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**MAKING A CASE FOR “INFORMAL SETTLEMENT UPGRADING”: IN SEARCH
OF A CONSTITUTIONAL RIGHTS-BASED APPROACH TO ASSIST THE STATE
IN IMPLEMENTING THE RIGHT OF ACCESS TO ADEQUATE HOUSING**

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CHAPTER 1

1. Introduction

‘Those who dwell in shantytowns, the quintessential locality of the ‘other side’ – an other-side-being is a being whose life and voice does not count’¹

The perpetual challenge of informal settlements² mirrors apartheid spatial planning and the inequities of local and global free-market forces that have led to the exclusion of the poor from South Africa’s urban fabric.³ One persisting aspect of the apartheid legal and politico-ethical theory that may best describe the present day housing challenge is spatial injustice; the lack of access by the poor, to well-located land which is closer to the urban core where there is greater economic opportunities.⁴ Perpetuating spatial injustice, some municipalities have continued to characterise informal settlements as an obstacle to the delivery of state-subsidised housing colloquially known as “RDP housing”.⁵ Informal settlements have also been described as criminal hotspots occupied by ‘illegal immigrants and land invaders intent on jumping the housing queue’.⁶ Hence the dominant approach has been to relocate or evict

¹ Figlan, L. “The Politic of Human Dignity” (2012) *Abahlali baseMjondolo* <http://abahlali.org/node/9325/> (accessed: 20 March 2016).

² The Constitutional Court, in *Abahlali baseMjondolo and Others v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) paras 44–48, discussed in detail in chapter 4, has accepted that defining what we mean by informal settlements adds nothing to the discourse. Whilst I agree with that statement, this dissertation employs the word ‘informal settlements’ throughout. I do this intentionally so that I impose an understanding of what is meant by informal settlement upgrading that the Upgrading of Informal Settlement Program (UISP) seeks to achieve. The UISP makes reference to the following characteristics: illegality and informality; inappropriately located; with restricted public and private sector investment; shrouded in poverty, vulnerability, and social stress. See Paragraph 2.3 of the UISP at 16. The word “informal settlement” sounds better than “slums,” a term often employed in international literature. It seems that both terms are derogatory for the poor, but for the sake of clarity and in line with a body of literature, however, the term informal settlements will be used in this dissertation. See also R. Pithouse ‘Progressive policy without progressive politics: Lessons from the failure to implement ‘Breaking New Ground’ (2009) 54 SSB/TRP/MDM <http://abahlali.org/node/5939/> (accessed: 3 January 2017).

³ Marie Huchzermeyer ‘The struggle for *in situ* upgrading of informal settlements: case studies from Gauteng’ (2009) 26 *Development Southern Africa* 60. Also look at Mark Purcell ‘Excavating Lefebvre: The right to the city and its urban politics of the inhabitant’ (2002) 58 *GeoJournal* 99, 101, where it was argued that the global investment in the cities has seen municipalities outsourcing their function; the net results being that the habitants of the city are excluded from participating in decisions about the design and future of the cities.

⁴ Josh Budlender, et al *Edged Out: Spatial Mismatch and Spatial Justice in South Africa’s Main Urban Areas* (2006) http://seri-sa.org/images/SERI_Edged_out_report_Final_high_res.pdf (accessed: 15 December 2016) at 2-3 : also see the Spatial Planning and Land Use Management Act 16 of 2013 (‘SPLUMA’): in section 7(a)(vi) this Act explains spatial justice as an “inclusive of land use management schemes that recognise disadvantaged areas, informal settlements and former homeland areas”. Therefore when land use schemes do the reverse, it amounts to spatial injustice.

⁵ The Reconstruction and Development Program (RDP) was an integrated socio-economic policy to reconstruct South Africa after apartheid. Its goal was to build 300 000 houses in a year with a minimum of 5 million houses in 5 years. The term comes from that document. It benefited people who earned R3500 per month with no property and satisfied a range of criteria. The program had six mechanisms: “project linked, individual, consolidation, institutional, relocation assistance and the people housing process”. The term ‘RDP house’ is carved from this policy.

⁶ J du Plessis and S Wilson *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (2005) 19 Centre on Housing Rights and Evictions (COHRE); available on http://www.cohre.org/sites/default/files/south_africa_any_room_for_the_poor_forced_evictions_in_johannesburg_8_mar_2005.pdf (“2005 COHRE report”). (Accessed: 8 March 2005).

informal settlement households away from the urban core, despite the associated negative impact on the socio-economic conditions of the settlements' residents.⁷

This injustice occurs at the time of "transformative constitutionalism" (a dominant project that seeks to cure the injustice of apartheid).⁸ Core to this constitutional transformative project is the objective to address socio-economic disparities through the constitutional normative objectives of human rights. In addition, it is also involves the progressive realisation of the rights to access adequate housing, water, electricity and sanitation in the informal settlement context.⁹ Tied to this notion of transformative constitutionalism is the "right to the city".¹⁰

The right to the city comprises of three elements:¹¹ the first is, *the right to participate* (which envisages that the urban citizens should have a say in decision-making processes that relate to the production of urban space); second is *the right to appropriate* (which envisages a right to physically occupy and use the urban space, including the already established urban space and also to create new spaces); and third are *claims relating to habitation* (which basically

⁷ Kate Tissington, *A resource guide to housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* Socio-Economic Rights Institute of South Africa (SERI) Research Report (2011) 61: <http://www.seri-sa.org/index.php/research-7/resource-guides>, in which the author estimates that 2.1 million South Africans live in inadequate housing. Also see Michael Clark and Kate Tissington 'Courts as a site of struggle for informal settlement upgrading in South Africa' in L. Cirolia, T. Gorgens, M. Van Donk, W. Smith and S. Drimie *Pursuing a Partnership Based Approach to Incremental Informal Settlement Upgrading in South Africa* forthcoming (2015); Also see J. van Wyk *Planning Law* 2ed (2012) at 504; also see Lilian Chenwi 'Legislative and Judicial Responses to Informal Settlements in South Africa: a Silver Bullet?' (2012) 23 *Stellenbosch Law Review* 540.

⁸ Sanele Sibanda 'Not purpose made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the struggle to eradicate poverty' in Sandra Liebenberg and Geo Quinot (ed) *Law and Poverty: Perspectives from South Africa and Beyond* 1ed (2012) 45; Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Also see C. Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253-277 and C Albertyn & B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248-276 ; Dikgang Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309; Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155 - 161.

⁹ The preamble and sections 1(a), 26 and 27 of the Constitution of the Republic of South Africa ("the Constitution") Also see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) at paragraph 191 -198 ("Joe Slovo"); also see M Pieterse "What do we mean when we talk about Transformative Constitutionalism?" (2005) 20 *SAPL* 161.

¹⁰ Henri Lefebvre *Le Droit a la Ville* (1968), translated and reprinted as part of Henri Lefebvre (Eleonore Kofman & Elizabeth Lebas) *Writings on Cities* (1996) 173-4. Lefebvre developed the concept in subsequent works including *Espace et Politique* (1973) and *Du Contrat de Citoyennete* (1990), cited in E Fernandes "The 'right to the city' in Brazil" (2007) 16(2) *Social Legal Studies* 201, 205. For the incorporation of the right to the city into the South African legal order see Thomas Coggin & Marius Pieterse 'Rights and the city: An exploration of the interaction between socio economic rights and the city' (2012) 23 *Urban Forum* 257; M Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *SALJ* 149; also see Bhavna Ramji *Evictions, engagement and alternatives: The constitutional responsibility on local government to provide access to adequate housing, and the obligation not to impact on this right negatively* (Unpublished LLM thesis, University of Kwazulu-Natal 2013).

¹¹ *ibid.*

involves the rights to inhabit the city and use its spaces). This conceptual framework is hardwired into our constitutionalism (constitutionalism understood both as a legal concept dealing with allocation of rights, responsibilities, powers and functions).¹² This conceptual framework informs the legislative and policy framework regulating housing and planning law.

The Housing Act,¹³ which governs our housing law, gives effect to the right to housing as stipulated in section 26 of the Constitution¹⁴ by setting out, amongst other things: the general principles governing housing delivery in South Africa, outlining the core functions of different spheres of government in relation to housing and provides a foundation for the implementation of the policy instruments in the National Housing Policy.¹⁵

The *Breaking New Ground* (BNG) policy of 2004,¹⁶ for instance, its instrument dealing with the upgrading of Informal Settlements is considered to be a game-changer and a more comprehensive approach than the delivery of RDP housing envisaged through the National Housing Subsidy Scheme (NHSS).¹⁷ BNG is predicated on ‘sustainable human settlements, integration, housing assets and upgrading of informal settlements’. The revised National Housing Code¹⁸ incorporates the Informal Settlement Upgrading Program (UISP). Broadly, the aim of the UISP is to ensure *in situ* upgrading of informal settlements, instead of relocation in order to ensure security of tenure, healthy environment and socio-economic integration.¹⁹ Therefore in this paper, by upgrading of informal settlements I mean the full implementation of this program.²⁰

¹² I Currie... et al. *The new constitutional and administrative law* (2001) Vol 1:10

¹³ Housing Act 107 of 1997 (referred herein as the “Housing Act”).

¹⁴ The Constitution of the Republic of South Africa (“the 1996 Constitution”).

¹⁵ Part 1 to 4 of the Housing Act.

¹⁶ *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements*. Later, an updated version ‘the Breaking New Ground’ (“the BNG”), as well as the Upgrading of Informal Settlement Programme (“the UISP”) contained on Chapter 13 in the 2004 National Housing Code, and Part 3 in the updated 2009 Code by the Department of Human Settlement (“DHS”) was adopted under section 3(4)(g) of the Housing Act.

¹⁷ Marie Huchzermeyer ‘The new instrument for upgrading informal settlements in South Africa: contributions and constraints’ in Marie Huchzermeyer and Aly Karam (eds) *informal settlements: a perpetual challenge?* (2006) 42. Also see Kate Tissington (note 7 above)

¹⁸ National Department of Human Settlement *National Housing Code* (2009) is established in term of section 4 (1) of the Housing Act.

¹⁹ Look at the UISP Policy intent at paragraph 2.1.

²⁰ In order to bolster the UISP, the National Department of Human Settlements (NDHS) partnered with Cities Alliance, leading to the formation of the National Upgrading Support Program (NUSP) which began its work 2008. This process is aimed at evaluating 16 pilot projects on informal settlement upgrading and to make recommendations on an improved approach to upgrading: including the establishment of the support program, production of tool-kits to guide practitioners, capacity building and community engagement approach. The

Given that the connection between planning and housing law has been elusive, the ground-breaking law in the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA') closes the gap between inclusive spatial planning, the land use management schemes and the right to access adequate housing in the context of informal settlements. Therefore SPLUMA and other planning instruments like: the Integrated Development Plans²¹ (IDPs), Spatial Development Frameworks²² (SDFs) and Land Use Management Schemes²³ (LUMS) that are aimed at carving a vision for use of land, zoning and development. Firstly, an IDP is described as an inclusive, integrated and strategic plan for the development by the municipality. Provisions of budgets are based on this plan. Furthermore, this plan must be in line with the national and provincial plans and policies. The plan is binding in terms of legislation.²⁴ Secondly, the SDF is prepared by national, provincial and municipalities in order to detail a long-term spatial development vision that, amongst other things, must include previously disadvantaged areas, informal settlements and even slum.²⁵ Lastly, LUMS must be adopted after public consultation by the municipality, and it must "include provisions that permit the incremental introduction of land use management and regulation in areas under...informal settlements, slums..."²⁶ All these instruments must be understood, at least in part, as being aimed at facilitating a connection between housing and planning law.²⁷

In light of the above, this paper aims to make a case for incremental *in situ* upgrading of informal settlements. The task is to conduct a conceptual and substantive legal work in making a case for informal settlement upgrading. It will do this by auditing the above legislative and policy framework regulating housing and planning law against: (i) the doctrines of transformative constitutionalism and the right to the city; (ii) the role of local government and the monitoring and supporting roles by national and provincial spheres of government; and (iii) the jurisprudence that has dealt with evictions and informal settlement upgrading with the purpose of locating principles that may begin to govern efforts aimed at the implementation of the UISP. This jurisprudence will include an analysis of: *Joe Slovo*,

proposals of this program were condensed into the national and provincial Delivery Agreement. In terms of this agreement, NUSP was going to be rolled-out to 49 municipalities which are prioritising the implementation of the UISP. Despite Outcome 8 committing the NDHS to fast-tracking the upgrading of 400, 000 households living in informal settlements, the UISP has experienced challenges in implementation.

²¹ Section 25(1) of the Local Government: Municipal Systems Act 32 of 2000.

²² Section 12 of SPLUMA.

²³ Section 26 (2)(b) of SPLUMA.

²⁴ Section 25(1) of the Local Government: Municipal Systems Act 32 of 2000.

²⁵ Section 12 (1) (h) of SPLUMA.

²⁶ Section 24 (2) (c) of SPLUMA.

²⁷ J van Wyk (see note 7;505).

Abahlali BaseMjondolo, Nokotyana, Beja and Slovo Park.²⁸ It will be shown through the discussion of this jurisprudence that the state has either struggled or failed to implement the UISP.

Particular attention is paid to *Grootboom*²⁹ as the first case that offers a vantage point from which to ground incremental *in situ* upgrading of informal settlements. The aim is to emphasise continuity by suggesting that the policy aimed at informal settlement upgrading provides us with a *Grootboom* compliant program which is necessary to deal with the challenge of informal settlement.³⁰ First, this argues that the Constitutional Court in *Grootboom* has found that the state provision of state-subsidised housing through the NHSS is an inadequate and unreasonable response, to the extent that it does not cater for those living in desperate and crisis circumstances.³¹ This category, it is further argued, includes those living in informal settlements.³² Accordingly, *Grootboom* represents a catalyst for positive social change in a number of ways. Firstly, *Grootboom*:

Did not only end homelessness, but it sparked follow-up legal decisions, government policy reform and political action. These reforms and actions have given the poor [...] a much larger range of tenure rights and opportunities in the urban areas, which may gradually result in the comprehensive provision of public housing.³³

The value of the above observation is that, as a response to the housing policy shortfalls identified in *Grootboom*, national government developed the UISP, as a national policy instrument aimed at preventing evictions through *in situ* upgrading of informal settlements.³⁴

²⁸ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) ("Joe Slovo"); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCRL 31 (CC) ("Nokotyana"); *Abahlali BaseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) ("Abahlali"); *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 ("Beja") and *Mohau Melani and Residents of Slovo Park Informal Settlement v City of Johannesburg and Others* 2016 (5) SA 67(GJ) ("Slovo Park").

²⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ("*Grootboom*").

³⁰ Look at paragraphs 173 to 188 of the *Beja* judgment, where the court supported a view that the scrutiny of the UISP must be in terms of the reasonableness test as was set out in *Grootboom*.

³¹ Look at *Grootboom* at par 42. This case necessitated the government's policy reform for the upgrading of informal settlements. See also Malcolm Langford 'Housing Rights Litigation: *Grootboom* and Beyond' in Malcolm Langford et al (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 187, 202. Also see par 209 of *Joe Slovo*, where Justice Ngcobo makes the connection.

³² *Grootboom* par 44

³³ See the 2005 COHRE report (see note 6; 75).

³⁴ Stuart Wilson 'Without Means, there are no Real Rights' *openDemocracy* 23 September 2013

³⁵ See the 2005 COHRE report (note 6 above). Also see Stuart Wilson 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"' (2011) *Urban Forum*.

Secondly, the jurisprudence trajectory post *Grootboom* opens one possible contour which Dugard and Wilson advise is likely to succeed:

We consider that litigators in future cases would be well advised to colour their claims by references to the concrete entitlements contained in legislation. Claims based on the failure to implement existing policy, or to give effect to policy are, in our view, the most likely of socio-economic rights claims to succeed. Claims, which seek to impose a duty to act fairly in the implementation of socio-economic programmes, and in limiting access to those programmes, also stand good prospects of success.³⁵

This guidance is directed to litigators to search for more concrete rights contained in the legislative and policy framework. Furthermore, it suggests that claims demanding implementation of the policies already in place are likely to succeed, provided there is evidence that the state is failing to give effect to, or is not acting fairly in the implementation of its policies. Given the lack of implement of the UISP, on the part of the state in order to incrementally upgrade informal settlements; this paper takes the guidance from Dugard and Wilson further.³⁶

The scope of this paper is as follows: in chapter 2 a connection is made between the legislative and policy framework as it relates to housing (an aspect of informal settlement upgrading) and planning law in order to broaden our understanding about upgrading and spatial justice. I begin by constructing the constitutional rights-based approach aimed at informal settlement upgrading and argue that it must take stock of all the rights applicable in the Bill of Rights, for example the right to equality, human dignity, privacy, freedom of movement and residence, freedom of trade, environment that is not harmful to one's health and well-being, property, housing and basic services (e.g. water, electricity and sanitation), security of tenure and access to land.³⁷ From this construction of the constitutional rights-based approach, two important propositions are made: first that this constitutional rights-based approach ought to inform our understanding about planning and housing law, to the extent of our discourse around the upgrading of informal settlements. To put it more starkly, this constitutional rights-based approach ought to inform the significance of the Housing Act,

³⁵ See Stuart Wilson & Jackie Dugard 'Constitutional jurisprudence: The first and second waves' in Malcolm Langford, Ben Cousins, Jackie Dugard & Tshepo Madlingozi (eds) *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2013) 35, at 59.

³⁶ Kate and Michael (note 7 above) argue that there has not been a sufficient roll-out of the UISP in order to upgrade informal settlements, but municipalities have relied on the provision of RDP houses as the de facto option of informal settlement formalization. This paper locates the UISP within the legislative and policy scheme aimed at realizing the right to housing.

³⁷ Sections 9, 10, 12, 21, 22, 24, and ss 25 (5) and (6), and sections 26 and 27 of the Constitution.

the UISP and SPLUMA for ensuring spatial justice and upgrading of informal settlements; and second, this chapter argues that this constitutional rights-based approach together with the legislative and policy framework aimed at informal settlement upgrading conforms to transformative constitutionalism and the right to the city as our preferred constitutional model for social justice. Therefore it will be shown as part of the main agenda of this paper that informal settlement upgrading is our constitutional project.

In chapter 3, it will be argued that local government must deliver on the UISP promise of informal settlement upgrading, and that the national and the provincial spheres of government must monitor and support local government, subject to the duty to co-operate. It will also be argued that these principles will help accelerate the implementation of the UISP.

In chapter 4 it will be shown that in the literature a number of critical features at the centre of informal settlement upgrading are captured, namely: community participation, the principle that relocation or eviction should be considered as the last resort, the sensitivity for context-specific socio-economic circumstances of each informal settlement community and the rights-based approach to upgrading. However, the literature does not provided a critical analysis of the state's approach to relocation and eviction, in particular, the role of the PIE Act³⁸ in informal settlement upgrading. Furthermore, the literature does not highlight how informal settlement communities may force municipalities to take reasonable steps to upgrade them. Therefore an attempt is made to analyse *Joe Slovo*, *Abahlali BaseMjondolo*, *Nokotyana*, *Beja* and *Slovo Park* in order to extrapolate a number of principles applicable in informal settlement upgrading cases in order to assist municipalities in the implementation of the UISP. By paying attention to these principles, it will be argued that the municipalities will be able to fulfil the rights stipulated in the Bill of rights.

In chapter 5, I make a case for the upgrading of informal settlements by taking stock of the value of the legislative and policy framework, the importance of the role of the state and the implication of the jurisprudence. I argue that the implementation of the UISP must take account of *in situ* upgrading and relocation only under exceptional circumstances. The implementation of the UISP must further take account of the rights to equality, dignity of poor communities, rights of access to adequate housing, the binding nature of the UISP, the importance of meaningful engagement, the need to incrementally secure tenure and the need to show urgency in the implementation of the UISP.

³⁸ Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act").

CHAPTER 2

THE LEGISLATIVE, POLICY AND CONCEPTUAL FRAMEWORK FOR INFORMAL SETTLEMENT UPGRADING

2.1 Introduction

For the past twenty years in our conversations about housing, we have ignored the role of the planning law instruments. This chapter argues that by re-imagining the constitutional rights-based approach, we start to amass a rich body of knowledge that assists in an integrated approach that sees informal settlement upgrading and other planning law instruments as two sides of the same coin.³⁹

First, what do we mean by housing law in relation to informal settlement upgrading? The Housing Act regulates housing law in South Africa. It sets out the role of all the spheres of government in respect to housing. In addition, it promotes the role of the state as a facilitator of housing development and ensures that housing activity occurs within the constitutional framework of co-operative government.⁴⁰ A number of factors inform what we mean by housing law, for instance we understand housing to mean ‘a basic human need, a product and process, a product of human endeavour and enterprise, a vital part of integrated developmental planning, a key sector of the national economy and as vital to the socio-economic well-being of the nation’.⁴¹ Under the Housing Act, the Minister of Human Settlements has a duty to publish a National Housing Code,⁴² a comprehensive housing policy that applies to national, provincial and local government.⁴³ The Upgrading of Informal Settlement Program (UISP) is a policy instrument established under the Housing Code with the aim of ensuring *in situ* upgrading of informal settlements and relocation thereof under exceptional circumstances.⁴⁴

Secondly, what do we mean by planning law as it relates to informal settlement upgrading? This question does not in any way suggest a critical examination of planning law or its role in the upgrading of informal settlements. That is not the goal. The purpose is a modest one, it is

³⁹ J van Wyk (supra 7: 505), the argument made here is that by employing these rights to do some concrete work in the implementation of informal settlement upgrading and planning law, we actually begin to connect these dots in law. Also see the UISP at 3.10, where the town establishment process is discussed.

⁴⁰ *Grootboom* at para 47.

⁴¹ Preamble of the Housing Act.

⁴² Section 4 (1) of the Housing Act.

⁴³ Section 4 (6) of the Housing Act.

⁴⁴ The Programme is instituted in terms of section 3(4) (g) of the Housing Act, and is referred to as the National Housing Programme: Upgrading of Informal Settlements (UISP).

to suggest that within the premise of making a case for informal settlement upgrading, both substantively and conceptually, housing and planning law must be had as one conversation. It has already been accepted that the apartheid spatial patterns have resulted into spatial injustice, therefore seeing planning and housing law as one discourse may lead to an integrated, coherent and programmatic response to the challenges of informal settlements

A number of planning instruments exist to accomplish the different aspects of land use, planning and development. These are based on the principle of zoning: 'the allocation of different uses to different areas'.⁴⁵ They comprise, amongst others, Integrated Development Plans ("the IDPs"),⁴⁶ the Spatial Development Framework ("the SDF")⁴⁷ and the Land Use Management Schemes ("the LUMS").⁴⁸ Firstly, an IDP is described as an inclusive, integrated and strategic plan for the development by the municipality. Provisions of budgets are based on this plan. Furthermore, this plan must be in line with the national and provincial plans and policies. The plan is binding in terms of legislation.⁴⁹ Secondly, the SDF is prepared by national, provincial and municipalities in order to detail a long-term spatial development vision that, amongst other things, must include previously disadvantaged areas, informal settlements and even slums.⁵⁰ Lastly, LUMS must be adopted after public consultation by the municipality, and it must "include provisions that permit the incremental introduction of land use management and regulation in areas under...informal settlements, slums..."⁵¹ Strategically employed, these instruments may prove vital in carving a strong case for informal settlement upgrading.

How is the connection between housing and planning law then crafted? What is clear is that at the heart of the informal settlements issue, is that while most of them provide access to modest shelter, access to land, tenure security and economic opportunities. They are also often without basic services, like water, electricity and sanitation and are not included in planning measures. Therefore, because informal settlement comprises a multitude of inter-related socio-economic factors, a number of constitutional rights constitute our point of departure. In other words, these constitutional rights provide a lens within which we must assess the existing legislative and policy framework aimed at addressing the challenge of

⁴⁵ J van Wyk (note 7 above).

⁴⁶ Section 25 (1) of Local Government: Municipal Systems Act 32 of 2000.

⁴⁷ Section 12 of SPLUMA.

⁴⁸ Section 26(2) (b) of SPLUMA.

⁴⁹ Section 25(1) of the Local Government: Municipal Systems Act 32 of 2000.

⁵⁰ Section 12 (1) (h) of SPLUMA.

⁵¹ Section 24 (2) (c) of SPLUMA.

informal settlements, and these rights include: the right to equality,⁵² human dignity,⁵³ freedom of movement and residence,⁵⁴ the right to an environment that is not harmful to their health or wellbeing,⁵⁵ the right of access to adequate housing, tied to the rights to land and tenure security.⁵⁶ In addition, the Constitution further guarantees the rights to water and indirectly secures the rights to electricity and basic sanitation.⁵⁷

Two important propositions are made in this chapter: first that a constitutional rights-based approach ought to inform our understanding about planning and housing law, to the extent of our discourse around the upgrading of informal settlements. To put it more starkly, this constitutional rights-based approach ought to inform the significance of the Housing Act, the UISP and SPLUMA as measures aimed at ensuring spatial justice and *in situ* upgrading of informal settlements; and lastly, this chapter argues that this constitutional rights-based approach together with the legislative and policy framework aimed at informal settlement upgrading conforms to transformative constitutionalism and the right to the city as our preferred constitutional model for social justice, thus making informal settlement upgrading our constitutional project.

2.2 The legislative and policy framework for Informal Settlement Upgrading

[a] *The Constitution of the Republic of South Africa*

Firstly, as the supreme law of South Africa, the Constitution captures our imagination for an informal settlement free society, because it is based on social justice, fundamental human rights and improved quality of life of all citizens.⁵⁸ Even with its restrictive language that is embedded on the rights-based approach, with some creativity, it may begin provide solutions to the perpetual challenge of informal settlements and associated issues of spatial injustice, landlessness, and lack of access to housing and tenure security. As already been identified in this paper, a number of basic rights, collaboratively deployed may provide some capacity in doing this “concrete legal work”,⁵⁹ since the rights-based approach is our only hope for

⁵² Section 9 of the Constitution.

⁵³ Section 10 of the Constitution.

⁵⁴ Section 21 of the Constitution.

⁵⁵ Section 24 of the Constitution.

⁵⁶ Sections 25 (5) and (6) of the Constitution.

⁵⁷ Section 9(1) (a) (iii) of the Housing Act.

⁵⁸ The Preamble of the Constitution.

⁵⁹ This lexicon was first used by FL Michelman ‘ Liberal Constitutionalism. Property Rights, and the Assault on Property’ in Geo Quinot and Sandra Liebenberg (eds) *Law and Poverty ‘Perspectives from South Africa and*

upgrading informal settlements. In essence, the Constitution must be understood as outlining the structural framework from which both the law and policymakers must kick-start their constitutional task.⁶⁰

Secondly, there may very well be some overlap in the scope of the abovementioned constitutional rights directed at conducting this concrete legal work in the upgrading of informal settlements. However, the rights-based approach suggested here may not begin its work, unless the implementation thereof is reflected through the legislative and policy efforts.⁶¹ In order to understand the work of these rights in the upgrading of informal settlements, it may benefit us to have a look at planning and housing legislation and the related policy instruments. This legislative and policy assessment is a closed one, and it includes: the Housing Act, the UISP and SPLUMA as the body of housing and planning law that is aimed at upgrading of informal settlements. Below is a discussion of how the Housing Act, the UISP and SPLUMA, informed by the constitutional rights-based approach may actually conduct this concrete legal work.

[b]*The Housing Act*

The Housing Act gives effect to the right to access to adequate housing as provided for in the Constitution and is the main Act governing housing law.⁶² Constructed in exactly the same language as the White Paper,⁶³ the Housing Act rationalised a fragmented system regulating public and private subsidies inherited by the first democratic government in 1994 and clearly delineated the responsibilities and functions of each sphere of government with regard to the process of housing development and establishing a single housing policy targeting low-cost housing for the poor.⁶⁴ It replaces the previous racially driven and fragmented housing arrangements legislation.⁶⁵ It defines housing development⁶⁶ as:

[T]he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities

Beyond (2012) 268 where he defined special, concrete legal work as a 'a directly traceable difference in the disposition of some identifiable subsets of cases at law...' This paper borrows this lexicon to explain the work of the rights approach in the upgrading of informal settlements.

⁶⁰ Section 2 of the Constitution.

⁶¹ *Grootboom* at para 39 -44.

⁶² Preamble of the Housing Act.

⁶³ South Africa. National Department of Human Settlement. *White Paper: A New Housing and Strategy for South Africa* (1994).

⁶⁴ *Grootboom* para 47.

⁶⁵ *ibid.*

⁶⁶ Section 1 of the Housing Act.

in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to-

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

It sets out the applicable general principles to housing development that must be promoted by all spheres of government. These are as follows:⁶⁷

- The poor must be prioritised;
- The need to consult with affected individuals and communities;
- Provide as wide a choice of housing and tenure options as reasonably possible;
- Ensure a housing development that 'is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; and is administered in a transparent, accountable and equitable manner; and upholds the practice of good governance';⁶⁸
- 'Encourage and support individuals, communities, including, but not limited to, co-operatives, associations and other bodies which are community based, in their efforts to fulfil their own housing needs, by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community';
- Conditions to ensure the prevention of slums and slum conditions; process of racial, social, economic and physical integration in urban and rural areas; effective functioning of, and equitable access to the market; measures to prevent unfair discrimination on gender; higher density of housing development to ensure economical utilisation of the land and services; housing needs for the disabled; community recreational areas; the expression of cultural identity and diversity;
- Taking cognisance of the impact of housing development on the environment;
- Respect for the Bill of rights, the principle of co-operative governance and intergovernmental relations and compliance with Constitution;
- Strive for consensus amongst all spheres of government on issues of housing development;
- Facilitate participation of all stakeholders.

⁶⁷ Part 1 of the Housing Act.

⁶⁸ Section 9 (1)(a)(i) of the Housing Act.

The Housing Act must be understood as promoting a rights-based institutional arrangement which is aimed at facilitating access to adequate housing, security of tenure, access to land, whilst prioritising the poor. The Housing Act, through the UISP is aimed at improving the quality of life and ensuring the socio-economic development of informal settlements dwellers. I take this issue further below.

[c] Upgrading of Informal Settlement Program

The first question is how does the Housing Act ensure that the housing rights of those who live in informal settlements are progressively realised? The answer to this question is found in the policy prescript of the UISP, a policy instrument aimed at ensuring *in situ* upgrading of informal settlement or relocation, only under exceptional circumstances.⁶⁹ It is aimed at ensuring minimal disruptions to community networks and social structure and upgrading that is subject to extensive community consultation in order to reach appropriate development solutions.⁷⁰ It places local government at the forefront of implementation. It makes provision for funding of suitable land, land rehabilitation and security of tenure, by placing tenure goals within deliberations between local authorities and residents.⁷¹ Essentially, what the UISP provides to informal settlements residents is “access to land, basic municipal engineering services and social amenities”. However, “to qualify for housing assistance benefits, such as registered ownership” beneficiaries need to comply with the requirements of the National Housing Subsidy Scheme (NHSS).⁷²

The programme also makes provision for a phase process for the upgrading of informal settlements. It seeks to provide phased upgrading. It begins with basic services and possibly ending with the provision of a top structure or housing.⁷³ This phased approach is as follows:⁷⁴

- i. Phase 1: this is the application stage. At this stage the municipality applies to provincial government for funding to upgrade the informal settlement. The application should include an Interim Business Plan which must “include relevant details of the municipality’s IDP and Housing Development Plan as well as pre-feasibility details of the particular upgrading project”.

⁶⁹ UISP at para 2.3

⁷⁰ UISP at para 3.3

⁷¹ UISP at para 2.2

⁷² UISP at para 4.4

⁷³ J van Wyk (see note 7; 479-480).

⁷⁴ Paragraph 4 of the UISP.

- ii. Phase 2: this is the project initiation. During this phase, municipalities receive funding from provincial government to “undertake the following activities: The acquisition of land through negotiation or expropriation; The undertaking of a clear socio-economic and demographic profile of the settlement; The installation of interim services to provide basic water and sanitation services to households in the settlement on an interim basis pending the formalisation of the settlement; and conducting pre-planning studies to determine detailed geotechnical conditions and undertaking an environmental impact assessment to support planning processes”.
- iii. Phase 3: this is the project implementation stage. At this stage, the municipality submits a Final Business Plan. The provincial government (through the Member of the Executive Council (MEC) for Housing) “must consider the Final Business Plan and, upon approval, the municipality will receive funding to undertake the following activities: the establishment of project management capacity; the establishment of Housing Support Services; the initiation of planning processes; the formalisation of land occupation rights and the resolution of disputes; relocation assistance; land rehabilitation; the installation of permanent municipal engineering infrastructure; and the construction of social amenities, economic and community facilities”.
- iv. Phase 4: this is the housing consolidation stage. This is the final phase of the process. At this stage, “township establishment finalisation, ownership registration (where appropriate) and house construction will take place”. Any outstanding social amenities will also be constructed during this phase.

The UISP ensures: security of tenure, health and community empowerment.⁷⁵ As the last step to conducting the concrete legal work of realising the constitutional rights, the implementation of the UISP must be seen as a tangible and substantive output that the Constitution envisaged. In this regard, the UISP is exactly what Dugard and Wilson had in mind in their search for substantive content to realise the right to housing. However, for this concrete legal work to be completed, law and policy makers must accommodate spatial recognition and integration of informal settlements into the urban core. Planning law is at the centre of exactly that goal. Below, I identify instruments of planning law outlined in SPLUMA that must begin to recognise informal settlements upgrading.

⁷⁵ UISP at paragraph 2.1

[d] *SPLUMA: Locating Informal Settlement Upgrading within Planning Law*

Given the state's insistence on mega housing projects in the outskirts of the urban core and the spatial exclusion of the poor, SPLUMA must be understood as an attempt at ensuring spatial integration of informal settlements into the urban fabric and to make provision for a just planning system for South Africa.⁷⁶ This is evident in SPLUMA, because it recognises upgrading of informal settlements in a number of planning instruments. This clearly shows that in situ upgrading of informal settlements is traceable in planning instruments.

First, SPLUMA states that 'incremental upgrading of informal areas' may include any settlement and that it "means the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation".⁷⁷ In essence SPLUMA calls for the spatial recognition of informal settlements through planning instruments, like the IDPs, SDFs and LUMSs.

Secondly, SPLUMA outlines development principles,⁷⁸ the content and purpose of the SDFs, and the LUMSs.⁷⁹ The development principles are:

- i. Spatial justice: which relates to ensuring access to, and flexible management of land by disadvantaged communities and informal settlements; it accommodates security of tenure and incremental upgrading of informal settlements and emphasises the inclusion of informal settlements;⁸⁰
- ii. Spatial sustainability:⁸¹ This includes consistently upholding land use measures in accordance with the environmental instruments, promoting land development that is spatially compact, resource frugal and within the fiscal institutional and administrative means of the competent authority and promoting land development in locations that are sustainable and limit urban sprawl. It also calls for spatial planning and land use management that may result in viable communities;
- iii. Efficiency: the minimisation of negative socio-economic impacts to communities;⁸²
- iv. Spatial resilience: spatial planning that sustains livelihoods in communities;⁸³

⁷⁶ SPLUMA was introduced to give effect to section 155(7) and 44(2) of the Constitution.

⁷⁷ Section 1 of SPLUMA.

⁷⁸ Section 7 of SPLUMA.

⁷⁹ Chapter 5 of SPLUMA.

⁸⁰ Section 7 (a) (i) to (vi) of SPLUMA.

⁸¹ Section 7(b)(vii) of SPLUMA.

⁸² Section 7 (c) of SPLUMA.

⁸³ Section 7 (d) of SPLUMA.

- v. Good administration: relates to principles of good governance, for instance transparency and public participation.⁸⁴

Thirdly, SPLUMA makes provision for national, provincial and municipal Spatial Development Frameworks (SDFs). These SDFs must amongst other things, reflect long-term and coherent spatial vision and plans for spatial planning and land use management in each sphere. The SDF must,

Include previously disadvantaged areas, informal settlements, slums and it must address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere.⁸⁵

This will serve to address and mitigate the ‘historical spatial imbalances in the patterns of growth and development’.⁸⁶ It must indicate the strategic positions and locations of infrastructure investment.⁸⁷ It must also allow spaces for citizen engagement. It is important that SDFs by different spheres of government are ‘co-ordinated, aligned and harmonised’.⁸⁸ Municipal SDFs as a part of IDPs must ‘co-ordinate, align and express development plans and policies emanating from various spheres of government as they apply to a municipal area’.⁸⁹ As inclusive instruments of planning law, the SDF and IDP have crucial roles to play in the implementation of housing policy and the UISP.⁹⁰ Therefore they must all be seen as necessary tools for ensuring upgrading that is, access to adequate housing, land, basic services and security of tenure for informal settlement residents.

Fourthly, SPLUMA makes provision for the Land Use Management Scheme (LUMS). LUMS is part of planning law that deals with amendments or reviews of land use by the authority that drafted them, another authority or by an owner as set out in the original plan.⁹¹ These reviews and amendments may also take place through a court order.⁹² A comment by those affected by changes to the land use is important.⁹³ LUMS must ‘include provisions that permit the, slums and areas not previously subject to a land use scheme’. It must also ‘permit provision of incremental introduction of land use management and regulation in areas under

⁸⁴ Section 7(e) (iv) of SPLUMA.

⁸⁵ Section 12 (1)(h) of SPLUMA.

⁸⁶ J van Wyk (supra) at 275-276.

⁸⁷ Section 12(1) (k) of SPLUMA.

⁸⁸ *ibid*, see section 2(a) of SPLUMA.

⁸⁹ *ibid*, also see section 20 (2) of SPLUMA.

⁹⁰ Section 21 (f), (i) and (k) of SPLUMA.

⁹¹ J van Wyk (supra) at 326.

⁹² *ibid*.

⁹³ *ibid* at 327.

traditional leadership, rural areas, informal settlement, slums and areas not subject to land use scheme'.⁹⁴ It must include provision that promotes affordable housing.⁹⁵ It must be aligned and coordinated to a municipal SDF and IDP in order to ensure amongst other things, social inclusion.⁹⁶ Municipalities have discretion to amend LUMS subject to public interest, advancement of previously disadvantaged communities and in order to further its vision and development goals.⁹⁷ Therefore, LUMS must be seen as necessary instruments for the implementation of the housing policy and the UISP in order to upgrade and recognise informal settlements in the municipal development plans.

Ultimately, housing and planning law instruments and the constitutional rights-based approach aimed at informal settlement upgrading must be viewed in light of the constitutional vision for transformation and social justice. Below, I ground this concrete legal work on the conceptual framework that has long made waves in the academic circles; the right to the city and transformative constitutionalism.

2.3 The Conceptual Framework

The conceptual framework driven in this section is that the above constitutional rights (the rights-based approach) and the legislative and policy framework aimed at conducting concrete legal work on *in situ* upgrading of informal settlements conforms to “transformative constitutionalism and the right to the city” as our constitutional model for social justice. Simply put, the argument is that as part of making a case for informal settlement upgrading, at least conceptually, it is accepted that the UISP conforms to our constitutional transformative mission. I do this by extrapolating and linking a number of constituent elements of the right to the city to those of transformative constitutionalism. It is from the politico-ethical theory of this conceptual framework that the upgrading of informal settlements is linked to our constitutional social justice project. At this juncture I propose a modest approach that says it is possible to view the upgrading of informal settlements using the right to the city approach (inclusive of the notion of transformative constitutionalism).

⁹⁴ Section 24(2)(c) of SPLUMA.

⁹⁵ Section 24 (1) (d) of SPLUMA.

⁹⁶ Section 25(1)(b) of SPLUMA.

⁹⁷ Section 26 (5) of SPLUMA

[a] The right to the city and its constituent elements

The 'right to the city' as a concept was first articulated in the works of French philosopher, Henri Lefebvre in 1968 informed by the left-leaning, Marxist foundations.⁹⁸ This concept has resurfaced and has regained relevance as a reaction to fears of growing global neo-liberal governance that threatens to disenfranchise the majority of people.⁹⁹ As a theoretical conception, the right to the city "has been adapted to the urban context," as "a call for radical restructuring of social, political and economic relations in the city" through highlighting the need for urban inhabitants to have a say in the production of urban space.¹⁰⁰ In capturing Lefebvre's essence of the right for the urban inhabitants, Mark Purcell noted, "the right to the city is like the cry and demand... a transferred and renewed right to urban life."¹⁰¹

Three core dimensional elements inform the design and content of our understanding of the right to the city in developmental studies literature:¹⁰² the first is the *right to participate* (which envisages that the urban citizens should have a say in decision-making processes that concern the production of urban space). Another element of the right to the city is the *right to appropriate* (which involves a right to physically occupy and use the urban space, including the already established urban space and also to create new spaces). Thirdly, are *claims relating to habitation* (these are basically rights to inhabit the city and use its spaces). The right transcends individual liberty to accessing the urban resources, by accepting a collective approach.¹⁰³ From this, it rejects the Westphalian frame which confines the right to citizens, but rather extends it to all regardless of nationality and legal status. In this sense "it extends to all who seek inclusion, habitation, appropriation or participation and, as such, is claimed also by none working class malcontents and marginalized groups or anyone who participates in the struggle over the city's form and meaning".¹⁰⁴ Primarily, "it is the law, practices and social structure that excludes people from any of its constituent elements that violate the right to the city."¹⁰⁵ Understood in this sense, the right connotes a form of substantive equality.¹⁰⁶ With this background in mind, I suggest that the right to the city may be aligned with the

⁹⁸ T Coggin and M Pieterse (see note 10 above). Also see M Pieterse (see note 10; 257). Also see B Ramji (see note 10; 64).

⁹⁹ Mark Purcell (note 2 above) 99–101.

¹⁰⁰ *ibid* at 102.

¹⁰¹ *ibid*.

¹⁰² T Coggin and M Pieterse (note 10 above) 260 and Pieterse (note 10 above) 153. Also see M Purcell (see note 2; 102–103).

¹⁰³ D Harvey 'The Right to the City' (2008) 53 *New Left Review* 23, 23.

¹⁰⁴ T. Coggin and M Pieterse (see note 10; 259–260) .

¹⁰⁵ *ibid* 260.

¹⁰⁶ *ibid* 260. Also see C. Albertyn (note above) 253–277 and C Albertyn & B Goldblatt (see note 8; 248–276).

South African principle of transformative constitutionalism, because if one were to pitch transformative constitutionalism at a constitutional textual level the results would be that our constitutional transformative mission may begin to testify to the constitutional vindication of the right to the city. This is important, because by placing the right to the city within the constitutional normative objective we enable ourselves to engage with what we mean about socio-economic transformation in the context of informal settlement upgrading.

[b]The right to the city and transformative constitutionalism

As noted above, the right to the city is not an encapsulation of unique claims. In its composite form, it packages civil, political and socio-economic rights that are already constitutionalised in South Africa. For instance, a body of literature exists that bears testimony to fact that in our constitutional discourse we preferred transformative constitutionalism as our approach to “reading and understanding the Constitution.”¹⁰⁷ In a constitutional dispensation where rights are justiciable, courts play an important role in shaping our thinking about rights in a manner which is often described as ‘transformative’.¹⁰⁸ By transformative constitutionalism we mean: “the transformation of political and social institutions in a democratic and egalitarian manner through a constitutional right-based approach that is undertaken through enactment, interpretation and enforcement”.¹⁰⁹ The aim is the reconstruction of society, and eradication of systematic inequalities reflected through race, gender, class and other forms by ensuring distributive justice. It is addressing the apartheid landscape in all its forms.¹¹⁰

In bringing textual lucidity to this abstract concept, Pieterse again packages this transformative mission by pulling out a number of sections from the Constitution’s Bill of Rights. He directs us to: “the founding values;¹¹¹ the duty of the state to respect, promote, protect and fulfil the rights in the Bill of Rights;¹¹² the extension of applicability of the Bill of Rights to private relations;¹¹³ the substantive conception of the right to equality, including the

¹⁰⁷ S Sibanda (see note 8; 44).

¹⁰⁸ M Pieterse (see note 39 ;162-163).

¹⁰⁹ K Klare (see note 8 ; 249)

¹¹⁰ K Klare (see note 8 ; 249); M Pieterse (see note 8 above) (2005) 20 *SAPL* 155; P Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch LR* 351; T Roux ‘Transformative Constitutionalism and the best interpretation of the Constitution: Distinction without a deference’ (2009) 20 *Stellenbosch LR* 258 259.

¹¹¹ Sections 1 to 6 in the Constitution.

¹¹² S 7(2) of the Constitution.

¹¹³ S 8(2) of the Constitution.

prohibition of private discrimination;¹¹⁴ the inclusion of socio-economic rights;¹¹⁵ and the limitation clause.”¹¹⁶ It is from this framework that the next big leap this section aims to make is possible, that is, to link the right to the city to transformative constitutionalism. However, this is no easy task as two Catch-22s stand at the entrance gate. Firstly, it is not easy to reduce the right to the city to a legal notion of a right.¹¹⁷ Secondly, its conglomerate nature imposes challenging new ways to our understanding of rights without thinking about them in silos. However, I share the sentiment that the existence and increased recognition by the World Charter¹¹⁸ at international level and its vindication at the domestic level may help construct a legal concept of this right depending, of course, on how each constituent element is domestically understood.¹¹⁹

Coggin and Pieterse have made strides in capitalising on this optimism in their seminal work linking the right to the city to the constitutional normative objectives. First, they have argued that the “broader vision of citizenship, ideals of inclusion, participation, tolerance, respect for difference and belonging” can all be read into the 1996 Constitution by fitting this dimension within the preamble and founding provision, in particular, section 1 of the Constitution.¹²⁰ Of course this view is not impossible, given that the Constitutional Court has extended constitutional protection to non-citizens.¹²¹ They further argue that the Constitutional Court has adopted an interdependent and indivisible approach to its interpretation of human rights.¹²² Thirdly, they point us to sections: 9 (the right to equality), 10 and 11 (the rights to dignity and life respectively), 12 (the freedom and security of the person), 16 (freedom of expression), 17 (the right to assemble, demonstrate, picket and petition), 18 (freedom of association), 21 and 22 (freedom of movement, trade, occupation and profession). Together, these rights conform to three constituent elements of the right to the city, mainly to guaranteeing the quality of city life, access to city space and safety and securing decent

¹¹⁴ S 9 (2) of the Constitution.

¹¹⁵ Sections 25, 26 and 27 of the Constitution.

¹¹⁶ Section 36 of the Constitution.

¹¹⁷ See for instance, Lloyd’s *Introduction to Jurisprudence* 8ed (2008) 569-574: where rights are said to be strictly corrective to duties. For instance where X has a claim right is to say that Y owes a certain duty to X.

¹¹⁸ ‘World Charter on the Right to the City’ (2005) available at <http://www.globalgovernancewatch.org/resources/world-charter-on-the-right-to-the-city>.

¹¹⁹ Thomas Coggin and Marius Pieterse (see note 10; 261-262).

¹²⁰ *ibid* 262.

¹²¹ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) where the Constitutional Court extended social assistance benefits to permanent residents in South Africa.

¹²² Coggin and Pieterse (see note 10;262) where they cite *Grootboom* para 23-24 and 83. In addition they make an example of ss7, 8, 36, 38 and 172 as providing a composite that is necessary for judicial adjudicative process.

existence and participating in the urban space.¹²³ Fourthly, they point us to section 24 (the right to an environment that is not harmful to health and wellbeing in order to secure, amongst other things, “ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development”) and they note on the one hand that this right speaks to city life and issues of heritage that are integral for the city. Sustainable development on the other hand, speaks to struggles over the nature and form of future urban development.¹²⁴ Fifthly, they argue that section 26, especially, subsection 26(3) (the right that prevents arbitrary evictions) provides a “powerful legal basis for claims of habitation” and it also makes for a ‘new normality’ that neutralises the private property syllogism for summary eviction.¹²⁵ Sixthly, they argue that sections 27 and 29 (the rights to health care, food, water, social security and education, respectively) also form the constituent elements of the right to the city. Lastly, they note that even though the rights to sanitation, energy and transport are not expressly provided for in the Constitution, sections 152 and 195 dealing with the development objectives and people-centred local government caters for these rights.¹²⁶ From this conceptual integration of the right to the city into the South African legal order, they conclude that the Constitution recognises and protects many of the constituent elements of the right to the city, provided a purposive and holistic reading is employed.

At this level of conceptualisation, it is readily noticeable that there is a practical element to the transformative mission of the Constitution and the politico-economic focus of the right to the city. I support this articulation by Pieterse and Coggin to the extent that it confirms this nexus between the transformative mission of the Constitution and the right to the city. For instance, whilst it may be argued that transformative constitutionalism may be seen as a value, it is also possible as Pieterse has shown, to reduce this transformative mission to identifiable rights in the Constitution, particularly those rights that are able to do the concrete legal work in the office of the right to the city. A wholesale reading of the Constitution reveals the possibility of the constituent elements of the right to the city that may help suture up the nexus to the notion of transformative constitutionalism. Therefore what is clear is that the right to the city in so far as it can be associated to the constitutional transformative

¹²³ *ibid* 262.

¹²⁴ *ibid* 263. Also see AJ Van der Walt *Property and Constitution* (2012) 137. He also incorporates this notion to his idea of constitutional property.

¹²⁵ S Wilson “Breaking the tie: Evictions from private land, homelessness and a new normality” (2009) 126(2) *SALJ* 270, 270.

¹²⁶ *ibid* at 263-264. Note that in the next section I link these rights to the objectives of the UISP where they are expressly secured, rather than to simply rely on the Constitution.

mission, provides armoury to community struggles for informal settlement upgrading and spatial integration, thus placing the ball directly in the court of local government.

2.4 Conclusion

Where does all of this leave us? It is now possible to say informal settlement upgrading is part of the constitutional transformative mission. This argument was made through three important constructs. Firstly, it was through an articulation of the constitutional rights-based approach that embraces informal settlement upgrading. Secondly, it was argued that this constitutional rights-based approach ought to inform the significance of the Housing Act, the UISP and SPLUMA in ensuring spatial justice and in situ upgrading of informal settlements. As part of making a case for informal settlement upgrading, it was argued that planning law instruments in the forms of the IDP, SDF and LUMS are at the heart of what I mean by an integrated, coherent and programmatic response to spatial injustice and the in situ upgrading of informal settlements. Lastly, this chapter argued that the constitutional rights-based approach together with the legislative and policy framework aimed at informal settlement upgrading conforms to “transformative constitutionalism and the right to the city” as our preferred constitutional model for social justice. It follows that informal settlement upgrading is our constitutional project. It is this rights-based approach that is carried forward and located within the democratic developmental agenda of local government, the oversight role by national and provincial spheres of government and the courts mediation of informal settlement upgrading cases. However, this is not to suggest that this legislative and policy framework has done the above mentioned concrete legal work or that the subsequent conceptual framework has been reflected through the state practice. In fact, the discussion of the jurisprudence below shows that government has either struggled or failed to implement the UISP.

CHAPTER 3

LOCAL GOVERNMENT RESPONSIBILITY IN ENSURING INFORMAL SETTLEMENT UPGRADING

Having considered, the constitutional rights-based approach, and the legislative and policy framework in the context of informal settlement upgrading and grounding this work on transformative constitutionalism and the right to the city, the next question is: how should the state then deliver on the UISP promise of informal settlement upgrading? Who exactly, from the different spheres of government, should drive upgrading? A particular constitutional framework is suggested in this chapter which suggests that what our Constitution envisages is a developmental local government. I argue that municipalities are at the forefront of implementation of the UISP, subject to the oversight role of the national and provincial spheres in the form of supporting and monitoring and the duty on all spheres to co-operate. I argue that all these principles may help accelerate the implementation of the upgrading of informal settlements through the UISP.

3.1 Developmental local government and informal settlement upgrading

To what extent do the objectives, powers and areas of competence of local government support the idea of ‘developmental local government’? In terms of the constitutional framework, local government in South Africa is a developmental and democratic institution.¹²⁷ In *Joseph*,¹²⁸ the Constitutional Court said that “the Constitution specifically entrenches the developmental duties of municipalities”. Firstly, local government is a deliberate legislative assembly with legislative and executive powers set out in the Constitution.¹²⁹ These are called original constitutional powers, and they can be exercised by a municipality without first having to be authorised to do so by national or provincial legislation.¹³⁰ Secondly, section 152 of the Constitution provides that the objects of local government are to provide democratic and accountable government for local communities; and to ensure the provision of services to communities in a sustainable manner. In addition, section 152 also states that the objects of local government are to promote social and

¹²⁷ Solange Rosa ‘Transformative Constitutionalism in a Democratic Developmental State’ in Geo Quinot and Sandra Liebenberg (eds) *Law and Poverty ‘Perspectives from South Africa and Beyond’* (2012) 100, 108-112.

¹²⁸ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (“*Joseph*”) at para 36.

¹²⁹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) at para 26 (referred to as *Fedsure*); also see *Democratic Alliance v eThekweni Municipality* 2012 (2) SA 151 (SCA) paras 18-21.

¹³⁰ *City of Cape Town v Robertson* 2005 (2) SA 323 (CC).

economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government. A municipality must also strive, within its financial and administrative capacity, to achieve these objectives.¹³¹ Thirdly, section 153 of the Constitution goes on to provide that a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community. In addition, section 153 also provides that a municipality must participate in national and provincial development programmes. As De Visser¹³² argues: these objects comprise four elements: democracy; sustainable service delivery and improving the standard of living; a safe and healthy environment and cooperative government.

Furthermore, the Local Government Municipal Systems Act 32 of 2000 (LGMS) also captures this notion of developmental government in sections 1, 4 and 23. Three elements of development can be extrapolated from these sections. First is material element or material needs; improving standard of living and reducing absolute poverty; improving the material well-being of people which requires empowerment, that is, for people to make choices and determine outcomes independently rather than to 'develop' people.¹³³ Second is choice enlargement, which relates to the right to dignity and a right every person has to make choices about their wellbeing. Third is equity (comprising inter-social equity); development must benefit everyone, requiring redistributive equality; and intergenerational equity-development of one generation need not deny development of the next. The latter includes the notion of sustainable development.¹³⁴

According to the White Paper on Local Government¹³⁵ a developmental local government is characterised by four critical development imperatives.¹³⁶ Firstly, maximisation of social and economic growth: which includes the provision of basic services in order to ensure minimum

¹³¹ See *Grootboom* para 46, where the court said that the reasonableness of the measures employed by the state in ensuring the realisation of the socio-economic rights may also depend on the resources available. Also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) ("*Blue Moonlight*") para 74 where the Court held that as soon as the state accept its obligation to realise the right to housing, it must adequately budget for it.

¹³² J De Visser *Developmental local government: a case study of South Africa* (2005) 71.

¹³³ *ibid* at 11.

¹³⁴ *ibid* at 13.

¹³⁵ White Paper on Local Government (1998) at 38-42.

¹³⁶ Explained by Koma, SB "The Evolution of Developmental Local Government in South Africa: Issues, Trends and Options" (2012) 9 (1) *Journal of US-China Public Administration* 53-67, 55-6.

standard of living [...]”. Secondly, there must be cooperative governance.¹³⁷ Thirdly, there must be participation of the local communities in matters of local government.¹³⁸ Lastly, there must be good political leadership. All these facets may help assuage challenges of local government.

Understood in this manner, developmental local government may be connected to key policy prescripts of the UISP in two ways. First, the UISP provision aimed at *in situ* upgrading that is conducted in partnership with the affected communities, subject to meaningful engagement. It also calls for an incremental approach to ensuring tenure security, access to basic services and a safe and healthy environment. Lastly, socio-economic development is located at the heart of the very existence of local government which is good for accountability, transparency and local democracy.¹³⁹

Locating the role of municipalities in informal settlement upgrading is important for a number of reasons. In *Grootboom*, the Constitutional Court stated that a comprehensive housing program must determine the obligations of all three spheres of government.¹⁴⁰ However, even though it is desirable that the obligations of all spheres of government be determined, the court in *Blue Moonlight* held that, that will depend on the circumstances of each case:

In view of the intertwined responsibilities of the national, provincial and local spheres of government with regard to housing, it would generally be preferable for all of them to be involved in complex legal proceedings regarding eviction and access to adequate housing. Indeed, joinder might often be essential and a failure to join fatal. Whether it is necessary to join a sphere in legal proceedings will however depend on the circumstances and nature of the dispute in every specific case.¹⁴¹

This means that, joinder of municipalities on housing and eviction cases will depend on whether they have “a direct and substantial interest in any order the court might make; whether the organ of state is responsible for the conduct that is being constitutionally

¹³⁷ Section s41(i)(h) of Constitution, and the Intergovernmental Framework Act 13 of 2005

¹³⁸ S 152 (i)(e) of the Constitution, and the Municipal Structures Act of 1998 institutionalises citizen participation in local government.

¹³⁹ *Joseph* at para 34; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

¹⁴⁰ Para 40 of *Grootboom*.

¹⁴¹ *Blue Moonlight* at para 45.

challenged, or in order to save time, and costs”.¹⁴² In the informal settlement upgrading cases the effect of the rules on joinder of municipalities is that municipalities are required to initiate, plan and make applications in order to implement the UISP in order to give effect to the housing right in section 26 of the Constitution. This principle was solidified in *Nokotyana*:¹⁴³

It seems that the Municipality complied with the provisions of paragraph 13.7.1, as it did submit an application for assistance under this chapter to the MEC. The Chapter 13 phased development process provides for four phases; the provision of services only come into play in the second phase, after a decision to upgrade the settlement has already been taken by the MEC.

The importance of this principle is that any efforts to upgrade informal settlements must arise from the IDP, SDF and LUMS of each municipality. What this suggests is that they must, at least be part of municipal planning. For example the Housing Act specifically states that municipalities must ensure the right of access to adequate housing, water, sanitation, electricity, roads, storm water drainage as part of their IDPs.¹⁴⁴ The role of municipalities in terms of their obligation to the fulfilment of the right to housing was summarised as follows in *PE Municipality*:¹⁴⁵

Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect.

In upgrading of informal settlements, the UISP explains the role of municipalities as being to:¹⁴⁶

- Initiate, plan and formulate applications for projects relating to the *in situ* upgrading of informal settlements, which in the case of municipalities that are not accredited, must be in collaboration with and, under the supervision of the Provincial Department;

¹⁴² *Blue Moonlight* paras 44, 45; see also Rule 5 of the Rules of the Constitutional Court cited in *Blue Moonlight* para 44. See also rule 10 read with rule 6(14) of the Uniform Rules of Court. Also see *Sailing Queen Investments v Occupants of La Colleen Court* 2008 (6) BCLR 666 (T) at para 6-8.

¹⁴³ See para 43 of *Nokotyana* Judgement. This case is discussed in detail in chapter 4 below.

¹⁴⁴ Housing Act section 9 (1) (a).

¹⁴⁵ *Port Elizabeth Municipality v Various Occupiers* (12) BCLR 1268 (CC) at para 56.

¹⁴⁶ UISP para 2.6.1

- Request assistance from the Provincial Department on any of the matters concerned if the municipality lacks the capacity, resources or expertise;
- Provide basic municipal engineering services such as water, sanitation, refuse removal services and other municipal services;
- Provide materials, assistance, and support where necessary to enable the *in situ* upgrading project to proceed;

From the above, it is clear that municipalities are placed at the forefront of informal settlement upgrading in that the realisation of the rights of the poor in the Bill of Rights depends on whether municipalities are taking steps to plan for development and actually implementing their development plans. More importantly, provision is also made to monitor and support municipalities where they lack capacity and resources.¹⁴⁷

In this regard, the Constitutional Court has said that the issue of lack of resources in municipalities may be dealt with as a factual and legal matter.¹⁴⁸ At a factual level, on the one hand, the municipality will have to show that it is incapable of meeting the needs of its residents.¹⁴⁹ As a legal enquiry, on the other hand, the Court has said that the issue of budgeting municipal resources is tied to a correct understanding of the statutory obligation by the municipality.¹⁵⁰ The *Blue Moonlight* Court stated:

...This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.¹⁵¹

From the above, it is clear that the first step entails the correct articulation of the municipality's constitutional obligation. The next step is for the municipality to plan, budget and implement its obligations. An incorrect understanding of the municipality's constitutional obligation does not absolve the municipality from discharging it; evidence will have to be adduced before the court to justify the lack of realisation of rights pursuant to the lack of recourses.

¹⁴⁷ Beja at para 148; also see *Blue Moonlight* at para 74.

¹⁴⁸ *Blue Moonlight* at para 69.

¹⁴⁹ *ibid* at para 76; also see *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para 24, 25 and 29 where the same reasoning was employed.

¹⁵⁰ *ibid* at para 69.

¹⁵¹ *ibid* at para 74.

3.2 Monitoring, Supporting and the Principle of Cooperative Governance

Although section 151(3) of the Constitution provides that municipalities have ‘the right to govern, on their own initiative, the local government affairs of their communities, subject to national and provincial legislation’, it also recognises that local government is the most fragile of the three spheres of government and often lacks the capacity to exercise its powers. The Constitution, therefore, provides that the manner in which local government exercises its legislative and executive powers must be subjected to national and provincial oversight. These oversight powers may be divided into different categories, namely: the power to ‘monitor’ and ‘support’. These powers (including the principle of cooperative government) are at the disposal of national and provincial spheres to assuage challenges local government in discharging their constitutional obligation.

[a] Monitoring Local Government

The power to monitor local government is set out in section 155(6) of the Constitution. This section provides that each provincial government must, by legislative or other measures, provide for the monitoring and support of local government in the province; and promote the development of local government capacity to enable municipalities to perform their functions and to manage their own affairs. This power confers on provincial government the authority to ‘observe’ or ‘keep under review’, the manner in which a municipality manages its affairs, exercises its powers and carries out its functions. However, it does not confer on provincial government the authority to control the affairs of a municipality. The power to monitor is accordingly the least intrusive of all the supervisory powers. It is “a watered-down form of the supervision of local government as the monitoring of local government is carried out within the framework of intergovernmental relations”.¹⁵²

The Housing Act, for instance states that it is the responsibility of the Minister to ‘monitor the performance of the national government and, in co-operation with every MEC, the performance of provincial and local governments against housing delivery goals and budgetary goals.’ In addition, the UISP states that the provincial department will be responsible for the funding and implementation of this programme in partnership with municipalities, and that provincial departments must do everything in their power to assist

¹⁵² In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996*, (‘the First Certification Judgement’) 1996 (4) SA 744 (CC) at 372.

municipalities to achieve their obligations under this programme. This role on the part of province also includes monitoring the implementation of a project by a municipality.¹⁵³

[b] Supporting Local Government

The power to support local government is set out in section 154(1) of the Constitution. This section provides that the national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. In addition, section 155(6) of the Constitution provides that each provincial government must, by legislative or other measures, provide for the monitoring and support of local government in the province; and promote the development of local government capacity to enable municipalities to perform their functions and to manage their own affairs. This power confers on both the national and provincial government the authority to strengthen a municipality's ability to manage its affairs, exercise its powers and perform its functions. This power may also be used by national and provincial government to prevent a decline or degeneration in a municipality's existing structures, powers and functions. It is accordingly, more intrusive than the power to monitor local government, but less intrusive than the power to regulate or intervene.¹⁵⁴

This form of support, however, is different from that referred to in sections 154(1). This is because it is not aimed at preventing a decline or degeneration in a municipality's existing structures, powers and functions. Instead, it is aimed at supporting local government as an equal partner in order to achieve common goals.¹⁵⁵ Support may include: providing capacity to municipalities in order to enable them to discharge their duties and by remedying "shortcomings of municipalities that may have been identified during monitoring."¹⁵⁶ Mathenjwa warns against the practice of provincial government supervision of local government to utilise "monitoring as a standalone tool isolated from the support of local government. The failure to link monitoring and support of local government may have led to provincial government dissolving municipal councils under the guise of monitoring instead of supporting the municipalities".¹⁵⁷ Instead, he argues that when applying the contextual approach, the "provisions of the Constitution dealing with the monitoring and support of local government by provincial government should be interpreted within the context of chapter 3

¹⁵³ Local Government: Municipal Finance Management Act 117 of 1998 sections 5, 21 and 71.

¹⁵⁴ In the *First Certification Judgement* para 371.

¹⁵⁵ MJ Mathenjwa "The power to monitor local government is ancillary to the duty to support local government" (2014) 28 (2) *Speculum Juris* 159, 164.

¹⁵⁶ *ibid.*

¹⁵⁷ Mathenjwa (see note 139; 159).

of the Constitution” which creates the system of co-operative government. “This should be the case, because the monitoring of local government involves the relationship between the spheres of government which is regulated by the principles of co-operative government”.¹⁵⁸ The purposive construction of the provisions of “the Constitution requires that the monitoring of local government to be undertaken purposively (not arbitrarily), with the aim of supporting local government to achieve its constitutional objectives”.¹⁵⁹

In terms of the Housing Act the Minister of Human Settlement must “assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their duties in respect of housing development;”¹⁶⁰ and “support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development”.¹⁶¹ In addition, the UISP states that the provincial and national departments should “assist municipalities with the use and implementation of accelerated planning procedures”.¹⁶²

3.2 Conclusion: Taking it all in

It has been argued that the doctrine of developmental local government has been subsumed in the institutional arrangement espoused in the UISP in that municipalities must initiate, plan and make applications to the provincial government in an effort to implement the UISP. It was further argued that where necessary municipalities may be monitored and supported by provincial and national government subject to the principle of co-operative government. Additionally, in making an argument for placing municipalities at the forefront of the implementation of the UISP, *Grootboom*, *Blue Moonlight*, *PE Municipality*, *Joseph*, the Housing Act and the UISP were used as evidence. The next chapter discusses the leading jurisprudence in relation to eviction, housing and informal settlement upgrading in order to extrapolate principles that are essential for the implementation of the UISP.

¹⁵⁸ Mathenjwa (note 139; 171).

¹⁵⁹ Mathenjwa (note 139; 173).

¹⁶⁰ Housing Act section 3 (2) (d).

¹⁶¹ Housing Act section 3 (2) (e).

¹⁶² UISP para 2.6.2

CHAPTER 4

THE COURTS AT THE CENTRE OF MEDIATING INFORMAL SETTLEMENT UPGRADING

4.1 Introduction

A number of reasons have been given for the lack of implementation of the UISP, ranging from:¹⁶³ the state's overreliance on the provision of formal subsidy housing, the state's avoidance of challenges associated with *in situ* upgrading, the state's provisions of houses for political mileage and the state's lack of capacity to meaningfully engage communities. The state's approach has been relocation, eviction and demolition, coupled with the provision of formal subsidy housing. This approach, it seems, has undermined the policy prescripts envisaged in the UISP, thus sparking tensions between municipalities and informal settlement communities who often have to bear the brunt of this top-down approach to development of informal settlements.¹⁶⁴ These informal settlement communities have turned to the courts in a bid to challenge the state's approach and demand a more inclusive and participatory approach to upgrading of informal settlements.¹⁶⁵ This is illustrated through five cases on evictions, relocation and upgrading of informal settlement: the *Abahlali* case, *Joe Slovo*, *Nokotyana*, *Beja* and *Slovo Park*.¹⁶⁶ The only four studies that have explained the trajectory of this jurisprudence have provided insight on the benefits and limits of litigation in unsettling the implementation impasse in the UISP cases.¹⁶⁷ What is remarkable about these studies is their attempt to capture the most critical features at the centre of informal settlement upgrading, namely: community participation, the principle that relocation or eviction should be considered as the last resort, the sensitivity for context-specific socio-economic

¹⁶³ Michael Clark and Kate Tissington (note 7 above) where it was argued that this policy of evictions, relocation and demolition has persisted despite interventions in terms of the *National Upgrading Support Programme* (hereafter referred to as "the NUSP") and Department of Human Settlement *Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life* (2010) calling for a programmatic approach to the implementation UISP; also see Lilian Chenwi (note 7 above).

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ *ibid. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) ("Joe Slovo"); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCRL 31 (CC) ("Nokotyana"); *Abahlali Basemjondolo Movement of South Africa v Premier of the Province of KwaZulu- Natal* 2010 2 BCLR 99 (CC) ("Abahlali"); *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077 ("Beja") and *Mohau Melani and Residents of Slovo Park Informal Settlement v City of Johannesburg and Others* 2016 (5) SA 67(GJ) ("Slovo Park"); For a critical analysis of these cases see L. Chenwi (see note 7); Tissington and Clark (see note 7); Dugard and Wilson (note 31; 678-681) and Tissington (see note 7; 42-55).

¹⁶⁷ *ibid*.

circumstances of each informal settlement community and the rights-based approach to upgrading. Even though these studies applaud litigation for exposing and resolving the impasse on critical issues relating informal settlement upgrading, they have left open certain questions. For instance, they have not provided a critical analysis of the state's approach to relocation and eviction, in particular, the role of the PIE Act on informal settlement upgrading. Furthermore, they do not highlight how informal settlement communities may force municipalities to take reasonable steps to upgrade them. The purpose of this chapter, therefore, is to analyse *Joe Slovo*, *Abahlali BaseMjondolo*, *Nokotyana*, *Beja* and *Slovo Park* in order to extrapolate a number of principles applicable to informal settlement upgrading cases. It is further argued that these principles may assist municipalities in the implementation of the UISP, whilst being sensitive to the rights in the Bill of rights.

4.2 Joe Slovo Judgment

The case concerned a relocation of an informal settlement community known as the Joe Slovo informal settlement ("Joe Slovo"). The City of Cape Town ("the City") sought to upgrade this settlement through a developer, Thubelisha Homes. In order to upgrade the settlement, the developer sought to relocate the community from Joe Slovo to Delft, 15km away from Cape Town. In embarking on this upgrading project, the state instituted eviction proceedings through the PIE Act. The legal questions that the Constitutional Court had to answer were two-fold.¹⁶⁸ The first was whether at the time of the proceedings in the High Court, the residents of Joe Slovo were already "unlawful occupiers" in terms of section 6 of the PIE Act; and whether it was just and equitable to evict them. Secondly, whether the upgrading project is a reasonable measure in terms of 26(2) of the Constitution?

On the first issue the court was divided. On the one hand, Yacoob J, agreeing with Langa CJ and Van der Westhuizen J held that the residents enjoyed no express or tacit right to occupy the property, and that the provision of services and planning for housing development in the area did not amount to a tacit consent by the City.¹⁶⁹ On the other hand, Moseneke DCJ, agreeing with Ngcobo and Sachs JJ held that there was tacit consent by the City, which amounted to a right to occupy, which was later terminated by the City of Cape Town at the time the eviction proceedings were launched.¹⁷⁰

¹⁶⁸ *Joe Slovo* at para 15-16.

¹⁶⁹ *ibid* para 78-84.

¹⁷⁰ *ibid* at paragraphs 148, 150, 154, 178, 223, 225 and 229.

Having accepted that at the time the proceedings were instituted, the residents of Joe Slovo were unlawful occupiers, the next question was whether it is just and equitable to evict them. It is on this issue that we begin to see consensus from the Court. The Court noted that the case was different from all other eviction cases, because here the case involved relocation in order to allow upgrading of the settlement and that the community was going to be provided with decent temporary accommodation under favourable conditions. Yacoob J held that it was just and equitable to evict, because: firstly, the purpose was to facilitate housing development which is part of the state's obligation; secondly, there was some consultation, even though he overlooked the fact that the consultation was not meaningful;¹⁷¹ thirdly, the residents stood a chance to be allocated houses in the development, provided this is strengthened through a court order; fourthly, there was nothing wrong with the state dictating the design and the implementation of the housing project; lastly, that even though consultation and *in situ* upgrading¹⁷² were important issues to considered, those considerations were not enough to prevent an eviction.¹⁷³

On the second issue relating to the reasonableness¹⁷⁴ of the N2 Gateway Project, the Court was unanimous. The Court held that the project was reasonable because it was aimed to facilitate upgrading in the settlement and that there was reasonable engagement, even though the quality of engagement was not desirable.¹⁷⁵

A closer look at the *Joe Slovo* Judgement brings to light three important principles necessary for upgrading an informal settlement. The first is that the role of the PIE Act must be assessed against the principle that the UISP is the main policy instrument aimed at the upgrading of informal settlements with emphasises on *in situ* upgrading, and relocation under exceptional circumstances. Second, is that the reasonableness test in this case was shifted from the

¹⁷¹ *ibid* at para 166.

¹⁷² *ibid* at para 173-174.

¹⁷³ *ibid* at para 166-172.

¹⁷⁴ *ibid* at para 104, where *Grootboom* test of reasonableness was used in this regard, where the court said that it must be remembered in relation to the requirement of reasonableness that:

The measures must establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The program must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on s 26 in which it is argued that the State has failed to meet the positive obligations imposed upon it by s 26(2), the question will be whether the legislative and other measures taken by the State are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

¹⁷⁵ *ibid*.

Grootboom analogy to cases of relocation in order to facilitate upgrading as in *Joe Slovo*. For instance *Joe Slovo* represents a case that constitutes what we mean by of reasonable implementation.¹⁷⁶ Lastly is the implication of the case on the value of meaningful engagement in upgrading cases.

On the first point, which is a principle that relates to the role of the PIE Act in cases of informal settlement upgrading, I agree with Ngcobo J that it is undesirable to first brand residents of an informal settlement, unlawful occupiers in order to relocate them for the purpose of facilitating upgrading.¹⁷⁷ The reasons for this are straightforward, the UISP recognises that informal settlements are inherently incidents of human need that are intrinsically illegal, informal, not well-located and a result of social stress and vulnerability and the UISP is aimed at alleviating these tragedies.¹⁷⁸ Therefore, the application of the PIE Act might mean an exclusion from the benefit of the UISP for those who might not qualify in the “housing consolidation phase”, given that the community must first be branded as ‘unlawful occupiers’.¹⁷⁹ Furthermore the state’s approach aimed at eviction and relocation negatively affects the “fragile livelihoods and important social and community networks.”¹⁸⁰ In explaining a more humane approach, Ngcobo J in *Joe Slovo* correctly pointed out that the PIE Act approach is perhaps unnecessary, as it does not accord with the value of human dignity for informal settlements communities. According to him, it would have been in line with human dignity of the landless to couch the question of relocation (for the purpose of implementing housing development) subject to public interest and justice and equity, instead of applying the PIE Act.¹⁸¹ Another slightly different view is discernible from the language employed by the guiding principles of the UISP. For instance, a contextual reading of the

¹⁷⁶ *Grootboom* (supra) at para 42.

¹⁷⁷ Paragraph 216-218 of *Joe Slovo*. Also see O’Reagan judgement in *Joe Slovo* on paragraph 290.

¹⁷⁸ UISP at para 2.3

¹⁷⁹ The UISP provides basic services, security tenure and infrastructure even to excluded groups in terms of the National Housing Subsidy Scheme: households that exceed the threshold income, persons without dependants, child-headed households, aged persons, illegal migrants and persons who are not first-time owners. For this see Kate Tissington (note 10 above) 86.

¹⁸⁰ Tissington and Clark (note 7 above) and the UISP.

¹⁸¹ Judgment of Ngcobo J in *Joe Slovo* para 217 where he writes as follows:

It seems to me that when people in the position of the residents of *Joe Slovo* are sought to be relocated in order to pave the way for the implementation of a government programme aimed at providing residents with adequate housing, the proper question to ask is not whether the residents are unlawful occupiers, but whether it is in the public interest and thus just and equitable to relocate them for that purpose. This is more so because the very purpose of the relocation is to upgrade the area they occupy and thereafter resettle them in the same area after it has been upgraded. This would be consistent with section 6(1) (b) of PIE. But this approach to the problem is immediately undermined by section 6(1) which requires “unlawful occupier” as a precondition to trigger the provisions of section 6(1) (b).

word “relocation” as employed by the UISP is that relocation is subject to *in situ* upgrading not being possible.¹⁸² Simply put, relocation should be looked into as a measure of last resort. Therefore, it seems a number of preceding factors should be taken into account before a decision to relocate is reached. Amongst others factors, should be the evidence and recommendations as made in a geo-technical report on the suitability of the land for residential zoning, a genuine attempt at meaningful engagement and financial feasibility.¹⁸³ All these factors should then inform the justice, equity and public interest enquiry, but outside the realm of section 6(1) of the PIE Act. The benefit of this approach is its conformity with the thinking of “relocation in order to facilitate development” as meeting the progressive demand for socio-economic rights, equality and human dignity.

The second principle relates to how the reasonableness test is sheltered in upgrading cases. It is now axiomatic that section 26 of the Constitution imposes a positive obligation on the state to adopt and implement a reasonable policy within its resources, which would ensure access to adequate housing on a progressive basis.¹⁸⁴ It was this proposition as articulated in *Grootboom* that informed the court’s reasoning in *Joe Slovo*. One of the issues that the court had to deal with was the argument by the two *amici curiae* that the current location provided sustenance against poverty and other socio-economic stresses, as opposed to Delft where they should relocate. By holding that the community will be better off at a later stage¹⁸⁵ and reducing the issue of relocation to a matter of convenience,¹⁸⁶ the court seems to have airbrushed the potentially negative socio-economic impact of relocation on the community of Joe Slovo by not applying the reasonableness test to “weigh up the interest of the residents and the harm to be suffered against the justifications of the government for the relocation”.¹⁸⁷ Arguing for a substantive and interest-based approach, Wilson and Dugard¹⁸⁸ noted that had the court taken stock of the socio-economic circumstances of the community, the relocation approach by the state would have been found to be unreasonable, because a justification premised on a mere provision of better constructed housing without guaranteeing security of tenure is obviously unreasonable. This deferential approach by the Court was implicit in the

¹⁸² *Abahlali* at para 114.

¹⁸³ This reasoning has the support of the court in *Slovo Park*.

¹⁸⁴ *Grootboom* paras 40-43.

¹⁸⁵ Judgment of Yacoob J at para 107 in *Joe Slovo*.

¹⁸⁶ Judgment of O’Regan J para 321 in *Joe Slovo*.

¹⁸⁷ Stuart Wilson and Jackie Dugard ‘Taking poverty seriously: the South African Constitutional Court and socio-economic rights’ (2011) 3 *Stellenbosch LR* 664, 679.

¹⁸⁸ *ibid.*

reasoning employed by Ngcobo J. In which he held that the court should not interfere with the government's decision to allocate houses in terms of the project, unless the state is acting unreasonably. He also added that the Housing Act, the Housing Code, UISP or BNG policy and the N2 Gateway Project constitute "reasonable legislative and other measures" in terms of section 26(2) of the constitution.¹⁸⁹ It seems to me a proper approach would have been to take the reasonableness test a step further. The contentious question in *Joe Slovo* was not whether the constitutional and legislative framework was unreasonable, but whether there was reasonable implementation of the UISP.¹⁹⁰ Justice O'Regan, for instance suggested that the fact that the state's policy did not provide for *in situ* upgrading does not mean it is unreasonable.¹⁹¹ I agree with this, however, by reducing the interest of the community "to matters of 'convenience', the Court was not able to properly weigh them against the state's eviction policy".¹⁹² Therefore an approach that takes into account the socio-economic impact on the lives of communities, and relocation as the last resort is desirable, as it accords to the precepts of the UISP and the Bill of Rights.

The third issue is that despite the court's watered-down version of meaningful engagement, there is still value for the principle. *Joe Slovo* was no different. The court in that matter linked meaningful engagement to "developmental responsibility of local government".¹⁹³ In terms of this approach, even though the state must be provided some leeway in the design and structure of development, this does not mean the interest of the community affected is any less.¹⁹⁴ The quality of what constitutes meaningful engagement in *Joe Slovo* was not clearly emphasised. This is despite engagement being at the core of the UISP.¹⁹⁵ Instead, the court

¹⁸⁹ Judgment of Ngcobo J para 229 of *Joe Slovo*.

¹⁹⁰ This approach is bolstered in *Grootboom* para 42, where it was held as follows:

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

¹⁹¹ Para 304 of *Joe Slovo*

¹⁹² Wilson and Dugard (note 187; 679).

¹⁹³ *Joe Slovo* at par 348.

¹⁹⁴ *Joe Slovo* par 111. B Ramji (note 10;67): Bhavna's view that for the right to the city to be developed the courts should move away from making planning the preserve of the state presupposes that communities are excluded. That interpretation is incorrect.

¹⁹⁵ Kate Tissington (note 7;50). One of the grounds on which the Court held that the Slums Act was invalid in the *Abahlali* case was that it precluded meaningful engagement. In essence, the Court found that it does not constitute a genuine attempt to engage after a decision to evict has already been taken and that meaningful engagement must take into account the comprehensive needs of the affected informal settlements in order to be just and equitable. See the *Abahlali* case at paragraphs 69 and 120, and 114 and 126.

imposed a strict order of engagement on relocation after ordering the eviction of the community. On this issue, Justice Yacoob held that all factors considered under the justice and equity enquiry point to the conclusion that an eviction is a reasonable measure to facilitate the housing development programme, and is as such reasonable, if measured against the court's finding in *Grootboom*.¹⁹⁶ The City, he further held, had acted reasonably in discharging its constitutional obligation to provide housing. Therefore the eviction is reasonable, because there was reasonable engagement, albeit not meaningful and rigorous.¹⁹⁷ Yacoob J seems to have found solace in the fact that relocation was accompanied by a guarantee that the residents of *Joe Slovo* will be primary beneficiaries of the N2 Gateway Project.¹⁹⁸ Justice O'Regan, for instance, justified the decision to evict by saying that the N2 Gateway project is a first attempt by the state, thus it constitutes a learning curve. Therefore granting an order of relocation was a matter of "convenience".¹⁹⁹ It was from this leniency that she did not emphasise the quality of engagement that took place between the community of Joe Slovo and the state.²⁰⁰ The concerning factor is the top-down approach to development that is visible through most impasses between communities and politicians.²⁰¹ The most worrying part is that the court appears to have not been concerned with the quality of engagement either, procedurally or substantively. Despite there being evidence that the residents were informed that it would be impossible for the housing development to allocate housing to all the residents of Joe Slovo. In addition, the community was informed that it is necessary that they relocate to temporal accommodation pending upgrading of Joe Slovo. However, the evidence does not suggest that the community was informed that *in situ* upgrading was impossible. It is also clear that various municipality, provincial and national government officials and Thubelisha engaged the residents on different occasions. This approach was bound to generate misunderstanding and confusion. The limits of the court's role in such matters were exposed by what transpired later. On 24 August 2009, the Constitutional Court suspended the execution of the eviction order after the MEC filed a report to the court explain his concern about the costs of relocation far-outweighing the costs *in situ* upgrading. The MEC further raised concerns about the absence of planning to accommodate every resident who qualified, given that they will be left behind in temporal relocation accommodation. This MEC was from the Democratic Alliance (DA), as opposed

¹⁹⁶ Judgement of Yacoob J para 115 of *Joe Slovo*.

¹⁹⁷ Judgement of Yacoob J para 117 of *Joe Slovo*.

¹⁹⁸ Judgement of Yacoob J para 107 of *Joe Slovo*.

¹⁹⁹ Judgement of O'Regan J para 321 of *Joe Slovo*.

²⁰⁰ *ibid* at 302- 303.

²⁰¹ L Chenwi (see note 7; 557).

to the ANC, which was formerly in power in the province.²⁰² Given the Court's approach, *Joe Slovo* may be said to have diminished the importance of meaningful engagement, in cases where eviction is being sought by the state in order to facilitate development. However, at a closer glance *Joe Slovo* is an example of a case where upgrading could not be said to have taken place under the UISP, but rather through provision of state-subsidised housing with varying tenure options. Despite the withering of meaningful engagement in *Joe Slovo*, as a principle, it remains, not only a key principle for inclusive vision in development cases, but also reaffirms the participation core, an element of the right to the city.

4.3 Abahlali BaseMjondolo Judgment

The question of elimination instead of upgrading of informal settlements has created confusing messages with regards to the state's approach to informal settlements upgrading.²⁰³ This is evident in the *Abahlali* case that sent the Abahlali BaseMjondolo Movement of South Africa to the court. Writing for the majority, on the constitutional validity of section 16 (of the impugned Slums Act²⁰⁴ which gave "the MEC of the province power to publish a notice in the provincial gazette determining a period within which an owner or person in charge of land or a building that is occupied by unlawful occupiers must institute proceedings to evict the occupiers under the PIE Act"), Moseneke DCJ, held that it is inconsistent with the Constitution and invalid. The logic that informed the majority decision was that section 16 was at odds with the PIE Act, the Housing Act and the National Housing Code that subjected evictions to "the last resort principle," meaningful engagement with the unlawful occupiers and other relevant circumstances.²⁰⁵ The court further held that section 16 is likely to render unlawful settlements residents vulnerable to evictions should an MEC decide to issue a notice under section 16. Therefore the court concluded that the power given to the MEC to issue a notice is overbroad and irrational because it applies to any unlawful occupier on any land or in any building even if it is not a slum and is not properly related to the purpose of the Act, which is to eliminate or to prevent the re-emergence of slums.²⁰⁶

The court in this case underscored the importance of meaningful engagement and eviction being the measure of last resort after consideration of the possibility of *in situ* upgrading of

²⁰² *ibid.*

²⁰³ Section 2(1)(e)(iii) of the Housing Act is as follows: 'the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions'.

²⁰⁴ KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 ("the Slums Act").

²⁰⁵ *Abahlali* paras 67-69.

²⁰⁶ *Abahlali* para 118.

the informal settlement and other developmental objectives. This principle underscores the participation core of the right to the city. In essence, the court strengthened the weaker security of tenure for the unlawful occupiers, thus protecting a wider range of those with insecure tenure. Furthermore, it prevented a number of poor South Africans living in informal settlements from a provincially initiated legislative program aimed at eroding their weaker tenure and being rendered homeless.²⁰⁷ What is clear is that, although legitimate, the policy that the government was pursuing could not take into account the socio-economic circumstances of the homeless through measures aimed at providing them with security of tenure in the form of land and housing.²⁰⁸ Therefore it fell short of the reasonableness standard as established in *Grootboom*. What is evident is that ‘eradication’ is perhaps not the correct policy message, but rather a correct message is *in situ* upgrading or relocation under exceptional circumstances. This judgement reaffirms the ‘appropriation and habitation elements’ of the right to the city (the right to use, to create and recreate urban space). By allowing *in situ* upgrading and security of tenure, it ensures less disruption of the community’s social networks, livelihoods and keeps intact the community’s access to economic opportunities, clinics, schools, transportation and other amenities, thus ensuring spatial justice and social cohesion.

4.4 Nokotyana Judgment

This case involved an informal settlement community’s quest to have toilets: “ventilated improved pit latrine” per household, instead of the one chemical toilet per ten households offered to them by the City of Ekurhuleni (“the city”). They also asked for high-mast lighting to enhance safety and access by emergency vehicles. They ground their claim on the right of access to adequate housing. They also relied on the supremacy clause in section 2, the enforcement of the Bill of Rights clause in 7, the right to human dignity in section 10 and the interpretation clause in section 39 of the Constitution and on Emergency Housing Program: Chapters 12 (EHP) and the UISP, in chapter 13 of the National Housing Code.²⁰⁹ They sought an order against the Municipality to provide them with basic services, pending a decision on whether the settlement would be upgraded to a formal township.

²⁰⁷ Kate Tissington (note 7; 53). Also see Tissington and Clark (note 7 above).

²⁰⁸ Kate Tissington (note 7; 53); Tissington and Clark (note 7 above); L Chenwi (note 7; 560-561); also see *Abahlali* at paras 102, 113, 114, 115 and 118.

²⁰⁹ *Nokotyana* at 21-31 for an exposition of the applicants’ case.

In August 2006 the municipality submitted a proposal, in terms of the UISP to the province to upgrade the settlement. This application was delayed for three years. The community argued on the one hand that pending the decision “to be upgraded, the City is required in terms of its obligations under the Constitution, legislation and the UISP to provide the settlement with certain basic services with immediate effect” in terms of the (EHP).²¹⁰ On the other hand, the City argued that, in terms of the UISP, it may not provide basic services until the decision to upgrade has been made. Three issues are important in this case.

The first question was whether the city is obliged under EHP to provide the services. The Court held that the EHP is only applicable at the discretion of the MEC, and given that the discretion was not exercised in this case, it was not applicable. In any event the residents did not find themselves in the state of emergency, but rather an ongoing state of need. The second was whether the city was obliged to provide these services under the UISP. The court held that the city had complied with its duties under the UISP, which was to submit an application to province, and that the installation of basic services could only take place once a decision to upgrade has been made.²¹¹ The last question was whether it would be appropriate to address the delay by Gauteng Province in deciding whether the settlement should be upgraded. The court ordered the MEC to take a final decision concerning upgrading the settlement within fourteen months of the judgement.²¹²

As argued elsewhere in this paper, the ability of municipalities to discharge their constitutional role may at times depend on assistance and support from the national and provincial government.²¹³ It follows that in order for informal settlement communities to rely on the UISP in court they will have to show that the municipality in charge of their jurisdiction has taken steps to apply for upgrading with the provincial government.²¹⁴ Therefore, the discretion to initiate upgrading of informal settlements must start with the municipality. The Constitutional Court confirmed this principle in *Nokotyana*.

²¹⁰ The relevant provisions of the Constitution, legislation and the National Housing Code are set out in more detail at 25-31 in *Nokotyana*.

²¹¹ *Nokotyana* at para 42.

²¹² *Nokotyana* para 55-57.

²¹³ M Pieterse (see note 10; 172-173).

²¹⁴ See paragraph 2.6.1 of the UISP. See also *Nokotyana* in para 43:

It seems that the Municipality complied with the provisions of paragraph 13.7.1, as it did submit an application for assistance under this chapter to the MEC. The Chapter 13 phased development process provides for four phases; the provision of services only come into play in the second phase, after a decision to upgrade the settlement has already been taken by the MEC.

Bilchitz²¹⁵ argues, and I agree with him, that the court failed to decide on the normative content of section 26 as including basic sanitation. According to him, the Court may have been aroused by the fact that the residents were making a minimum core argument. As a result, the Court refused to decide on this submission by holding that the emergency and upgrading programs were aimed at giving effect to section 26 and not at prescribing the minimum standard for the right of access to adequate housing.²¹⁶ This view by the Court is a “red herring”, given that the UISP and EHP already express the state’s obligation to incrementally secure tenure and basic services for the poor living in informal settlements.²¹⁷

However, this was no surprise given that our courts have in the past dismissed the idea of anything that sounds like the minimum core, that is, “the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation”.²¹⁸ A number of reasons were put forward: firstly, it was said that it is impossible to determine the minimum core standard in relation to the socio-economic rights, whether generally or with regards to specific groups.²¹⁹ Secondly, the courts are ill-suited to deal with ‘polycentric issues’—issues that have “multiple social and economic consequences for the community”.²²⁰ Thirdly, the

²¹⁵ D Bilchitz ‘Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*’ (2010) 127, 3 SALJ 597.

²¹⁶ *ibid.* Also see *Nokotyana* Para 47. It must be noted that the idea of a minimum core was long rejected by the Constitutional Court in *Grootboom*, *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703 (“TAC”) and *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (“*Mazibuko*”); a number of criticisms have been levied against the Court for its rejection of the minimum core. Firstly, some have argued that, reliance on the reasonableness test has meant that the Court defers the responsibility of determining the normative content of a right lies with the executive and legislative arms of government. Secondly, The “courts should, however, set an invariable nationally applicable “standard” against which the government’s compliance with its socio-economic rights obligations can be evaluated.⁷⁸ The argument is that without such a standard that applies for the whole of South Africa, the courts will not be able to establish, in the first place whether or not the measures taken by the government may be regarded as reasonable.⁷⁹ A “universal” standard will, however, provide a referent or benchmark against which the reasonableness of government measures can be examined and evaluated.⁸⁰ It also creates a means by which to inform the setting of government priorities with respect to those in society whose survival is threatened by extreme deprivation”. Thirdly, some support the view that the State must determine the minimum core standard based on the diversity of needs. For reasonable analysis of sources on the issue, the following sources are noted. However, more sources exist on the issue. see for example: Stewart L “Adjudicating socio-economic rights under a transformative constitution” (2010) 28 *Penn State International Law Review* 487 at 492-493; Bilchitz D “Giving socio-economic rights teeth: The minimum core and its importance” (2002) 119 *South African Law Journal* 484 at 484-501; Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria: PULP 2009) at 61. Davis D “Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?” (2006) 22 *South African Journal on Human Rights* 301 at 301-327; Lehmann K “In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core” (2006) 22(1) *American University International Law Review* 163 at 177-178.

²¹⁷ Kirsty Mclean ‘Housing’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service 07-06) 55-41.

²¹⁸ *Grootboom* at para 31 and *Mazibuko*.

²¹⁹ See *Grootboom* at para 33.

²²⁰ *ibid*; Iain Currie and Johan de Waal *The Bill of Rights Handbook* (2013) 569; see also *Mazibuko* at para 55; *Treatment Action Campaign* at paras 36-39; *Grootboom* at para 33.

courts have said that the test in socio-economic rights cases is one of reasonableness.²²¹ However the courts have stated that there may be cases where courts may have regards to the minimum core of the right. That position was summarized in *Grootboom* as follows:

There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.²²²

It is clear from the small window of opportunity in *Grootboom* that regard may be given to the minimum core provided it informs the reasonableness test. However, evidence or information is required for this enquiry to be conducted by the court. In *Nokotyana*, the court was called upon to decide on the provision of basic services, but the administrative hurdle in the UISP, mainly, that the MEC must approve an application to upgrade by the municipality had not been crossed. For instance, the court was asked to decide whether the city is obliged under EHP and the UISP to provide the services when the MEC had not exercised his or her discretion under the EPH and the city had submitted an application under the UISP, and was awaiting response from the MEC. As a result the case was not one that was envisaged by the *Grootboom* judgment. It was therefore not possible to decide on the normative content of the right to housing without first dealing with the technical aspect presented by the EHP and the UISP on the case. It would have been inappropriate for the Court interrogate whether the normative content of the right of access to adequate housing includes sanitation without first dealing with the administrative aspects of the EHP and the UISP.

4.5 Beja Judgment

The City of Cape Town (“the City”) made the decision to upgrade the informal settlement at Silvertown Khayelitsha (“the SST”) in terms of the UISP. In the process of implementing the project, the city also intended upgrading two other sites: Makhaza and Town 2, therefore the three areas, being Makhaza, Town 2 and SST were going to be upgraded. During October

²²¹ *ibid.*

²²² *Grootboom* at para 33.

2004 the City submitted the application to the province for funding of this project. The province approved the project in July 2005 on subject to certain conditions between the province and the city.

As part of this project the city decided to install communal toilets on a ratio of 1:5; meaning that one toilet would be provided for every five families. During consultations, the three sites were identified, being: SST, Makhaza and Town 2. The breakdown of the communal toilets was therefore: 179 toilets to be installed in SST, 59 toilets to be installed in Makhaza and 25 toilets to be installed in Town 2. The installation of the communal toilets began in 2007. 63 toilets were constructed in Makhaza, 30 in Town 2 and 63 in SST. From these figures, it is evident that more toilets were built in Makhaza and Town 2 than the original number envisaged in terms of the 1:5 ratio. There was however, a shortfall of the communal toilets constructed in the SST area. By July 2007 the contractor had installed 63 toilets in SST and whilst busy with another 62 toilets, the community expressed their unhappiness with communal toilets and requested that the installation thereof to be stopped. The community demanded individual toilets for each erf. Therefore construction of the communal toilets was discontinued and only 156 of the 282 communal toilets were completed.

The City then began to install the unenclosed toilets in Silvertown, Khayelitsha, during May 2009 and completed this in December 2009. The unenclosed toilets installed in SST and Town 2 were all enclosed by the residents themselves. However in Makhaza 225 toilets were installed and all but 55 toilets were enclosed by the residents. The unenclosed toilets consisted of a concrete slab for the toilet to stand on with the cistern and a water pipe that was not affixed to any walls. After an inspection in loco, the court made an interim order for the city to enclose the toilets subject to the written requests by the communities. However, the implementation of this order was frustrated by the instability in the communities.

In this matter, the court was called upon to answer four questions in this case: first, whether a legally enforceable agreement was reached with the affected community in relation to the fact that the community would enclose the toilets themselves. Secondly, whether providing one toilet per five households, what is referred to as the 1:5 ratio issue was adequately decided upon? Thirdly, whether any constitutional rights of the affected community were infringed? Lastly, whether certain aspects of the Housing Code were unconstitutional?²²³

²²³ *Beja* at paras 9 to 37 for a detailed exposition of the facts.

On the first issue, in relation to the agreement between the community and the city that the community would enclose the toilets themselves, the court held that the city is bound by the UISP and the Constitution to ensure participation and for the funding of this program is in line with the UISP. Furthermore the court set out the requirements that this agreement must meet:

The conclusion of agreements with communities for the purposes of giving effect to socio-economic rights is commendable. These agreements, to be enforceable, ought to at least satisfy four minimum requirements; (i) it must be concluded with duly authorised representatives of the community; (ii) it must be concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies, (iii) it must be properly minuted and publicised, (iv) it must be preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement. None of these requirements were met in this matter.²²⁴

The court further held that a collective agreement would not amount to waiver of a constitutional right, like dignity and privacy of vulnerable minorities in the community.²²⁵ On this point the court held that to be reasonable the agreement must take account of the unemployed, disabled, women, children and the poor. Ultimately, the court held that the agreement is not valid and enforceable between the City and the Community. This could not legitimise the installation of the unenclosed toilets.²²⁶

On the second issue: the provision of one toilet to five households, the court noted that the city relied on a “crosspollination” of the Emergency Housing Program and the UISP without seeking clarity from the provincial department or meaningfully engaging the community on this approach. As a result the court held that this approach was not in line with the legislative and policy framework on upgrading of informal settlements.²²⁷

On the third issue, the court held that the provision of unenclosed toilets amounted to a violation of the rights to housing, dignity, privacy, a healthy and safe environment and the right to basic services. Further that the decision was not reasonable and fair, and thus unlawful and unconstitutional.²²⁸

²²⁴ *ibid* at para 98.

²²⁵ *ibid* at 101-103.

²²⁶ *ibid*

²²⁷ *ibid* at 107-118.

²²⁸ *ibid*

This judgement is important for a number of reasons. First, the courts have also pronounced the importance of the state's obligation to meaningfully engage on informal settlement upgrading matters. In addition, the court clarified the impact of meaningful engagement on the enforceability of agreements between municipalities and informal settlement communities. On this point, the UISP, for instance, set out four principles, and these include:²²⁹

- Clear terms relating to the membership structure of each party, representatives of each party and terms relating to their mandate;
- Specific responsibilities of each party to the agreement;
- The processes and proceedings relating to meetings; and
- Signatures of members indicating acceptance of the terms of the contract.

Secondly, the court took a view that an individualistic rights-based approach, that takes into account the rights of minorities, rather than a utilitarian approach is preferable, thus emphasising the point that the buy-in of a majority into the contract does not imply a waiver of constitutional rights of minorities, as that would run counter to the proposition in *Grootboom* that a reasonable housing programme must take into account the needs of those most vulnerable and desperate.²³⁰

Thirdly, the effect of the judgement by the court in *Beja* is that implementation of the UISP must ensure that constitutional rights and the procedural requirement to meaningfully engage are respected and promoted, if the project is to be considered constitutional. Furthermore, the judgement shows that by taking into account the socio-economic circumstances of the community, the court may adopt a substantive account of the reasonableness test.²³¹ Viewed in this sense, *Beja* reaffirms the claim to dignified habitation and participation (the core components of the right to the city). As a result it affirms the rights-based approach in informal settlement upgrading matters.

²²⁹ The UISP in paragraph 3.11

²³⁰ *Beja* at para 101 -102.

²³¹ Wilson and Dugard (note 187: 679).

4.5 Slovo Park Judgment

The case concerned approximately 10 000 very poor residents living in 3700 households in the Slovo Park Informal Settlement (“Slovo Park”). They have been living there for 21 years, and have endured life without basic services, like access to electricity, proper sanitation and refuse removal. Shack fires break out, and ambulances often refuse to collect the sick, because the roads are not formally demarcated and the settlement does not appear on the map of the City of Johannesburg (“the City”). For 20 years the community of Slovo Park has endured a period of broken promises from state officials. Having engaged the state in all its avenues, as the step of last resort, the community approached the court. First, the residents sought an order directing the city to apply to the provincial government for funding to upgrade Slovo Park in terms of the UISP. The residents grounded their claim on the fact that the failure by the city to make a decision to upgrade Slovo Park was administrative action that falls to be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).²³² Secondly, the residents argued that even though the environmental assessment reports have indicated that Slovo Park is dolomitic, such risk is low, and in any event, the UISP offers funding for rehabilitation and other technical solutions in order to mitigate any risk posed by dolomite.²³³ On the other hand, the city argued that it has taken a policy decision to relocate the residents who qualify for housing to a site called Unaville, 11 km away from Slovo Park. In essence, the city has preferred to relocate qualifying residents to Unaville over *in situ* upgrading of Slovo Park. The residents’ argument was that the city’s decision was unlawful, because the UISP has the force of delegated legislation, it is a comprehensive flexible and primary instrument and compliance with it is not optional.²³⁴ On the same point the city argued that its decision is a policy decision taken by the executive of the city exercising its executive authority, and is therefore not subject to review.²³⁵

The court held that indeed, the province and the city are under a constitutional obligation to realise the residents’ right of access to adequate housing, and are bound by the legislative and policy framework set out in the Housing Act and the National Housing Code.

The city argued that relocating residents to Unaville and budgeting for the acquisition of land for the purpose of providing housing meets its constitutional obligation.²³⁶ On this point the

²³² *Slovo Park* at paras 1-36.

²³³ *ibid* at para 26.

²³⁴ *ibid* at para 13-14.

²³⁵ *ibid* at para 18.

²³⁶ *ibid* at para 16.

Court held that in terms of section 9(a)(i) of the Housing Act, the Minister is required to determine the housing policy, whilst the province must administer the national housing policy and the city is required to implement it.²³⁷ The Court held that the UISP must be implemented in partnership with the residents.²³⁸

The court further held that the purpose of the UISP is to provide security of tenure and a healthy environment for people living in informal settlements. The UISP envisages a developmental approach with minimal disruption of existing community social networks and support structures.²³⁹ The court confirmed the principle that relocation must be conducted under exceptional circumstances, after consideration of all possibilities, and within the context of a community approved relocation strategy.²⁴⁰

The central issue that the court had to decide on was whether the city's failure to consider a decision to *in situ* upgrading Slovo Park, amounted to administrative action in terms of PAJA. The court further confirmed the jurisprudence that has held that implementation of a policy is an administrative function, and is subject to review under PAJA.²⁴¹ The court said that all the residents of Slovo Park were asking for was the implementation of the existing policy in the UISP, and that this was a typical administrative function and is subject to review.²⁴²

The court further held that the city's failure to apply the UISP was unlawful, in that the decision was first taken outside the legislative and policy framework prescribed by the Housing Act and the National Housing Code from which the UISP is derived. In this regard, the city is required to first consider the UISP as the primary policy instrument. Secondly, it was in breach of the residents' right to just administrative justice and thirdly, it infringed on the residents' right of access to adequate housing in terms of section 26 (1) of the Constitution. Lastly, the city's decision to relocate residents will exclude a certain number of people from adequate housing. Ultimately, the court ordered that the decision not to apply the

²³⁷ *ibid* at para 32-33.

²³⁸ *ibid* at para 34 and 46-47.

²³⁹ *ibid* at para 34 and 48.

²⁴⁰ *ibid* at para 35.

²⁴¹ The court outlined the seven requirements of administrative justice in PAJA; see also *Chirva v Transnet Ltd* 2008 (4) SA 367 (CC); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) ; See also *Permanent Secretary Department of Education and Welfare, Eastern Cape v Edu College PE* 2001 (2) SA (1) (CC) . It held that the present case was no different.

²⁴² *ibid* at para 41, however at para 21-23 it appears that even though the court made reference to the principle of legality and its associated standard of rationality, it acknowledged that the decision by the city is susceptible to review, and merely branding it a policy decision does not insulate it against review.

UISP be reviewed and set aside. The city was then ordered to apply for funding from province. The province was ordered to respond within three months.²⁴³

This judgement is important for a number of reasons. Firstly, it confirmed the UISP as the primary policy instrument for the *in situ* upgrading of informal settlements, and that failure to implement the policy amounts to administrative action reviewable under PAJA. Secondly, that the MEC and the City are bound in terms of the legislative and policy framework (the Constitution, the Housing Act, National Housing Code and UISP) to implement the program in partnership with the community.²⁴⁴ Thirdly, the court confirmed that the UISP is aimed at *in situ* upgrading, subject to relocation under exceptional circumstances. Lastly, the judgement calls for social cohesion and informal settlements spatial integration into the Cities.

4.6 By way of conclusion: the implication of this jurisprudence for informal settlement upgrading

There should be some clarity by now. This paper went beyond the findings of the studies before it, because the cases discussed above contain the following principles that are necessary for the fair and reasonable implementation of the UISP:

- i. The courts have lamented the role of the PIE Act on informal settlement upgrading cases. They have said that it is not in line with the principle of ensuring *in situ* upgrading and relocation under exceptional circumstances. They have further warned that this approach is in breach of the rights to equality and dignity of poor communities. They have also said that in order to justify relocation of a settled community, a municipality will have to show that relocation is a reasonable step because what is clear by now is that ignoring the UISP in favour of relocation and eviction amounts to a breach of section 26(2) of the Constitution, the Housing Act, and is thus unreasonable and not inclusive. The UISP is a primary policy that regulates *in situ* upgrading of informal settlements in partnership with the residents and is binding on all municipalities.
- ii. The courts underscored the importance of meaningful engagement on informal settlement upgrading cases. In this regard, they have said that the Memorandum of

²⁴³ *ibid* at para 4 of the order.

²⁴⁴ The fact that municipalities are taken to court to implement the UISP might run counter the efforts and vision made in the IDP. It is really important that the municipalities initiate the program, by first setting it out in its planning instruments like the IDP, SDF and LUMS.

Understanding constructed in terms of the UISP must be subject to meaningful engagement and the rights in the Bill of Rights. Essentially the UISP must be implemented in partnership with the affected community.

- iii. A municipality must understand its role in informal settlement upgrading cases as being to incrementally achieve security of tenure, spatial integration and ensuring minimal disruption of community networks through *in situ* upgrading.
- iv. What is expected of municipalities is to ensure that an application is made to the province in order to ensure compliance with the UISP. Where there is systematic failure on the part of the municipality to implement the UISP, PAJA may be used to compel it to implement the UISP.
- v. The courts have indicated that province must consider an application to upgrade by a municipality within a reasonable amount of time. What is reasonable time will depend on the circumstances of each case.

Municipalities may employ these principles in their implementation of the UISP in order to ensure compliance with the rights in the Bill of Rights.

CHAPTER 5

CONCLUSION: MAKING A CASE FOR INFORMAL SETTLEMENT UPGRADING

A warning was sounded about the informal settlement challenge in South Africa in this paper. In this regard, two aspects were identified: first, the persistent growth of informal settlements despite the provision of RDP housing and secondly, the apartheid spatial patterns that relates to the challenge of informal settlements. I noted that these challenges existed at the time of transformative constitutionalism, the constitutional project aimed at redressing legacies of apartheid. As a solution to these challenges, this paper sought to find answers in law that may begin to address the challenges of informal settlements.

The syllogism in this paper is a simple one. First, it was argued that by taking stock of the right to equality, human dignity, freedom of movement and residence, the right to an environment that is not harmful to their health or wellbeing, the right of access to adequate housing, tied to the rights to land and tenure security, and further the Constitution guarantees the rights to water and indirectly secures the rights to electricity and basic sanitation, one may begin to construct a constitutional rights-based approach that informs the legislative and policy framework regulating informal settlement upgrading and planning law.

This framework was identified as including: the Housing Act, the UISP and SPLUMA which is a combination of housing and planning law instruments. From this legislative and policy framework, a case in favour of informal settlement upgrading was made that suggested that informal settlement upgrading finds its support in our law, in particular, our Constitution. Secondly, a question was asked as to how should the state then deliver on the UISP promise of informal settlement upgrading? Who exactly, from the different spheres of government should drive upgrading? A particular constitutional framework was suggested that made it possible to suggest that what our Constitution envisages is a developmental local government.

I argued that municipalities are at the forefront of implementation of the UISP, subject to the oversight role of the national and provincial spheres in the form of supporting and monitoring and the duty on all spheres to co-operate. In addition,

I argued that all these principles may help accelerate the upgrading of informal settlements through the UISP. Lastly, an analysis of *Joe Slovo*, *Abahlali BaseMjondolo*, *Nokotyana*, *Beja* and *Slovo Park*, was undertaken from which a number of principles were identified.

Firstly, we now know that the role of the PIE Act on informal settlement upgrading cases is inappropriate, because it is not in line with the principle of ensuring *in situ* upgrading and relocation under exceptional circumstances. The courts have warned that this approach is in breach of the rights to equality and dignity of poor communities. They have also said that in order to justify relocation of a settled community, a municipality will have to show that relocation is a reasonable step because what is clear by now is that ignoring the UISP in favour of relocation and eviction amounts to breach of section 26(2) of the Constitution, the Housing Act, and is thus unreasonable. Also we know that the UISP is a primary policy that regulates *in situ* upgrading of informal settlements in partnership with the residents and is binding on all municipalities.

Secondly, we know that the courts have underscored the importance of meaningful engagement on informal settlement upgrading cases. In this regard, they have said that the Memorandum of Understanding constructed in terms of the UISP must be subject to meaningful engagement and the rights envisaged in the Bill of Rights.

Thirdly, a municipality must understand its role in informal settlement upgrading cases as being: to incrementally achieve security of tenure, spatial integration and ensuring minimal disruption of community networks through *in situ* upgrading.

Fourthly, that it is expected of municipalities to ensure that an application is made to the province in order to ensure compliance with the UISP. Where there is systematic failure on the part of the municipality to implement the UISP, communities may use PAJA to compel the municipality to implement the UISP.

Finally, the courts have indicated that province must consider an application to upgrade by a municipality within a reasonable amount of time. What is reasonable time will depend on the circumstances of each case. Collectively, these principles assist municipalities in the implementation of informal settlement upgrading whilst being sensitive to the rights of poor communities living in informal settlements.

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UNIVERSITY OF KWAZULU-NATAL

**EXEMPTION FROM ETHICS REVIEW APPLICATION FORM: 2014
(HUMANITIES AND SOCIAL SCIENCES RESEARCH ETHICS COMMITTEE)**

Preamble

Research studies that qualify for exemption from ethics review include those employing the method of review of *materials available in the public domain* such as:

- Newspapers, websites, magazines, public reports, public statements, films, television programs, public performances, public exhibitions, public speeches
- Published works, systematic reviews, literature reviews, collective reviews
- Archived materials that are available in the public domain

Studies involving the *review of archived materials that are confidential* (e.g. hospital/ clinic case notes, medical records) must be ethically reviewed and are **not exempt** (although they may qualify for expedited approval). Studies of closed social media sources/fora require ethics review.

Studies involving the review of departmental/institutional statistics, (employees, clients, patients, service providers and users) service records etc must be ethically reviewed and are usually **not exempt**.

Studies that employ *additional methods* involving direct contact with human participants such as interviews, focus groups etc., over and above or in addition to review of materials in the public domain are **not exempt**.

The status of a study's ethics review exempt status can only be made by the REC chair and not by the applicant or another third party.

Updated: 20 March 2014

PLEASE NOTE THAT THE FORM MUST BE COMPLETED IN TYPED SCRIPT. HANDWRITTEN APPLICATIONS WILL NOT BE CONSIDERED

SECTION 1: PERSONAL DETAILS

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- 1.4 Applicant's gender : MALE
 1.5 Applicant's Race (African/ Coloured/Indian/White/Other) : AFRICAN
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 1.8 College : LAW AND MANAGEMENT
 1.9 Campus : HOWARD COLLEGE
- 1.10 Existing Qualifications : LLB
- 1.11 Proposed Qualification for Project : LLM
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3.2				
3.3				

SECTION 2: PROJECT DESCRIPTION

2.1 Project title

MAKING A CASE FOR 'INFORMAL SETTLEMENT UPGRADING': IN SEARCH OF A CONSTITUTIONAL RIGHT-BASED APPROACH TO ASSIST THE STATE IN ENSURING ACCESS TO ADEQUATE HOUSING

2.2 Questions to be answered in the research

(Set out the critical questions which you intend to answer by undertaking this research.)

1. WHAT IS THE RIGHT-BASED APPROACH TO UPGRADING OF INFORMAL SETTLEMENT?
2. WHAT IS THE ROLE OF LOCAL GOVERNMENT IN UPGRADING TOOLS AND ACCESS TO HOUSING?
3. HOW THE COURTS HAVE ADJUDICATED THE ISSUES OF INFORMAL SETTLEMENT UPGRADING?
4. WHAT ARE THE PRINCIPLES THAT EMERGE FROM THE JURISPRUDENCE AND WHAT ARE THE IMPLICATIONS FOR INFORMAL SETTLEMENT UPGRADING?

2.3 Research approach/ methods

Please indicate in detail, your sources of data to be collected

THE STUDY IS A DESK-TOP STUDY. IT INCLUDES THE REVIEW AND INVESTIGATION OF: (BOOKS, THESIS, NGO RESEARCH REPORTS, ACADEMIC ARTICLES, NEWSPAPER ARTICLES, INTERNET RESOURCES, LEGISLATION, POLICY DOCUMENTS, WHITE PAPERS, COURT RULES AND CASE LAW.

SECTION 3: FORMALISATION OF THE APPLICATION

APPLICANT

I have familiarised myself with the University's Code of Conduct for Research and undertake to comply with it. The information supplied above is correct to the best of my knowledge.

DATE: 07 March 2017

SIGNATURE OF APPLICANT L. P. Uchendu

SUPERVISOR/PROJECT LEADER/DISCIPLINE ACADEMIC LEADER

DATE: 16-3-2017

SIGNATURE OF SUPERVISOR/ PROJECT LEADER/DISCIPLINE LEADER

[Signature]

RECOMMENDATION OF SCHOOL RESEARCH ETHICS COMMITTEE/HIGHER DEGREES COMMITTEE

The application is (please tick):

<input type="checkbox"/>	Recommended and referred to the Human and Social Sciences Ethics Committee for further consideration
<input type="checkbox"/>	Not Approved, referred back for revision and resubmission

NAME OF CHAIRPERSON:

SIGNATURE: _____

DATE: _____

RECOMMENDATION OF UNIVERSITY RESEARCH ETHICS COMMITTEE (HUMAN AND SOCIAL SCIENCES)

The application for Exemption is (please tick):

<input type="checkbox"/>	Approved by Chairperson
<input type="checkbox"/>	Not Approved. Sent back for further clarity and resubmission

If approved, the Exemption Number to be recorded: _____

NAME OF

CHAIRPERSON: _____ SIGNATURE _____

DATE: _____