clause 4.5 62.

⁹ Act 22 of 1994.

Land administration reform is aiming at the re-assignment, delegation, and rationalisation of the country's fragmented legislation and institutional system. The Land Titles Adjustment Act¹¹ attempted to rationalise the requirement for different procedures dependant on the race group for which the land was reserved and repealed legislation dating back to 1927.¹² The Land Administration Act¹³ provides for the delegation of powers and assignment of the administration of laws regarding land matters to the provinces, and to provide for the creation of uniform legislation. It also deals with the repeal or amendment of former homeland Acts, as well the extension of the State Land Disposal Act¹⁴ to those areas.¹⁵

Land tenure reforms have been taking place for some time. The Upgrading of Land Tenure Rights Act¹⁶ originally promoted the 'upgrading' of a number of land rights to western-style private individual landownership without attempting to provide the range of different land-use rights that was required.¹⁷ The government perception that freehold tenure was the desirable tenure form for a future South Africa ignored reality.¹⁸ The criticisms of the Act led to amendments in 1992,¹⁹ and 1993,²⁰ and more recently the enactment of the Upgrading of Land Tenure Rights Amendment Act.²¹ The intention of the amendment is to amend the Upgrading of Land Tenure Rights Act to amongst other things allow for the upgrading of Schedule 2 rights outside formalised townships.²² According to the Act it is: '... the government's policy that the upgrading of land tenure rights should henceforth be demand driven and that security of tenure should be protected under a variety of forms of tenure.'²³

¹⁰ Rutsch and Jenkin *op cit* 40.

¹¹ Act 111 of 1993.

¹² Rutsch and Jenkin *op cit* 37.

¹³ Act 2 of 1995.

¹⁴ Act 48 of 1961.

¹⁵ Rutsch and Jenkin *op cit* 39 and 168, 169, 170.

¹⁶ Act 112 of 1991.

¹⁷ Rutsch and Jenkin *op cit* 200-204.

¹⁸ Rutsch and Jenkin *op cit* 33.

¹⁹ Upgrading of Land Tenure Rights Act 139 of 1992.

²⁰ Upgrading of Land Tenure Rights Act 108 of 1993.

²¹ Act 34 of 1996.

²² Longtitle.

²³ Preamble .

Also in terms of land tenure reform a legislative programme has been initiated which includes the Land Reform (Labour Tenants) Act²⁴ which provides security of tenure to labour tenants. The Act will also facilitate acquisition of land for tenants. The Communal Property Association Act²⁵ provides a legal mechanism to accommodate the needs of those people who wish to hold land collectively.

The Interim Protection of Informal Land Rights Act²⁶ is a holding measure to protect the, '... existing interests of people who have informal rights to land while an investigation is in progress.'²⁷ According to Van der Walt, the Act provides an interesting example of a non-right or a residential nature (such as exercised by squatters or inhabitants of informal settlements) been converted into lawful, protected rights in property by legislation.²⁸ The provisions of the Act²⁹ define an 'informal right to land' to include 'the beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997'³⁰ As such, subject to any law which provides for expropriation of land or rights in land, '... no person may be deprived of any informal right to land without his or her consent.'³¹ This makes it possible to protect as rights in property '... the existing land-use interests even of people whose occupation might, in terms of traditional dogma, be unlawful in nature.'³²

The almost overwhelming number of new land reform measures and legislation is welcome. It is now up to the government to effectively implement the measures.

²⁴ Act 3 of 1996.

²⁵ Act 28 of 1996.

²⁶ Act 31 of 1996.

²⁷ Green Paper on South African Land Policy *op cit* Box 1.2 4.

²⁸ AJ Van der Walt 'Towards a theory of rights in property: explanatory observations on the paradigm of post-apartheid property law' (1995) 10 *SA Public Law* 323.

²⁹ Act 31 of 1996.

³⁰ Section 1(c).

³¹ Section 2(1).

³² Van der Walt *op cit* 333.

3.8 Relevant National Policy Documents

In order to move away from a reactive, crisis-orientated and inevitably inadequate response to the phenomena of rapid urbanisation, it is necessary to develop a new national framework for development. This must include a national strategy to break the housing crisis and provide secure and upgraded shelter, as well as an urban policy for post apartheid cities that aims to manage large cities effectively and equitably.¹ A number of policies have been formulated or are in the process of formulation in South Africa.

RECONSTRUCTION AND DEVELOPMENT PROGRAMME (RDP)

The Reconstruction and Development Programme (RDP)² is, '... an integrated, coherent socio-economic policy framework,' and seeks to eradicate the results of apartheid.³ All development should take place within the parameters set by the RDP. The RDP is envisaged as a vision for fundamental transformation of our society.⁴

The basic principles of the RDP include the need for a people driven⁵, integrated and sustainable programme.⁶ This requires thorough ongoing democratisation of South Africa.⁷ According to the programme: 'Above all, the people affected must participate in decision-making.'⁸ The RDP attempts to integrate growth, development, reconstruction, redistribution and reconciliation into a single programme⁹ and requires clearly identified and substantiated integrated goals.¹⁰

The Government of National Unity's (GNU) RDP target was initially set at the creation of a million houses over a period of five years. However this effectively merely amounts to the freezing of the housing backlog at 1994 levels in the year 1999.¹¹

¹ Swilling and Humphries *op cit* 333.

² As set out in the White Paper on Reconstruction and Development of the Government of National Unity, published on 15 November 1994.

³ Clause 1.1.1.

⁴ Clause 1.5.2.

⁵ Clause 1.3.3.

⁶ Clause 1.3.2.

⁷ Clause 1.3.7.

⁸ Clause 1.3.7.

⁹ Clause 1.3.6.

¹⁰ Clause 1.3.8.

¹¹ See Kromberg and Molele *op cit* 1.

HOUSING WHITE PAPER

The Department of Housing has produced a Housing White Paper¹² which attempts to formulate a housing policy better suited to the needs of a democratic South Africa. The Paper is one of the main policy documents of the RDP.¹³ Commenting on the Paper the Minister of Housing in her 1995 budget speech said:

'We are determined that houses are to be built in the right places. In a sustainable manner. In a manner which allows people to create living environments they are happy to call home. We now have the policies in place to allow us to do precisely that.'¹⁴

The policy intends to mark the beginning of a process, and attempts to establish a policy framework creating an enabling environment, as opposed to simply providing a new set of rules.¹⁵ According to Van der Merwe and Pienaar the publication will, '... have an undeniable effect on the housing issue in South Africa.' and, '... is highly overdue'.¹⁶

Housing is defined in the policy as, '... a variety of processes through which habitable, stable and sustainable public and private residential environments are created for viable households and communities'.¹⁷ It recognises that the environment in which the house is situated is as important as the house itself.¹⁸ The paper accepts that housing is a basic human right and government is under a duty to take steps to create conditions that will lead to an effective right to housing for all. Government must also refrain from taking steps that promote or cause homelessness.¹⁹

The approach by government to housing support is envisaged as focusing around promoting a wide variety of delivery approaches. It includes ensuring access to well-located land, provision of basic services, secure tenure and the ongoing construction and upgrading of the public environment, services and homes. A process of consolidation and upgrading is seen as forming an integral part of

¹² White Paper for Housing Government Gazette General Notice 16178 Number 1376, 23 December 1994.

¹³ AJ Van der Walt 'Land Reform in South Africa since 1991 - an overview' (1995) 10 *SA Public Law* 24, 25, 26.

¹⁴ Quoted in S Lewis 'Minister makes it official: June 5 is kick-off date!' (1995) *May Housing in Southern Africa* 4.

¹⁵ Housing White Paper *op cit* Clause 1 Preamble. For a discussion of this also see Van der Walt and Pienaar *op cit* 443, 444.

¹⁶ Van der Merwe and Pienaar *op cit* 297.

¹⁷ Housing White Paper *op cit* Clause 4.2.

¹⁸ Housing White Paper *op cit* Clause 4.2.

¹⁹ Housing White Paper *op cit* Clause 4.4.2.

subsidised housing projects.²⁰ Describing the paper Cobbett argues that it would be inappropriate to stipulate specific details pertaining to housing such as the minimum size of a house at this stage. 'Rather, we specify the basic conditions of housing, which are secure tenure, privacy, security, protection from the elements and sufficient living space are the goals that we should be striving for.'²¹

The decision to include the concept of upgrading in the policy goes some way to resolving a relatively old debate over the place of informal settlements and site and service schemes in a new housing and development strategy. On the one hand was the argument that given scarcity of resources and the cost of formal housing the upgrade and development of existing well-located settlements must be an important part of an overall urban strategy. Contrasting this were those who argued that the answer to the problem of informal settlements lay in massive state subsidised housing programmes. They argued that attempts to upgrade settlements would merely perpetuate problems of poverty and inequality.²² However it now seems clear that upgrading is viewed as part of a solution to the housing crisis.

URBAN DEVELOPMENT STRATEGY

The Urban Development Strategy of the Government of National Unity, a discussion document, was published for comment in October 1995.²³ The policy includes the strategic goals of reducing existing disparities in infrastructure and facilities and the provision of affordable housing, shelter and security of tenure for urban residents within fiscal and other constraints.²⁴ A related goal is the establishment of secure living and working spaces marked by social stability. Problems of spatial inefficiency, and the overall quality of the urban environment should be tackled by better integrating environmental concerns within development planning and urban management practices.²⁵ According to the document urban integration and the management of urban growth depends on effective land use planning incorporating the principles of Integrated Environmental Management as well as a functioning urban and regional planning system.²⁶ The policy acknowledges the need for creative and varied approaches to the housing problem. According to the document, 'Informal settlements, for example, have become part and parcel of the urban landscape and offer many people the most

²⁰ Housing White Paper *op cit* Clause 4.6.2.

²¹ Kromberg and Molele *op cit* 7.

²² Hindson and McCarthy *op cit* 30.

²³ Discussion Document: Urban Development Strategy of the Government of National Unity Government Gazette General Notice 1111 of 1995, 12 October 1995.

²⁴ Clause 2.2.

²⁵ *Ibid.*

²⁶ Clause 6.1.1.

feasible option. Others attach greater value to formal structures and environments.²⁷ The policy also stresses, 'The housing backlog will simply be beyond reach if fully serviced formal housing is the norm ... It is not necessary to confine housing strategies to conventional approaches and technologies.'²⁸

GREEN PAPER ON SOUTH AFRICAN LAND POLICY

Another policy document with important implications for housing is the Green Paper on South African Land Policy.²⁹ The Green Paper sets out the, '...vision and implementation strategy for a South African land Policy that is just, builds reconciliation and stability, contributes to economic growth, and bolsters household welfare.'³⁰ The government's response to land reform has three key elements to it, redistribution, land restitution and land tenure reform.³¹

According to the policy the goal of land tenure reform is to extend security of tenure to all South Africans under diverse forms of tenure so that people can hold and enjoy their land, homes and property without fear of arbitrary action by the state, private individuals or other institutions.³²

HOUSING BILL

The draft Housing Bill which will ultimately result in a new Housing Act has been published.³³ The proposed framework legislation sets out to prescribe certain principles fundamental to the housing process, and to define the roles of the three spheres of government. The preamble emphasises that everyone has the right to adequate housing. The right is described as both a product and a process.³⁴

The general principles of the Bill include giving priority to the needs of the poor. Transparency, accountability and equity must guide the administration of housing development, and the policy must maximise the freedom of the individual to exercise choice in the satisfaction of his or her housing needs. Housing development should be economically, fiscally, socially and financially affordable and

²⁷ Clause 6.2.3.

²⁸ Clause 6.2.3.

²⁹ Department of Land Affairs (1996) Green Paper on Land Reform.

³⁰ Green Paper on Land Reform *op cit* i.

³¹ Green Paper on Land Reform *op cit* Clause 1.3. The governments land reform measures are also discussed in more detail above in 3.7.

³² Green Paper on Land Reform *op cit* Clause 3.12.

³³ Government Gazette Number 17321 Notice 885 of 12 July 1996. The draft Bill is also discussed above in 3.5.

³⁴ Draft Housing Bill *op cit* Preamble.

sustainable, and promote the establishment of socially and economically viable communities. National, provincial and local government should also promote the process of social, economic and physical integration of urban and rural areas³⁵

GENERAL ENVIRONMENTAL POLICY

The Environment Conservation Act 73 of 1989 provides for a General Environmental Policy in Section 2(1).³⁶ Although not dealing directly with informal settlements the policy has important implications for development and planning.

The policy has been enacted and is based on the premises and principles that every inhabitant has the right to live, work and relax in a safe, productive, healthy, aesthetically and culturally acceptable environment. The policy also places a duty on the individual to '... respect the same right of his fellowman (sic)'.³⁷ Every generation is given the obligation to act as a trustee of its natural environment and cultural heritage in the interests of succeeding generations. Sustainable development is accepted as the guiding principle for environmental management.³⁸

In terms of the urban environment the policy envisages a holistic environmental approach forming part of all facets of urban planning and development. This includes the built and natural environments and takes socio-economic factors into account. According to the policy, 'Environmental expertise and the involvement of local communities will be promoted in order to ensure acceptable standards and living conditions'.³⁹ The policy thus places a duty on the state to take environmental factors into account in consultation with local communities in the planning and management of informal settlements.

CONCLUSION

The above policies are encouraging and indicative of the thought and debate occurring in the areas. Ultimately the policies must translate into legislation. It therefore can not be overemphasised that the real test will be translating policy into legislation which will make an impact on the daily lives of people living in and around informal settlements.

³⁵ Clause 2.2.

³⁶ *Government Gazette* 15428 Notice 51, 21 January 1994.

³⁷ General Environmental Policy *op cit* Preamble.

³⁸ General Environmental Policy *op cit* Preamble.

³⁹ General Environmental Policy *op cit* 38.

Chapter 4. PROVINCIAL GOVERNMENT

Although the focus of this dissertation has been on national measures pertaining to informal settlements and planning, the importance of other levels of government, especially in view of Schedule 4 and 5 of the proposed New Text, should not be ignored. This chapter will examine some of the important features of provincial government.

'Thousands of South Africans are living in distress and their standard of living needs to be raised as a matter of urgency. As a starting point, communities must be provided with basic needs and be assured that services will be rendered satisfactorily and effectively. ... The Central Government can create the strategies to achieve this, but they must be implemented and managed at provincial and local level.'¹

The important role of the provinces is also recognised in the Constitution. For instance the Constitution provides that provincial legislatures can pass provincial constitutions.²

Frequently the most important documents regulating town planning policy and control are contained in provincial ordinances.³ In Natal the Town Planning Ordinance⁴ deals with township development including control of land use, development generally, and use of buildings and land. The ordinance was drafted in an era not committed to democracy and equity.

The Natal Town Planning Ordinance⁵ is in the process of being redrafted.⁶ The revision proposes a 'Planning and Development Act' for the Province. The intended act will attempt to be quick, facilitative and easy to understand to ensure orderly planning.⁷ According to Brauteseth:

'It is hoped that at the end of the process, all of the communities in the province can be justifiably proud of an enactment which encourages the sustained use of the resources

¹ S Lombard 'Effective provincial government ensures a winning nation' (1995) *RSA Review* 24 at 33.

² Erasmus *op cit* 426; Also see Beukes *op cit* 399; The constitutional provisions pertaining to provinces are discussed in more detail above.

³ West *op cit* 609.

⁴ Ordinance 27 of 1949.

⁵ Ordinance 27 of 1949.

⁶ N Brauteseth 'Proposed New Planning and development Act for Kwa-Zulu-Natal' December 1995 *Monitor* 10.

⁷ Brauteseth *op cit* 10.

available in the Province, facilitates economic growth, the improvement in the quality of life, and the provision of reasonable services, through public consultation and participation.⁸

The importance of provincial government is also recognised at a national level. The discussion document for urban development⁹ envisages a number of functions as taking place at the provincial level. These include the moulding of province-specific policies, regulating the local development planning process and building local government capacity. Other tasks included are the evaluation and prioritisation of infrastructure programmes that require public funding, the monitoring of projects within a programme context and to ensure that funding criteria are being followed.¹⁰ The Housing White Paper envisages provincial housing functions as including the setting of provincial housing delivery goals, the determination of provincial housing policy, monitoring of provincial housing delivery, overseeing and directing the housing activities of provincial statutory, advisory and executive bodies.¹¹ The Department of Land Affairs also envisages a large percentage of land administrative functions as eventually been assigned to other tiers of government.¹²

The draft Housing Bill¹³ envisages provinces as playing an important role in the housing sphere. It sets out to define the three spheres of government in regard to housing development as well as to empower provincial and local government to administer national housing plans. Some of the tasks envisaged to be performed at a provincial level include determining provincial policy, in respect of housing policy, including a 'multi-year' plan in respect of the execution of any national housing programme, co-ordinating housing and related activities in the province, and adopting provincial legislation to ensure effective housing delivery.¹⁴ In addition the Bill envisages provincial government as playing a role in supporting and strengthening local government so that local government can perform its duties and responsibilities, and carrying out the duties and responsibilities of local government whenever a municipality is not able to do so for itself.¹⁵

⁸ Brauteseth *op cit* 11.

⁹ Urban Development Strategy *op cit*.

¹⁰ Urban Development Strategy *op cit* Clause 6.5.4.

¹¹ Housing White Paper *op cit* Clause 5.2.1.

¹² Green Paper on Land Reform *op cit* Clause 2.3.

¹³ Draft Housing Bill Government Gazette Number 17321 Notice 885 12 July 1996.

¹⁴ Draft Housing Bill *op cit* Clause 8.

¹⁵ *Ibid.*

The key implementation mechanism of the Development Facilitation Act¹⁶ is also envisaged as taking place at the provincial level with the establishment of provincial development tribunals responsible for government approvals of land development under the Act.¹⁷ The tribunals will also permit faster development decision-making, conflict resolution between stakeholders and greater community involvement in land development.¹⁸

It seems clear that although policy and framework legislation may be established at a national level actual implementation will take place at more devolved levels. The onus will therefore be on provincial governments to ensure that the needs of informal settlements are adequately planned for. According to Swilling an urgent task of the new regional government should be to formulate a policy for informal settlements.¹⁹ This policy should take place within a development strategy recognising the planning and environmental needs for the province as a whole.

¹⁶ Act 67 of 1995.

¹⁷ Green Paper on Land Reform *op cit* 64.

¹⁸ *Ibid.*

¹⁹ Swilling *op cit* 19.

Chapter 5. LOCAL GOVERNMENT

Any discussion of the problems associated with informal settlements can not afford to ignore local government. Local government has a central role to play in the delivery, co-ordination and implementation of the governments' urban strategy.¹ Local government is also seen in some instances as the first line of defence for the environment. The power of local government to plan and allocate zones gives them immense power in deciding the environmental future of an area.²

At the same time, 'Local government is a rather neglected field in law, a state also evident in the constitution.'³ Local government is traditionally regarded as the third tier of government, with regional or provincial government as the second or intermediate tier and the central or national government as the first tier.

According to Swilling the concept of local governance is important because of the history of conflict and enmity between squatter communities and the state.⁴ In the past local government did not adequately respond to urbanisation. This was compounded by the fragmented administration created by apartheid, bureaucratic confusion, disparities in the amount of funding between different areas, and the absence of co-ordinated planning for metropolitan areas as a whole.⁵ The Green Paper for Land raises the fact that although local authorities are major holders in land they have tended to use the land as a speculative asset. The paper suggests that local authorities should be encouraged to use their own land for development purposes before requesting additional land from local or provincial government.⁶

In order for local authorities to be effective and accountable institutions they should be able to plan and facilitate development, finance and provide infrastructure development, and manage the overall development of towns and cities in partnership with citizens willing to pay for the municipal services they consume.⁷ The restructuring of local government and the creation of single base tax structures has a role to play in providing solutions to the problems associated with violence and informal

¹ Urban Development Strategy *op cit* Clause 6.5.1.

² V Munnik 'Green Challenge For New Local Government - Closest to the People and Closest to the Environment' (1995) *Autumn New Ground* 14 at 15.

³ Beukes *op cit* 404.

⁴ Swilling *et al op cit* 33.

⁵ Ramphela 'Restoring the Land' *op cit* 104.

⁶ Green Paper on Land Reform *op cit* 70.

⁷ Urban Development Strategy *op cit* 6.

settlements.⁸ However financing decisions by local authorities such as the promotion of an end to payment boycotts and a degree of cross subsidisation within urban areas to help cover items such as the provision of bulk infrastructure are likely to be highly contentious.⁹

The physical processes of planning and housing are very much a local community matter. As such the role of metropolitan and especially local government in enabling, promoting, and facilitating the provision of housing to all segments of the population in areas under their jurisdiction can not be over emphasised.¹⁰ A number of functions pertaining to informal settlements are envisaged as been performed at the metropolitan or local level of government. These include:

- setting metropolitan / local housing delivery goals;
- the identification and designation of land for housing purposes;
- the regulation of health and safety standards in housing provision;
- the creation and maintenance of a public environment conducive to viable development and healthy communities;
- the mediation of conflict in the development process;
- the initiation, planning, co-ordination, promotion and enablement of appropriate housing development;
- welfare housing;
- land planning in areas under their jurisdiction;
- regulation of land and development.¹¹

The Urban Development Strategy provides that the primary responsibility of local authorities should be the delivery of services. In addition they should select, prepare and implement infrastructural programmes.¹²

The role of local government in housing development is discussed in Chapter VI of the draft Housing Bill.¹³ In terms of this Chapter local government must, within the national and provincial frameworks provided, take all reasonable and necessary steps to ensure that the inhabitants of its jurisdiction

⁸ Minnaar *op cit* 56.

⁹ J Maclean (ed) 'Vote of confidence for incremental housing' (1995) November *Housing in South Africa* 8.

¹⁰ Housing White Paper *op cit* Clause 5.2.3.

¹¹ Housing White Paper *op cit* Clause 5.2.3.

¹² Urban Development Strategy *op cit* Clause 6.5.4.

¹³ Draft Housing Bill Government Gazette Number 17321 Notice 885 12 July 1996.

have access to, 'adequate housing opportunities on a progressive basis.'¹⁴ Other duties of local government pertaining to informal settlements include the setting of housing delivery goals in their area of jurisdiction, the identification and designation of land for housing development purposes, the creation of a public environment conducive to viable housing development, mediation in conflicts arising in the housing development process and the initiation, planning, and the co-ordination, promotion and enablement of appropriate housing development.¹⁵ Provision is also made in the draft Bill for the participation of local government in national housing programmes.¹⁶

The type of pro-active approach local governments can take is demonstrated by some local governments forming policies around issues such as land invasion. For instance the Pietermaritzburg Msunduzi Transitional Local Council has established a 'Land Invasion Policy.'¹⁷ The policy defines 'land invasion' as the '... unauthorised occupation of structures which have been unlawfully erected on Council owned land'. The preamble of the policy stipulates that land invasion can not be countenanced on state, council or privately owned land because it does not promote the optimum utilisation of land resources, leads to, 'inter-community tensions' and less than optimum utilisation of available services. The policy contains both positive and negative elements to it. On a positive note in the policy the Transitional Council commits itself to the identification and development of suitable land for low cost settlements,¹⁸ and the establishment of a negotiating committee in order to engage land invasions and to locate appropriate sites for resettlement.¹⁹ On the other hand the policy also provides:

'In respect of unlawfully erected structures on Council owned land which are not occupied the Chief Traffic and Security Officer is hereby authorised to remove such structures immediately upon becoming aware of their existence.'²⁰

Summary powers of this nature are better suited to routine functions such as the handing out of speeding fines as opposed to the demolition of homes. The measure is a reversion to tactics of the past and of little assistance in finding solutions to the problems of land invasions. It is probably also

¹⁴ Draft Housing Bill *op cit* Clause 10.

¹⁵ Draft Housing Bill *op cit* Clause 10 (1).

¹⁶ Draft Housing Bill *op cit* Clause 10(3).

¹⁷ Pietermaritzburg Msunduzi Transitional Local Council 'Minutes of the Combined Executive and Economic Committees' 19 February 1996.

¹⁸ *Ibid* Paragraph 2.

¹⁹ *Ibid* Paragraph 3.

²⁰ *Ibid* 4(ix).

open to constitutional challenge. What the policy does demonstrate however is that if desired local government is well situated to take the lead in initiating planning and other measures to manage informal settlements.

If local government is going to be transformed and the conflict spoken of above reduced there are certain basic guidelines which local government should observe. Local decision making should include concepts of consensus and full participation on all levels. Although at times decisions will conflict with the interests of established suburban residents or shack dwellers it is also important to establish clear parameters, and avoid taking decisions behind closed doors.²¹ If development is to succeed power must be shifted towards the ultimate beneficiaries in communities, on the one hand, and new local authorities on the other hand.²²

²¹ J Yeld and R Gubb 'Shack Dwellers? Not in my back yard!' May (1992) *African Wildlife* 121

²² Swilling et al *op cit* 27

Chapter 6. ENVIRONMENTAL IMPACT ASSESSMENT ('EIA')

Environmental Impact Assessment is a process by which the likely significant effects of a proposed development are identified, assessed and then taken into account by the consenting authority in the decision-making process. It provides the opportunity to take environmental considerations into account at the earliest opportunity before decisions are made as to whether, or how to proceed with a development or action.¹ Mayet states that Environmental Impact Assessment, '... has enormous potential for flexibility to meet the challenges of a variety of development proposals, particularly those pertaining to informal settlements.'²

A key aim of Environmental Impact Assessment is to ensure that negative impacts of development proposals are mitigated, and positive aspects enhanced. This should be done, '... in such a way that the social costs of the development proposals (those borne by society, rather than the developers) are outweighed by the social benefits (benefits to society as a result of the actions of the property developers).'³ EIA does not concern itself with minuscule or trivial effects, and in general the first step in the process is scoping. Scoping involves a preliminary study to determine the detail required in the assessment.⁴ Depending on the outcome of the scoping a more in depth investigation may be required.

In South Africa EIA is also called Integrated Environmental Management (IEM).⁵ IEM is a way for decisions affecting land, land development and land distribution to incorporate an ecological perspective.⁶ IEM is a tool not confined to only the start of a process, but can also be used in an ongoing fashion for monitoring, control and correction of developments.⁷

The Environmental Conservation Act⁸ guides central, provincial and local authorities towards promoting the objectives of the General Environmental Policy⁹ issued in terms of the Act.¹⁰ The policy

¹ W Sheate *Making an Impact. A guide to EIA Law and Policy* (1994) 22.

² M Mayet *Integrating EIA in the planning and establishment of informal settlements in South Africa* (1994) University of the Witwatersrand 82.

³ G Preston 'Integrated Environmental Management - will it be worth having?' (1993) *May Africa - Environment and Wildlife* 31.

⁴ Fuggle and Rabie *op cit* 753, 755. Also see Sheate *op cit* 28, 29, 30.

⁵ Fuggle and Rabie *op cit* 748.

⁶ Ramphela *op cit* 140.

⁷ Department of Environmental Affairs and Tourism (1996) April *Discussion Document: Towards a New Environmental Policy for South Africa* 13, 14; Also see Sheate *op cit* 27.

⁸ Act 73 of 1989.

⁹ General Environmental Policy Government Gazette 15428 Notice 51, 21 January 1994.

includes as one of its objectives the principles of Integrated Environmental Management. Integrated Environmental Management and Environmental Impact Assessment should therefore become important aspects of planning and development programmes at all levels of government.

The Environmental Conservation Act¹¹ also provides for mandatory impact assessment for activities identified by the Minister of Environmental Affairs as, in his or her opinion having a detrimental effect on the environment.¹² The Act¹³ includes but does not limit the Minister to a number of categories which could be found harmful and therefore fall within the provisions of the Act, including land use and transformation, water use and transportation.¹⁴ An identified activity may not be undertaken without written authorization issued by the Minister, or by an administrator, local authority or an officer.¹⁵ Before written authorization can be issued, reports concerning the impact of the proposed activity and alternative proposed activities on the environment must be considered.¹⁶ Unfortunately the legal provisions governing Environmental Impact Assessment have to date been meaningless because of the failure of the Minister of Environmental Affairs and Tourism to issue procedures, and identify detrimental activities in terms of the Act.¹⁷

The General Environmental Policy¹⁸ issued in terms of the Environmental Conservation Act¹⁹ provides:

'Before embarking on any large-scale or high-impact development project, a planned analysis must be undertaken in which all interested and affected parties must be involved. In order to attain the sustainable utilisation of resources, the principles of integrated environmental management are accepted as one of the management mechanisms.'²⁰

¹⁰ *Ibid.*

¹¹ Act 73 of 1989.

¹² Section 21(1); Also see Ramphela *op cit* 143.

¹³ Act 73 of 1989.

¹⁴ Section 21(2).

¹⁵ Section 22(1).

¹⁶ The reports must be compiled and submitted as prescribed in terms of Section 22(2).

¹⁷ MS Mayet *Integrating Environmental Impact Assessment In The Planning And Establishment Of Informal Settlements In South Africa* (1994) University of the Witwatersrand 59.

¹⁸ General Environmental Policy *op cit*.

¹⁹ Section 2(1) of Act 73 of 1989.

²⁰ General Environmental Policy *op cit* Land Use.

Mayet contends that the heading 'Land use' includes the planning and establishment of informal settlements and, 'In the future, the Administrator in exercising his powers under the LEFTY²¹ will be bound to implement the EIA procedure.'²² Although this has not being the case in practice it may be that development taking place without EIA could be challenged on this basis.

The case of *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others*²³ dealt with certain aspects of Environmental Impact Assessment. Farlam J held that the powers of the Premier, and the applicable Provincial Minister to deal with rezoning applications made under the Land Use Planning Ordinance,²⁴ had to be in accordance with the policy determined by Section 2 of the Environmental Conservation Act²⁵.²⁶ The court also held that: 'Wilfully to ignore the advantages which may flow from what will, in my judgement, inevitably be a better investigation ... is unfair to all those persons who may be affected by the decision made.'²⁷ Ultimately however the courts decision was based on the fact that the applicants had shown an infringement to their right to procedurally fair administrative justice, and the comments on the Environmental Conservation Act²⁸ were merely *obiter*.

A number of rules have been published for comment in terms of Section 26(3), 46(4) and 59(3) of the Development Facilitation Act 67 of 1995.²⁹ Clause 27 of the proposed rules provides for a process called environmental evaluation. This provides that the land development applicant must include in the application for development an initial environmental evaluation, prepared in accordance with the integrated environmental management guidelines from time to time issued by the Department of Environmental Affairs and Tourism.³⁰ The initial report must indicate the extent to which the proposed activity or development will impact on the environment, as well as other more specific criteria, '... where appropriate ...'.³¹ A designated officer can also determine whether a comprehensive

²¹ Less Formal Township Establishment Act 113 of 1991.

²² Mayet *op cit* 62.

²³ 1996 (1) SA 283 (C).

²⁴ Cape Ordinance 15 of 1985.

²⁵ Act 73 of 1989.

²⁶ 1996 (1) SA 283 (C) at 303 C - G.

²⁷ 1996 (1) SA 283 (C) at 307 B - C.

²⁸ Act 73 of 1989.

²⁹ Act 67 of 1995; Rules published for comment in Government Gazette Number 17042 Volume 369, 22 March 1996.

³⁰ Clause 27(1).

³¹ Clause 27(5).

environmental impact report should be prepared,³² and based on the initial environmental evaluation can make a number of recommendations including the dismissal of the application, or the imposition of conditions of establishment.³³ The provisions are important because they provide a good example of how environmental criteria can be incorporated in new development and planning legislation. However it is likely that the present failure to implement environmental impact assessments under the Environmental Conservation Act³⁴ itself will undermine environmental provisions in other legislation.

The government envisages environmental management as forming an integral part of its urban strategy. Environmental concerns are not seen as just a luxury.³⁵ According to the proposed urban strategy, urban settlements and, 'In particular, the environmental impacts of new developments will have to be carefully monitored and managed according to the requirements of Integrated Environmental Management.'³⁶ According to the strategy document the government will emphasise environmentally-sensitive land use planning and impact assessment, the sustainable use of natural resources and protection of ecologically sensitive areas as well as pollution control in line with the Environmental Conservation Act and policy issued in terms of the Act.³⁷

The White Paper on Housing also states that policies, administrative practices and laws should promote the sustainability of land delivery.³⁸ The need for a set of national environmental standards is also stressed in the paper.³⁹

A technique which can be incorporated into Environmental Impact Assessment, and which could play a useful role in South Africa, is that of environmental mediation. A mediated settlement is a less adversarial and often quicker method of intervention than formal judicial processes. Mediation can also be relatively cost effective and preventative in the sense that it can be used to foster better relationships between disparate groups.⁴⁰

³² Clause 27(2).

³³ Clause 27(3).

³⁴ Act 73 of 1989.

³⁵ Urban Development Strategy *op cit* Clause 6.1.3.

³⁶ Urban Development Strategy *op cit* Clause 6.1.

³⁷ Urban Development Strategy *op cit* Clause 6.1.3.

³⁸ Housing White Paper *op cit* Clause 5.7.1.8.

³⁹ Housing White Paper *op cit* Clause 5.8.2.

⁴⁰ Mayet *op cit* 73, 74.

Mechanisms such as environmental mediation can be woven into the EIA process so as to expedite the planning of informal settlements in a conflict-free manner.⁴¹

If EIA is to work it is important that it integrates public participation into the planning and assessment process. Notification procedures should take care to respond to the wide variety of language groups in South Africa, as well as the high illiteracy rate.⁴² In addition mechanisms should be put in place to ensure processes are not biased in favour of more vocal and resourceful groups.⁴³

EIA is based on a recognition by decision makers to involve the public in decisions which affect the environment, the link between the health and well being of all species, and the fact that EIA is an implicit and essential element for ensuring ecologically sustainable development of all resources.⁴⁴ However if EIA is to become more than just a catch phrase to wish away environmental ills then steps must be taken by the government to practically implement EIA.

It is submitted that Environmental Impact Assessment is a mechanism which should be incorporated into the planning of informal settlements. The effective use of Environmental Impact Assessments can help reduce harmful effects informal settlements may have on the environment as well as increase the quality of life of the residents of informal settlements themselves.

⁴¹ Mayet *op cit* 83.

⁴² Mayet *op cit* 65.

⁴³ Mayet *op cit* 72.

⁴⁴ D Wiesner *EIA the Environmental Process, What is it and how to do one* (1995) Prism Press 4.

Chapter 7. CONCLUSION

Large scale urbanisation and the many shortcomings in the formal system of home and land acquisition have resulted in the formation of informal settlements. The problems of informal settlements were aggravated by the apartheid government and its unwillingness to try and find constructive solutions to the problems of informal settlements. This is still reflected by the lack of infrastructure found in informal settlements which in turn contributes to the negative effect informal settlements have on the environment.

Democracy in South Africa has heralded a new era of Constitutional Supremacy. For the first time in the country's history all levels of government and legislation must conform with the provisions of the constitution. The constitution confers rights on its citizens and the final constitution is likely to include a right to housing. If the right to housing is to be more than an unkept promise it is important that all levels of government ensure that adequate planning policy, frameworks and legislation are provided. These should ensure that they provide for both the provision of formal housing, and the needs of informal settlements.

'It is important that the government accepts the need for and advantage of large scale urban expansion, acknowledges that much urban growth will be informal, and recognises informal settlements as an appropriate and sustainable form of low income housing.'¹

At present legislation does not adequately provide for South Africa's planning or housing needs. Legislation is fragmented and includes some of the more reactive and draconian legislation of the past such as the Prevention of Illegal Squatting Act.² New legislation such as the Less Formal Township Establishment Act³ and the Development Facilitation Act⁴ tend to be crisis orientated and of an interim nature. Although a number of policy documents have been developed which attempt to address the challenges of informal settlements, few have resulted in legislation or being practically implemented.

It is necessary for South Africa to develop new planning legislation which can provide for the long term development needs of South Africa. This should include mechanisms which allow for the needs

¹ Swilling *op cit* 52.

² Act 77 of 1977.

³ Act 113 of 1991.

⁴ Act 67 of 1995.

of informal settlements to be taken into account. Other legislation which in the past did not provide for informal settlements such as the Deeds Registries Act⁵ should be amended so that they are able to assist in ensuring informal settlements provide secure and sustainable accommodation. Reactive legislation such as the Prevention of Illegal Squatting Act⁶ should be discarded as part of a commitment to a more constructive approach to informal settlement.

The responsibility of providing for informal settlements should not be the exclusive reserve of national government. Provincial and local government should be given sufficient powers and responsibilities to also play a role in the improvement of informal settlements. This must take place within the constitutional framework provided.

A more proactive approach incorporating effective planning and the tool of Environmental Impact Assessment will help reduce some of the negative environmental consequences of informal settlements. These negative environmental consequences include the effects on both the natural and human environment. Ideally informal settlements should not be perceived as environmental hazards. Instead they should be appreciated for the important role they can potentially play in the provision of secure, safe and healthy homes.

⁵ Act 47 of 1937.

⁶ Act 72 of 1977

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