

THE LEGAL-HISTORICAL CONTEXT OF URBAN FORCED EVICTIONS IN SOUTH AFRICA

Gustav Muller* **

1 Introduction

In the South African common law, ownership has been described as the real right that confers the most complete control over a thing.¹ According to this perception, it is argued that ownership has an individualistic nature and is an absolute right that can be enforced against anyone.² The owner can achieve this, *inter alia*, through her entitlement to recover

1 This definition may be traced back to Grotius and the distinction he drew between complete and incomplete ownership, defining complete ownership as “[v]olle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefde en t’sijnen bate dat by de wetten onverboden is” (Hugo De Groot *Inleidinge tot de Hollandsche rechts-geleerdheid* (ed F Dovring, HFWD Fischer & EM Meijers Leiden, 1965) 2 3 9-2 3 11). This definition was partially influenced by Bartolus de Saxoferrato who defined dominium as “ius de re corporali perfecte disponendi, nisi lege prohibetur” (Bartolus *ad D* 41 2 17 1: see AJ van der Walt “Bartolus se omskrywing van *dominium* en die interpretasie daarvan sedert die vyftiende eeu” (1986) 49 *THRHR* 305-321 at 309-310).

2 The abovementioned definitions of ownership by Bartolus de Saxoferrato (“nisi lege prohibetur”) and Grotius (“by de wetten onverboden”) make it clear that the Roman-law based concept of ownership was restricted by the objective law and thus by no means absolute. During the French Revolution, the population campaigned for the abolition of the feudal system, because the greater political freedom it generated was inextricably linked to possession of land. This gave rise to the reinstatement of private ownership and the introduction of separate public- and private-law measures concerning land. The concept of absolute, inviolable and individual private ownership was emphasised, because government interference was regarded as a violation of personal liberty. In order to afford it greater authority, this interpretation of ownership was characterised as a return to the Roman-law concept. It is easy to see how the entitlement to complete disposal in the definitions of Bartolus de Saxoferrato (“perfecte disponendi”) and Hugo Grotius (“met de zake alles mag doen nae sijn geliefde en t’sijnen bate), together with the industrial revolution in Great Britain and the revaluation of capitalism in the western world, led the nineteenth century Pandectists to emphasise that ownership was absolute. This idea was thus erroneously attributed to Roman and Roman-Dutch law. See P Birks “The Roman law concept of dominium and the idea of absolute ownership” (1985) *Acta Juridica* 1-37; DP Visser “The ‘absoluteness’ of ownership: The South African common law in perspective” (1985) *Acta Juridica* 39-52; G Pienaar “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” (1986) *TSAR* 295-308; Van der Walt (n 1).

* Lecturer, Faculty of Law, Rhodes University.

** This article is based on ch 2 of my unpublished LLD thesis entitled “The impact of section 26 of the Constitution on the eviction of squatters in South African law” (Stellenbosch University, 2011).

(*ius vindicandi*) her property from any person who retains possession of it, using the *rei vindicatio*. The *rei vindicatio* is regarded as the most important real action available to the owner. In the case of immovable property took the form of an eviction application. To succeed in this real action the owner had merely to allege and prove that she was the owner of the property in the defendant's possession.³ Once the owner satisfied these requirements, the court had no discretion to refuse the eviction order on the grounds of the social and economic circumstances of the unlawful occupiers or any other general policy considerations.⁴

The owner was entitled to evict because it was assumed that it was normal for a landowner to be allowed exclusive and undisturbed possession of her property.⁵ It follows that once ownership has been proved it would be regarded as superior to all other conflicting interests.⁶ The power to exclude unlawful occupiers is protected because it gives the owner greater security and autonomy. In the final analysis, the most persuasive rationale for the “presumptive power” of rights is that the interests that underlie those rights are *prima facie* more important than public interests that are in conflict with them.⁷ In this sense, “presumptive power” is an authoritative affirmation of individual autonomy, affording strong protection to the owner of land. When the owner is presumed to be entitled to exclusive possession of her property, the onus is on the unlawful occupier to show a legal basis for her continued occupation of the land. According to Singer, the occupier bears the “burden of persuasion” to show why the owner’s rights must be limited in terms of a right or, failing that, an overriding public interest.⁸ According to American legal doctrine, this “burden of persuasion” is assigned according to the core stick in the owner’s bundle of rights. In evictions, the core stick is the right to exclude others from your property. This right to exclude others provides the owner with the certainty that her vested rights and interests as owner will be protected through the stability that an established regime of property rights maintains.⁹ The owner’s need for stability and certainty was satisfied through reliance on the tradition or convention that she would be able to evict any unlawful occupier because of her stronger right to possession. Coombe describes this reliance on convention for firm background

3 *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A. Confirmed in *Akbar v Patel* 1974 (4) SA 104 (T) at 109F-H and *Jackpersad NO v Mitha* 2008 (4) SA 522 (D) at 528H-529A.

4 AJ van der Walt *Property in the Margins* (Oxford, 2009) at 54.

5 See *Chetty v Naidoo* (n 3) at 20A.

6 LS Underkuffler *The Idea of Property Its Meaning and Power* (Oxford, 2003) at 64-71 describes this as the “presumptive power” of property rights in terms of the common perception of property. She argues further that the view that individual rights are dominant and normatively more compelling than conflicting non-right interests must prevail if individual rights are to be taken seriously. Individual rights are important because they protect a certain state of affairs and do so for a particular reason. The common perception of property recognises the individual interests of owners as strong “property rights” which have been fixed in time and are protected against the threat that public interests pose.

7 *Idem* at 74.

8 JW Singer *Entitlement – The Paradoxes of Property* (New Haven, 2000) at 62.

9 Van der Walt (n 4) at 59.

or “normality conditions” as the “politics of interpretation”.¹⁰ Coombe argues that the “politics of interpretation” adopts the guise of an adjudicative strategy that attempts to limit the apparent indeterminacy of interpretation by seeking stable legal meaning in convention as found in a doctrinal tradition or a core text like a constitution.¹¹

During apartheid, courts found stable legal meaning in the South African doctrinal tradition that entitled a private owner to exclude others from her property and to enforce this right against others by means of the *rei vindicatio*. The result was that evictions from land occurred without any regard for the personal circumstances of the unlawful occupiers, because these considerations were simply not relevant in the absence of a constitutional provision guaranteeing access to adequate housing that would force courts to consider all relevant circumstances before issuing an eviction order.

The powerful *rei vindicatio* was enhanced by the powers that the government gave the police to evict people for purposes of health, safety, and the public interest¹² in terms of the Slums Act 53 of 1934, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967, and the Health Act 63 of 1977. Van der Walt observes that there is nothing extraordinary about the state’s powers to evict people for these purposes.¹³ However, he adds that during apartheid these powers were used for the political purpose of establishing and maintaining an unequal and unjust land-use system according to racial criteria.¹⁴ Various apartheid measures¹⁵ were then enacted to bolster the government’s right to evict and displace people, irrespective of their personal circumstances or need for housing.

The aim of this article is to place urban forced evictions in their legal-historical context. It will be shown that the common-law right to evict was reinforced through legislation in order to ensure the stability and security of individual owners through the exercise of arbitrary and discriminatory state power. Part two of this article traces the development of black land tenure in rural and urban areas through an overview of the most important legislative measures. Part three provides an overview of the powers that the Prevention of Illegal Squatting Act 52 of 1951 afforded individual owners and local authorities.

10 RJ Coombe “‘Same as it ever was’: Rethinking the politics of legal interpretation” (1989) 34 *McGill LJ* 603-652 at 637-639 analyses the “politics of interpretation” against the backdrop of the concern with “contextual” interpretation and theoretical developments regarding the “interpretive turn” in the social sciences. The “interpretive turn” signals a turn away from conventional understandings of language that underlie traditional legal scholarship and adjudication towards the recognition that there is no inherent or stable meaning in words. It is argued that convention is unstable and socially contingent because it always privileges one set of meaning to the violent exclusion of all others and thus it cannot provide a ready-made, neutral and objective source of stable meaning. See, also, AJ van der Walt “Modernity, normality, and meaning: The struggle between progress and stability and the politics of interpretation” parts 1 and 2 (2000) 11 *Stellenbosch LR* 21-49, 226-243 at 235.

11 AJ van der Walt (n 10) at 231.

12 AJ van der Walt “Towards the development of post-apartheid land law: an exploratory survey” (1990) 23 *De Jure* 1-45 (hereafter Van der Walt “An exploratory survey”) at 32; AJ van der Walt “Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation” (2002) *TSAR* 254-289 (hereafter Van der Walt “Exclusivity of ownership”) at 259-263.

13 AJ van der Walt *Constitutional Property Law* 2ed (Wetton, 2005) at 413.

14 *Idem* at 414.

15 *Ibid.*

2 Black land tenure and urbanisation

2 1 Introduction

The modern history of South Africa is characterised by the special relationship of power, land and labour.¹⁶ According to Terreblanche, from the mid-seventeenth century until the late twentieth century the colonial powers and white farmers enriched themselves at the expense of the indigenous people by creating political and economic power structures that entrenched their privileged position *vis-à-vis* the indigenous people. Indigenous people were deprived of the opportunity to cultivate land, draw surface water and herd cattle, and so were reduced to “different forms of unfree and exploitable labour”.¹⁷

The Union government of South Africa further developed the British institution of segregation through the enactment of a plethora of racist laws that suppressed and exploited black people with greater vigour than any other government that had preceded it.¹⁸ Black farmers lost their land and were forced into forms of oppressive labour relationships with white farmers. Some white farmers entered into labour-tenancy relationships with black people and allowed their families to stay on the farms with them, until the government stepped in to limit the number of black people congregating on farms. This forced many black people to return to overcrowded “homelands”, while others chose to travel to the big urban centres of South Africa in search of unskilled employment opportunities at minimum wages. This had substantial implications for black people’s land tenure in both rural and urban areas.

2 2 Rural land tenure

This process of instituting and maintaining racial segregation in rural areas was streamlined through the enactment of the Black Land Act 27 of 1913.¹⁹ The purpose of this Act was to identify “traditional” black land and to reserve it for the use and occupation of black people exclusively. Section 1(1)(a) accordingly prohibited black people from acquiring a right to, interest in or servitude over land that was not “traditional” land in terms of a sale, lease or other agreement. Section (1)(1)(b) provided that black people could only obtain a right to, interest in or servitude over land located outside these “traditional” areas if it was owned by another black person. These provisions ensured that the movement of black people was limited to these traditional areas and that their ownership of land could

16 S Terreblanche *A History of Inequality in South Africa 1652-2002* (Durban, 2002) at 6.

17 *Ibid.*

18 *Idem* at 299.

19 When South Africa became a Union in 1910 all the colonies had laws in place enforcing racial segregation. Ord 2 of 1865 (Natal), Ord 4 of 1895 (OFS) and Ord 21 of 1895 (ZAR) all sought to limit the number of squatting families per farm. In the Cape, the Vagrancy Act 23 of 1879, the Vagrancy Amendment Act 27 of 1889, the Native Locations Amendment Act 33 of 1892, the Native Locations Amendment Act 30 of 1899 and the Private Locations Act 32 of 1909 imposed prejudicial taxes upon landowners and squatters who were not in a direct employment relationship.

not increase in those rare instances where they owned land outside the traditional areas.²⁰ Section 1(2) of the Black Land Act also provided that only black people could acquire a right to or interest in land located in the traditional areas. Any person found to be occupying land in contravention of section 1 would be guilty of an offence.²¹ However, black people could avoid these fines and possible imprisonment if they worked as labour tenants on white farms.²²

The Black Service Contract Act 24 of 1932 was the first comprehensive attempt to regulate labour tenancy in the Union.²³ The Act defined a labour tenant as any black person who was bound to render a service or had permission to occupy and use land in terms of a labour tenant contract.²⁴ No formalities were required for the formation of the labour tenant contract,²⁵ but it created reciprocal obligations for the parties.²⁶ Its duration was limited to a maximum of three years.²⁷ The labour tenant contract came to an end

20 A Claassens “Rural land struggles in the Transvaal in the 1980s” in C Murray & C O’Regan (eds) *No Place to Rest – Forced Removals and the Law in South Africa* (Cape Town, 1990) 27-65 at 30-43 provides a detailed anecdotal account of the strategies that the landowning communities of Driefontein and kwaNgema adopted during the 1980s to resist their forced removal “by exploiting the excesses of the racial platteland, to turn the contradictions in the dominant ideology to their advantage” (at 31). Claassens notes that this led government to adopt a policy of voluntary removals which, she asserts, “amounted to ‘persuading’ people to move by means that progressed rapidly from discussion, to withdrawal of health services, to demolition of schools, to withholding pensions and finally … to surrounding the village with armed police in the dead of night” (at 31).

21 Section 5 of the Black Land Act.

22 C Bundy “Land, law and power” in Murray & O’Regan (n 20) 3-12 at 6 notes: “What the 1913 Act attempted was to legislate out of existence the more independent forms of tenure and to perpetuate instead the most dependent. Its intention was to outlaw cash-paying tenants, and in the Orange Free State to forbid all sharecropping agreements. The Act was intended to reduce cash tenants and sharecroppers to the status of labour tenants or wage labourers.” See, further, ST Plaatjie *Native Life in South Africa* (Boston, 2009) and C Van Onselen *The Seed is Mine – The Life of Kas Maine, A South African Sharecropper 1894-1985* (New York, 1996).

23 Earlier attempts to exercise control over the occupation of white-owned farms by black people and to regulate the relationship between farmer and labour tenant included Ord 2 of 1855 (Natal) and Ord 21 of 1895 (ZAR). See M Haythorn & D Hutchison “Labour tenants and the law” in Murray & O’Regan (n 20) 194-213 at 195.

24 Section 1 of the Black Service Contract Act; s 2 of the Act also required black people to furnish a farmer with certain documentary proof of age, domicile in South Africa and, if under the age of eighteen years, permission to be employed as a labour tenant. See *R v Ndoweni* 1949 (2) SA 86 (N); *Malemone v Dreyer* 1949 (2) SA 824 (T); Haythorn & Hutchison (n 23) at 198-200.

25 Section 5(2).

26 Labour tenants had to (a) provide personal services or those of an able-bodied family member to the farmer for the specified period of each year and (b) use the land allocated to them only for those private purposes agreed upon in the labour tenant contract. The farmer had to (a) make the land agreed upon in terms of the labour tenant contract available to the labour tenants; (b) allow the labour tenants to reside on that land with their families and dependants; (c) allow the labour tenants to erect buildings and structures on that land; (d) allow the cattle or other stock of the labour tenants to graze on the land allocated to them; and (e) allow the labour tenants to plough the land, sow seed and to reap the crops. See Haythorn & Hutchison (n 23) at 200-201.

27 Section 5(1); s 5(2) created a presumption that the labour tenant contract was entered into for one year unless the parties specifically agreed otherwise. See Haythorn & Hutchison (n 23) at 201-202.

through effluxion and would be presumed to have been terminated if the farmer was unable to call on the services of the labour tenant for a period exceeding three months because of the tenant's absence from the farm without the farmer's permission.²⁸ Upon termination of the labour tenant contract, a labour tenant would be entitled to tend to any crop that was standing on the land "till it matures and thereafter to reap and remove it".²⁹ The tenant would also be entitled to demolish and remove or destroy any building or structure erected on the land that he or she was entitled to occupy and use in terms of the labour tenant contract, if that building or structure was not erected with building materials that the farmer had provided free of charge.³⁰ Failure to vacate the farm within one month of termination of the labour tenant contract would make the former labour tenant guilty of an offence.³¹

The Development Trust and Land Act 18 of 1936 was the legislative embodiment of the government's growing concern with the large number of black people who were living and working on white farms as labour tenants.³² Chapter 4 of the Act contained a number of provisions regulating the tenure of black people who resided on land other than the traditional and "released" areas.³³ A black man³⁴ was prohibited from occupying certain land unless he was either (a) the registered owner of that land; (b) a servant of the owner of that land; (c) a registered labour tenant; (d) a registered squatter; or (e) otherwise exempted from the prohibitions contained in chapter 4 of the Act.³⁵ Any black person who occupied land in contravention of these prohibitions would be guilty of an offence.³⁶

Any farmer who required the services of black people on a farm therefore had to ensure that they were registered as labour tenants³⁷ with the native commissioner of that

28 Section 5(5); s 5(11) further provided that where two or more labour tenants from the same kraal or household were bound to render services in terms of labour tenant contracts to one or more farmers (individually or jointly), these contracts could be terminated if any one of the labour tenants failed to render such services. See *R v Shapiro* 1949 (3) SA 581 (T); *R v Ndiyase* 1959 (3) SA 818 (N); Haythorn & Hutchison (n 23) at 202-206.

29 Section 5(7). See *Matjila v Moore* 1948 (3) SA 1001 (T).

30 Section 5(8). See Haythorn & Hutchison (n 23) at 206-208.

31 Section 5(12); s 10 held any offenders liable for a maximum fine of £10 or incarceration for a maximum period of two months (with or without hard labour) upon non-payment of the fine. See *R v Mokwena* 1947 (2) SA 686 (T).

32 Haythorn & Hutchison (n 23) at 196.

33 Section 25(1); s 25(2) enabled the State President to extend the application of ch 4 to these areas or to suspend the operation of the ch as a whole. See *R v Maluma* 1949 (3) SA 856 (T).

34 Section 26(2) excluded the wife, children and dependent family members of the category of people subjected to the prohibitions of s 26(1).

35 Section 26(1). However, see the special permissions afforded in s 34 of the Act.

36 Section 26(4). See *Mabaso v Native Commissioner, Ladysmith* 1958 (1) SA 130 (N); *R v Chomo* 1958 (4) SA 241 (T). The legislature accordingly amended the meaning of "reside" in s 4 of the Development Trust and Land Amendment Act 41 of 1958 to "being resident".

37 Section 27(2), Development Trust and Land Act.

district.³⁸ A farmer could be requested by the native commissioner to appear before a labour tenant control board³⁹ to explain why the number of labour tenants on his farm should not be reduced, since more labour tenants were registered for his farm than he required to conduct his domestic services or “in any other industry, trade, business or handicraft” carried on by him on that particular land.⁴⁰

All farmers were also required to prepare a prescribed form with the details (number, full names and the particulars of the licence, permission or terms and conditions of employment) of all black people residing on the farm and to submit it periodically to the native commissioner of the district.⁴¹ The submission of incorrect and incomplete details or failure to comply with this requirement would amount to an offence.⁴² This ensured that no farmer could get away with employing and allowing more labour tenants to reside on his land than he paid licence fees for and had registered with the native commissioner.

All black people who unlawfully⁴³ occupied land outside the traditional and released areas would be served with a written notice requesting them to show cause why they should not be evicted.⁴⁴ If the native commissioner could not be persuaded that the said people had a right of occupation, a warrant would be issued which authorised the police to evict the unlawful occupiers,⁴⁵ using reasonable force if necessary.⁴⁶ The government and the Department of Native Affairs were obliged to accommodate these black people in a traditional or released area after the eviction.⁴⁷

These provisions paved the way for the extensive eviction of labour tenants from farms during the 1960s and 1970s⁴⁸ as part of the plan to abolish labour tenancy in

38 Section 27(1).

39 Established in terms of s 28(1) of the Act.

40 Section 29(1).

41 Section 35(1).

42 Section 35(2).

43 Section 37(5) of the Act deemed black people to be in unlawful occupation of the land if they failed to vacate it after the termination period (one month for a servant and three months for a labour tenant, squatter or any other black person) expired.

44 Section 37(1).

45 Section 37(3).

46 Section 37(4).

47 Section 38.

48 L Platzky & C Walker *The Surplus People: Forced Removals in South Africa* (Johannesburg, 1985) at 138 calculated that between 1960 and 1983 1,13 million people were evicted from farms and a further 614 000 people were evicted from black spots and consolidation areas. M Morris “State intervention and the agricultural labour supply post-1948” in F Wilson, A Kooy & D Hendrie (eds) *Farm Labour in South Africa* (Cape Town, 1977) 62-71 at 71 analysed these numbers further and found that “[b] between 1960 and 1970, 340 000 labour tenants plus 656 000 squatters and 97 000 squatters in ‘Black Spots’ were estimated to have been removed. In addition, an estimated 400 000 labour tenants were removed between 1971 and 1974. By 1976 labour tenancy in South African agriculture has to all intents and purposes been abolished and farm labour was stabilised”.

South Africa, by replacing labour tenants with full-time wage-earning farm labourers.⁴⁹ To this end the provisions of chapter 4 of the Development Trust and Land Act were applied strictly and extremely efficiently to ensure that the land purchased to create the released areas could “accommodate the displaced squatters resulting from the application of chapter IV” of the Development Trust and Land Act.⁵⁰ The Act has therefore been described as “perhaps the most concerted legislative attack on peasant squatters and labour tenants”.⁵¹

The increasingly harsh measures regulating rural land tenure by black people increased the need for land in the traditional and released areas⁵² as employment conditions on white farms deteriorated.⁵³ Because industrial growth created employment opportunities in urban areas, black people could avoid the nearly impossible task of acquiring suitable accommodation in the traditional or released areas, and escape the prospect of criminal prosecution for not being registered. Bundy notes:

If the reserves were the sources of migrant labour, the mining compounds and the squalid urban townships were its destination: the system as a whole was propped up on the [Black] Land Act, the pass laws, influx control, and political exclusion. Denied access to land elsewhere, the inhabitants of the increasingly crowded reserves were condemned to a sphere of existence simultaneously distant, debilitating and deteriorating.⁵⁴

49 The *Report of the Inter-Departmental Committee of Enquiry in Connection with the Labour Tenant System and Matters Related Thereto* (1961) (hereafter *Report*) recommended the enactment of legislation that would abolish the labour tenant system by 1968. However, the *Report* (at 5) recognised that instant abolition of the labour tenant system would cause problems and therefore recommended that the system be phased out “by means of proclamation to a particular farm, area, district or province according to circumstance”. These recommendations were embodied in the Bantu Laws Amendment Act 42 of 1964, which repealed the Black Service Contract Act and substantially amended ch 4 of the Development Trust and Land Act. Ch 4 of the Development Trust and Land Act was repealed by the Abolition of Influx Control Act 68 of 1986.

50 Morris (n 48) at 68.

51 C O'Regan “No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act” (1989) 5 *SAJHR* 361-394 at 364; Van der Walt “An exploratory survey” (n 12) at 5.

52 As a result the “traditional” land was extended to 13 per cent of the land in the Union with the addition of certain “reserved” land in terms of the Development Trust and Land Act. Section 10(1) of the Development Trust and Land Act limited the total area of land for exclusive use and occupation by black people to 7,25 million morgen in the whole Union, while the Transvaal, Natal, Orange Free State and Cape colonies were respectively limited to 5,028 million morgen (s 1(1)(a)), 526 000 morgen (s 1(1)(b)), 109 000 morgen (s 1(1)(c)) and 1,587 million morgen (s 1(1)(d)).

53 O'Regan (n 51) at 365. Claassens (n 20) at 48 notes that white farmers often abused the political power and access to land that their skin colour conferred on them; they asserted their so-called superior position over black people by assaulting and often murdering disobedient labourers. Claassens found that very few farmers were prosecuted in such cases because the black labourers did not lay charges. In those rare instances when they did, the “half-hearted” prosecution process meant that even in the unlikely event of farmers being convicted, they seldom served prison sentences.

54 Bundy (n 22) at 8-9.

The process of urbanisation that ensued created a severe shortage of available formal housing⁵⁵ in urban areas, which led to the creation of informal settlements and urban squatting.

2 3 Urban land tenure

In urban areas the policy of separate development⁵⁶ was enforced through the Group Areas Act 36 of 1966. The purpose of the Act was to establish separate areas for the different race groups defined in the Act⁵⁷ and to control the use, occupation and acquisition of ownership of land in those areas.⁵⁸ The Act accordingly prohibited persons from other race groups from using, occupying or acquiring ownership of land in areas designated for a particular group.⁵⁹ It made provision for areas that differed with regard to the kind and/or extent of control exercised over use, occupation and ownership. If these areas were represented by points on a continuum the “controlled areas”⁶⁰ would be on the left and the “group areas”⁶¹ on the right. The progression from left to right on the continuum indicated not only an increase in the type and/or extent of control, but also the time when the area was created.⁶²

55 In 1994, the Department of Housing (as it was then known) published a *White Paper on Housing* (GN 1376 GG 354 of 23 Dec 1994) (hereafter *White Paper*), to mark the beginning of its plan to house the nation in terms of an inclusive and comprehensive housing policy framework. The *White Paper* (at 7) estimated that there were 8,3 million households in South Africa in 1994 and that the projected annual population growth would result in the formation of an additional 200 000 households per year, on average, until 2000 (par 3 1 1(b)). The *White Paper* envisaged that the population growth coupled with “[a] relatively small formal housing stock, low and progressively decreasing rates of formal and informal housing delivery” would result in a surge of households seeking alternative accommodation in informal settlements, “squatter housing” and already overcrowded formal housing. In par 3 1 3(d) it was estimated that approximately 1,06 million households or 13,5 per cent of the total population lived in free standing “squatter housing” on the periphery of cities and towns. The *White Paper* further noted that overcrowding in informal settlements and an increasing number of land invasions in urban areas not only threatened a rapid increase in the estimated housing backlog of 1,5 million housing units, but also aggravated the insecurity and frustration that individuals and communities as a whole felt on a daily basis; which would increase the rising levels of criminal activity and instability already prevalent in many communities.

56 JT Schoombee “Group areas legislation – The political control of ownership and occupation of land” (1985) *Acta Juridica* 77-118 at 77 argues that group-area legislation formed the cornerstone not only of racial segregation but also of the all-encompassing government policy of separate development.

57 Section 12(1) of the Act distinguished between white, black (originally termed “native”) and coloured (with subdivisions for Indian, Chinese, Malay and a “residual” class) groups.

58 Van der Walt “An exploratory survey” (n 12) at 26.

59 Section 23(6)(c)(ii) of the Act and the definition of “black residential area” in s 1 of the Black (Urban Areas) Consolidation Act 25 of 1945 expressly excluded these areas from the ambit of the Group Areas Act. See Schoombee (n 56) at 78.

60 In these areas the race group of a person determined her eligibility for lawful occupation of land; occupation contrary to this constituted a criminal offence in terms of s 46(1) of the Group Areas Act.

61 Areas proclaimed for occupation and ownership by a specific race group in terms of s 23 of the Act.

62 Schoombee (n 56) at 79.

The purpose of the Black (Urban Areas) Act 21 of 1923 was to ensure that black people had adequate accommodation in or near urban areas. To this end an urban local authority could, upon approval of the Minister of Native Affairs,⁶³ “define, set apart and lay out” land for the “occupation, residence and other reasonable requirements” of black people⁶⁴ and “define, set apart and lay out” any portion of a location or any other land within its jurisdiction where black people could lease a lot for the erection of “houses and huts for their own occupation”.⁶⁵ An urban local authority could provide buildings or huts to black people “on such terms and conditions as, with the approval of the administrator and the Minister,” it could prescribe through regulation to black individuals⁶⁶ and families⁶⁷ within locations or native villages.

Only black people were allowed to “enter into any agreement or transaction for the acquisition” of a right to, interest in or servitude over land in a location or native village.⁶⁸ Any person who was party to any agreement that attempted to circumvent section 4(1) would be guilty of an offence.⁶⁹ All black people who were employed within the jurisdiction of an urban local authority were further prohibited from obtaining residence anywhere else than in locations, native villages or native hostels.⁷⁰ Any person who harboured or otherwise provided accommodation to black people in contravention of section 5(1) would be guilty of an offence.⁷¹ The Act furthermore prohibited owners, lessees and lawful occupiers of land from allowing the congregation of black people on their land if that land was situated within three miles of the urban authorities’ jurisdiction.⁷² Any persons who allowed black people to congregate on their land in contravention of section 6(1) would be guilty of an offence.⁷³ This ensured that black people congregated in certain defined areas for domestic employment purposes where they could be carefully managed⁷⁴ and could have their living conditions inspected on a regular basis.

63 Section 1(2), read with ss 2(1) and 3(1).

64 Section 1(1)(a). These areas would be known as “locations”.

65 Section 1(1)(b). These areas would be known as “native villages”.

66 Section 1(1)(c). These areas would be known as “native hostels”.

67 Section 1(1)(d).

68 Section 4(1). However, coloured people could stay in locations and native villages if they were and continued to be ordinarily resident in those locations or native villages at the commencement of the Act (s 4(3)(a)), until the urban local authority could satisfy the Minister that “adequate and suitable accommodation” was available to them somewhere else in its jurisdiction (s 4(3)(b)).

69 Section 4(2).

70 Section 5(1). See s 5(2) of the Act in respect of the groups of black people exempted from this provision.

71 Section 5(3).

72 Section 6(1). The Governor-General could increase this area to a maximum of five miles in terms of s 6(2) of the Act.

73 Section 6(3).

74 According to s 11(1) every urban local authority had to appoint or assign officers for the management of every location, native village and native hostel within its jurisdiction.

However, black people were required to live in “proclaimed areas” if they sought employment in the mining and industrial sector.⁷⁵ Black people had to report to an authorised officer upon their arrival in these proclaimed areas. The authorised officer would, upon payment of a licence fee,⁷⁶ issue them with a certificate stating that they had duly reported their arrival in the proclaimed area⁷⁷ and provide them with a badge that identified them as eligible people to take up employment by the day.⁷⁸ Any person who intentionally attempted to deceive another,⁷⁹ or wilfully altered, defaced, destroyed or mutilated a certificate or document issued in terms of section 12 of the Act,⁸⁰ or aided and abetted any person in the commission of abovementioned⁸¹ would be guilty of an offence.⁸²

This enabled the urban local authority to “establish, equip, control and manage” the accommodation required for all the black people who sought employment in the proclaimed areas. All employers were obliged to pay a registration fee for the registration of the service contract entered into between them and their black labourers.⁸³ All black labourers who remained in a proclaimed area after the termination of their employment contract, expiration of their licence or release from prison had to report to an authorised officer in order to receive a certificate to that effect,⁸⁴ so that they could reside at a prescribed place until they found employment again.⁸⁵

A black labourer could be brought before a magistrate or native commissioner to “provide good and satisfactory account of himself” where there was reason to believe that he (a) was habitually unemployed; or (b) was “by reason of his own default” not in a position to make an honest livelihood; or (c) was leading an idle, dissolute or disorderly life; or (d) had been ordered to leave the proclaimed area in terms of section 12(1)(h) of the Act.⁸⁶ If the labourer failed to provide a satisfactory account of himself, a magistrate or native commissioner could order his eviction and his return to his place of origin and preclude his return to the proclaimed area for a certain period of time,⁸⁷ or impose

75 Section 12.

76 Section 12(1)(f).

77 Section 12(1)(b). Section 12(1)(d) empowered an authorised officer to refuse to issue this certificate to any black persons who appeared to be under the age of eighteen years and who could not provide evidence to the contrary, unless they entered the proclaimed area with a parent or guardian.

78 Section 12(1)(f).

79 Section 14(1)(a).

80 Section 14(1)(b).

81 Section 14(1)(c).

82 Section 14(1).

83 Section 12(1)(a). Section 18(1) prohibited any employer from employing more than fifty labourers who did not reside in a native hostel within the jurisdiction of the urban local authority. Section 18(3) made any contravention of this prohibition an offence punishable in terms of s 25 of the Act.

84 Section 12(1)(c).

85 Section 12(1)(g).

86 Section 17(1).

87 Section 17(2)(a).

detention for a maximum period of two years “in a farm colony, work colony, refuge, rescue home, or similar institution established or approved in terms of section [50] of the Prisons and Reformations Act” 13 of 1911.⁸⁸

These provisions were copied verbatim in the Black (Urban Areas) Consolidation Act 25 of 1945, which in turn led to the proclamation of the Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters.⁸⁹ Chapter 2 of these regulations provided for various forms of urban tenure for black people, conforming to the policy that the presence of black people in urban areas was of a temporary nature.

These regulations empowered a superintendent⁹⁰ of a black residential area to issue a site permit⁹¹ and a building permit⁹² to an emancipated black male who was “desirous of taking up residence in the Bantu residential area with his dependants and of erecting a dwelling”⁹³ if his application fulfilled certain requirements.⁹⁴ The site permit afforded the holder the right to the exclusive use and occupation of the site⁹⁵ in terms of a lease.⁹⁶ The holder of the site permit was required to maintain and repair the site,⁹⁷ and could not transfer the permit,⁹⁸ let, sublet or transfer the dwelling,⁹⁹ or sell, cede, assign, make over, alienate, pledge or hypothecate his permit¹⁰⁰ without the written permission of the superintendent.

88 Section 17(2)(b).

89 Procl R1036 in *GG Extraordinary* 2096 of 14 Jun 1968. The relevant matters referred to included the administration of and control over trading, business and professional sites (ch 3); the possession of dangerous weapons (ch 4); the administration of and control over communal halls and recreational grounds (ch 5); the keeping of animals (ch 6); the administration and control over bantu hostels (ch 7); and the establishment of cemeteries, internment and funerals (ch 8).

90 Reg 1 of ch 1 defined a “superintendent” as “the officer referred to in reg 1(2) of ch 2 of these regulations, being the officer appointed and licensed under the provisions of s 22(1) of the [Black (Urban Areas) Consolidation] Act for the management of the Bantu residential area and includes a deputy or assistant to such officer”.

91 The site permit had to include the name, date of birth, identity number and ethnic group of the holder (reg 6(6)(e)) and all other occupiers (reg 6(6)(f)) of the site. The site permit further had to include a description of the site (reg 6(6)(b)) and had to “specify which buildings, structures or fences have been or may be erected on the relative site” (reg 6(6)(c)).

92 According to reg 6(3) the holder of the building permit had to begin with building operations within three months of receipt of the permit if he wished to avoid its cancellation, withdrawal and *ipso facto* lapsing of any rights he acquired in terms of it.

93 Reg 6(1).

94 Reg 6(2).

95 Reg 6(6)(a).

96 According to reg 6(4) the rent and service charges were “payable monthly in advance with effect from the date of beneficial occupation of the site by the holder of the site permit”.

97 Reg 12.

98 Reg 9.

99 Reg 10.

100 Reg 11.

The superintendent was also empowered to issue a residential permit¹⁰¹ to an emancipated black male who was “desirous of taking up residence in the Bantu residential area and of occupying together with his dependants a council dwelling”¹⁰² if his application fulfilled certain requirements.¹⁰³ The residential permit afforded the holder the right to occupy the council dwelling as a tenant¹⁰⁴ on certain conditions.¹⁰⁵

The holder of a residential permit had the same obligations as the holder of a site permit, except that the prohibition in terms of regulation 9 did not apply. The superintendent was further empowered to issue a certificate of occupation¹⁰⁶ to an emancipated black male who was “desirous of acquiring the right of occupation of a dwelling”¹⁰⁷ if his application fulfilled certain requirements.¹⁰⁸ The certificate of occupation afforded the holder a protected personal right of occupation to a house that he purchased from the local authority. The holder of a certificate of occupation was prohibited from letting, subletting and transferring his dwelling without the written permission of the superintendent.¹⁰⁹ Apart from these forms of tenure, the superintendent was also empowered to issue entry, accommodation, hostel and lodger’s permits that granted the holders short periods of entry into a black residential area.

The South African economy experienced a period of growth at the beginning of the 1980s that forced a shift from capital to labour-intensive operations. This shift created a demand for skilled and unskilled workers that the supply of white and coloured workers could not satisfy.¹¹⁰ This unsatisfied demand for workers led to the rapid influx into white urban areas of black workers seeking to be close to employment opportunities.¹¹¹ Initially these black workers obtained the requisite permits to stay in the white areas, but eventually the permits either expired or were not renewed by a superintendent. This resulted in a flood of arrests for contraventions of the Black (Urban Areas) Consolidation Act and the regulations promulgated in terms of that Act. The resulting circle of lawlessness, violence and civil unrest¹¹² forced the government to change its urbanisation strategy and allow more black people to reside in urban areas in order to provide the work force that the growing economy required.

101 The residential permit had to specify the number of the allotted dwelling (reg 7(3)(a)); the date on which it was issued (reg 7(3)(e)); and the name, identity number and ethnic group of the holder (reg 7(3)(c)) and all other occupiers (reg 7(3)(d)) of the site.

102 Reg 7(1).

103 Reg 7(2).

104 Reg 7(6)(a).

105 Reg 7(6)(b)-(i).

106 The certificate of occupation had to specify the number of the allotted dwelling and include a description of the site (reg 7(4)(b)); the date on which it was issued (reg 8(4)(e)); the name, identity number and ethnic group of the holder (reg 8(4)(c)) and all other occupiers (reg 8(4)(d)) of the site.

107 Reg 8(2).

108 Reg 8(4)(a).

109 Reg 10.

110 Terreblanche (n 16) at 329-332.

111 *Idem* at 75.

112 *dem* at 404.

This change in the national urbanisation strategy led to the enactment of the Black Communities Development Act 4 of 1984. The purpose of the Act was “to provide for the purposeful development of Black communities outside the national states”.¹¹³ To this end the Minister of Co-operation and Development was empowered to declare certain areas to be development board areas¹¹⁴ and to establish a development board for each of those areas.¹¹⁵ The objects of these boards were to (a) promote the viability, development and autonomy of black communities; (b) promote the welfare of those communities and people; (c) take steps to prevent the economic and social decline of those communities and people; and (d) take steps to rehabilitate those communities and people.¹¹⁶ Pursuant to these objectives the boards were given certain local government,¹¹⁷ housing and development¹¹⁸ functions.

Significantly, the Black Communities Development Act empowered the board and the local authority or the township developer to grant a competent person¹¹⁹ leasehold for a period of ninety-nine years¹²⁰ on certain conditions and against payment or the furnishing of security for that right.¹²¹ Upon registration of this leasehold in terms of the Deeds Registries Act 47 of 1937, the holder of this real right would obtain a certificate that served as proof of the registration, her right to occupy the leasehold site and the fact that certain rights had vested¹²² in her.

These provisions paved the way for the enactment of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988¹²³ as part of the range of legislative provisions enacted during President FW de Klerk’s term in office that started dismantling apartheid land law.¹²⁴ The purpose of this Act was “to provide for

113 Long title of the Black Communities Development Act.

114 Section 3(1)(a).

115 Section 3(1)(c).

116 Section 16.

117 See ch 3.

118 See ch 4.

119 See s 52(2).

120 Section 52(1)(a).

121 Section 52(4)(a) and (b).

122 Section 53(5) of the Black Communities Development Act afforded the holder of the leasehold the right to (a) erect and improve buildings or to alter and demolish buildings or structures; (b) occupy the buildings or structures and the site; (c) encumber the leasehold; and (d) dispose of the leasehold to another competent person.

123 Section 24 of the General Law Second Amendment Act 108 of 1993 amended the short title of this Act, which was formerly the Conversion of Certain Rights to Leasehold Act.

124 Other legislative measures included the Abolition of Influx Control Act 68 of 1986, the Land Affairs Act 101 of 1987, the Abolition of Development Bodies Amendment Act 81 of 1990, the Abolition of Racially Based Land Measures Act 108 of 1991, the Abolition of Racially Based Land Measures Amendment Act 133 of 1992, the Regional and Land Affairs General Amendment Act 89 of 1993 and the Land Reform: Provision of Land and Assistance Act 126 of 1993.

the conversion of certain rights of occupation into leasehold or ownership".¹²⁵ The Act empowered the Director-General to conduct an investigation to determine which of the "affected sites"¹²⁶ within her province had been granted a right of leasehold or ownership.¹²⁷ At the close of this inquiry the Director-General had to publish a notice¹²⁸ stating to whom she intended granting a right of leasehold or ownership.¹²⁹ Upon expiration of the period specified for the lodging of an appeal against the notice or upon "confirmation, variation or substitution" of the determination,¹³⁰ the Director-General would then have to lodge the declaration, the title deed and any other documents with the Registrar of Deeds.¹³¹

2 4 Conclusion

The rural land tenure provisions severely limited the livelihood strategies of black farmers when it dispossessed them of their land and limited their free movement by providing that they could only occupy land lawfully in certain restricted areas.¹³² National policies exacerbated this situation by ensuring that there was no guarantee that these restricted areas would meet the needs of black farmers.¹³³ The only way for black farmers to sustain a family in rural areas was to enter into a temporary labour tenant contract with a white farmer because all other forms of tenure had been legislated out of existence. Because they had to leave white areas upon termination of a labour tenant contract without knowing whether they would obtain further employment as labour tenants on other farms, failing which they would have to return to overcrowded traditional or released areas, black people sought employment in urban areas.¹³⁴ The period of intense urbanisation that followed, forced government to enact strict influx control policies to keep black people at the periphery of urban areas.¹³⁵ These policies prohibited black people from living in any areas other than locations, native villages, native hostels or certain proclaimed areas if they were employed in the mining and industrial sector. Every aspect of their daily lives was meticulously regulated and recorded, so that compliance could be determined at a

125 Long title of the Act. Section 1 of the Black Communities Development Act defined "right of leasehold" as "a right of leasehold contemplated in section 52, and includes a right in respect of a sectional leasehold unit as contemplated in section 55, and 'leasehold' has a corresponding meaning".

126 See the definition of an "affected site" in s 1 of the Leasehold or Ownership Act.

127 Section 2(1), read with s 2(3).

128 Section 2(5).

129 Section 2(4).

130 Section 4(1), read with s 3.

131 Section 5(1), read with s 5(1A).

132 See MK Robertson "Dividing the land: An introduction to apartheid land law" in Murray & O'Regan (n 20) 122-136 at 123.

133 See M Sutcliffe, A Todes & N Walker "Managing the cities: An examination of state urbanization policies since 1986" in Murray & O'Regan (n 20) 86-106.

134 See D Van der Merwe "'Not slavery but a gentle stimulus': Labour-inducing legislation in the South African Republic" (1989) *TSAR* 353-369.

135 See JT Schoombee & DM Davis "Abolishing influx control – fundamental or cosmetic change?" (1986) 2 *SAJHR* 208-219.

moment's notice. Black people's tenure in these areas was always regarded as temporary, despite the illusion of permanency created by inspections to ascertain whether there were any factors impeding their general well-being and requiring improvement. However, black people started occupying vacant land and buildings closer to their work because they could not afford the daily commute from the periphery, nor could they risk losing their jobs on account of regularly being late for work. Government subsequently criminalised black people's tenure in white areas in terms of the Group Areas Act¹³⁶ and the Prevention of Illegal Squatting Act.

3 The Prevention of Illegal Squatting Act

3 1 Introduction

In 1944, parliament enacted a War Measure¹³⁷ in terms of the War Measures Act 13 of 1940. The War Measure enabled a magistrate to issue an order firstly, for the immediate removal of people living on land or in buildings without the permission of the owner/lawful occupier; and secondly, for the demolition of any buildings or structures that threatened the health and safety of the general public or the maintenance of peace and good order. The War Measure was inadequate, being premised on the hope that once evicted, these people "would go back to where they came from".¹³⁸ However, with nowhere else to go, the evictees merely moved to another piece of land nearby and waited for the process to start again. The city councils were forced to use a range of measures, mostly unsuccessful, to stem the influx of black people who flocked to the cities in search of employment opportunities. It was soon realised that a single measure would not solve the problem of urban squatting, and that a co-ordinated legislative framework was required.¹³⁹

Three years after the National Party won the 1948 election, parliament enacted the Prevention of Illegal Squatting Act 52 of 1951 with the aim of making good on the Party's promise to "take vigorous and effective steps to care for the safety of ... as well as property and the peaceful lives" of white people.¹⁴⁰ The purpose of the Act was to prevent and control illegal squatting on public or private land.¹⁴¹ This was achieved by making it a crime to enter and remain on land or in buildings/structures without any lawful reason.¹⁴² The Prevention of Illegal Squatting Act also contained provisions that

136 See A Dodson "The Group Areas Act: Changing patterns of enforcement" in Murray & O'Regan (n 20) 137-161.

137 Procl 76, *GG Extraordinary* 3325 of 6 Apr 1944.

138 HA Fagan *Report of the Commission of Enquiry into the Disturbances at Moroka, Johannesburg, on the 30th August 1947* (1948) at 25.

139 HA Fagan, HP Smit & AS Welsh *Report of the Native Law Commission* (Pretoria, 1948).

140 National Party *Election Manifesto* (1948).

141 Long title of Prevention of Illegal Squatting Act.

142 Section 1, read with s 2, of the Act.

firstly, enabled a court to order the eviction of squatters and authorised the demolition of any buildings or structures erected on the land without the permission of the owner/lawful occupier;¹⁴³ secondly, prohibited the collection of fees or the exercise of authority with regard to the organisation of illegal squatting;¹⁴⁴ thirdly, afforded administrative powers to magistrates and native commissioners to effect the removal of squatters;¹⁴⁵ fourthly, afforded local authorities the power to establish emergency camps;¹⁴⁶ and finally, criminalised any obstruction of police and other authorised officials “acting under the authority of an instruction or order issued” by a court.¹⁴⁷ The peremptory nature of these provisions obliged owners to evict unlawful occupiers and therefore significantly extended “the scope of evictions based on the stronger right to possession” under apartheid land law.¹⁴⁸

In 1952 the National Party supplemented the Prevention of Illegal Squatting Act with a package of laws aimed at implementing its influx control policy. The Black Laws Amendment Act 54 of 1952 amended section 10 of the Black (Urban Areas) Consolidation Act so as to provide that black people were only permitted in urban areas for seventy-two hours without a permit, except if they had been born or had been continuously employed in the area. The Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 consolidated the pass laws and introduced a uniform reference book which all black men had to carry on their person at all times, while the Black Service Levy Act 64 of 1952 introduced a scheme of employer taxation that would finance the provision of housing and services in the townships.¹⁴⁹

The South African government continued to enforce its policy of influx control during the 1960s and 1970s. However, as the economy changed its focus from agriculture to mining, a change of policy was required to stem the tide of people streaming to cities in an effort to satisfy the demand for low-income employment under a capitalist-driven economy. This forced a change in government policy, which coincided with various amendments to the Prevention of Illegal Squatting Act.

The 1976 amendment to the Prevention of Illegal Squatting Act¹⁵⁰ followed on the judgment in *S v Peter*.¹⁵¹ It was argued that the continuous surge of people into urban areas and the epidemic erection of shacks necessitated a departure from normal legal

143 Section 3.

144 Section 4.

145 Section 5, read with s 8, of the Act.

146 Section 6.

147 Section 7.

148 Van der Walt (n 13) at 413.

149 O'Regan (n 51) at 369.

150 Prevention of Illegal Squatting Amendment Act 92 of 1976.

151 1976 (2) SA 513 (C). In this case the Bantu Affairs Administration Board, acting in terms of s 12 of the Black Affairs Administration Act 45 of 1971, actively pursued the prosecution of 6000 squatters who had moved onto a piece of land known as Cross Roads during April and August of 1975 in contravention of s 1, read with ss 2 and 3, of the Prevention of Illegal Squatting Act.

procedures to show that effective action was being taken to address a problem that was assuming serious proportions.¹⁵² The amendment inserted section 3B into the Act, which enabled landowners and local authorities to summarily demolish squatter shacks after a seven-day notice period. The provision further deterred landowners from allowing squatters to live on their land by making this a criminal offence punishable by a fine, imprisonment or both.

The judgment in *Fredericks v Stellenbosch Divisional Council*¹⁵³ resulted in the 1977 amendment of the Prevention of Illegal Squatting Act.¹⁵⁴ The seven-day notice period¹⁵⁵ was removed and replaced by an ouster clause. The aim of this clause was to prevent squatters from approaching the court to obtain an order that would prevent their removal unless they could show that they had title or a right to the land. O'Regan observed that this amendment reflected the government's determination to counter the squatters' resolve to pursue legal strategies that enabled them to resist removal.¹⁵⁶

The government realised that the demand for low-income labour required the strict influx control policy to be changed. The Riekert Commission of Inquiry into Manpower Utilization was therefore established¹⁵⁷ to investigate and report on the participation of black people in the urban labour market. The Commission recommended that black urban labourers be afforded the freedom to move and work in any urban area, provided that suitable accommodation was available for them.¹⁵⁸ The 1980 amendment of the Prevention of Illegal Squatting Act¹⁵⁹ reflected this recommendation with an alteration to the summary demolition powers of local authorities.

Shortly after the South African government conceded that its influx control strategy for urbanisation had failed, the Constitutional Affairs Committee of the President's Council was required to develop a new strategy for urbanisation. The committee acknowledged that influx resulted in an increased urban population, a decrease in available land stock and ultimately in urban squatting. The new strategy would thus have to absorb inevitable urbanisation, the resultant overcrowding and the fact that the acquisition of formal housing was unattainable for most black people.

The committee accordingly created the notion of "orderly urbanisation", which would focus on development and the accommodation of and planning for urban growth. The notion of "orderly urbanisation" was premised on the operation of market forces,

152 O'Regan (n 51) at 370-371.

153 1977 (3) SA 113 (C).

154 Prevention of Illegal Squatting Amendment Act 72 of 1977.

155 MD Blecher "Spoliation and the demolition of legal rights" (1978) 97 *SALJ* 8-16 at 15 referred to the notice period in terms of s 3B(2) as a safety device on a machine. Where the safety device failed to ensure that no one was hurt, the unwillingness and incompetence of the operators of the machine should warrant their replacement rather than result in the scrapping of the safety device. The author argued that the safety device was scrapped by the rapid and harsh legislative response to *Fredericks v Stellenbosch Divisional Council* which resulted in severe hardship for squatters who were no longer afforded the opportunity to remove their valuables or to find alternative accommodation.

156 O'Regan (n 51) at 372-373.

157 In terms of GN 1673 GG 5720 of 26 Aug 1977.

158 O'Regan (n 51) at 373.

159 Prevention of Illegal Squatting Amendment Act 33 of 1980.

while its purpose was to accomplish spatial ordering. This would be achieved through direct measures, such as legislation, ordinances and by-laws, and indirect measures, like incentives and restrictive conditions. These recommendations ultimately paved the way for the enactment of the Abolition of Influx Control Act 68 of 1986. However, the 1988 amendment of the Prevention of Illegal Squatting Act¹⁶⁰ not only amplified its application to include rural areas, but also introduced comprehensive provisions to regulate rural squatting. It extended the powers of local authorities to remove squatters and summarily demolish their homes, and it eroded judicial powers and common-law principles pertaining to the rights of accused persons.¹⁶¹

3 2 Powers to remove¹⁶²

3 2 1 *Criminal provision – section 1*

Section 1(1)(a) of the Prevention of Illegal Squatting Act provided that it would be a criminal offence for any person to enter onto land without lawful reason or to remain on that land without the permission of the owner or lawful occupier, irrespective of whether the land was enclosed or not.¹⁶³ This provision remained largely untouched, despite criticism of criminalisation of activities that extended far beyond the implied scope of the long title of the Act.¹⁶⁴

However, until 1988 the comprehensive criminal prosecution of squatters anticipated by this provision had not materialised, since it proved to be an ineffective technique for forcibly removing entire communities.¹⁶⁵ O'Regan observed that this could be attributed to the reluctance of government to undertake a large-scale prosecution programme, fearing that it might result in the criminal justice system being extended beyond its means.¹⁶⁶ This coincided with government's inability to prove the elements of the crime, because it had no means of showing firstly, that the land in question fell within the scope of the Prevention of Illegal Squatting Act;¹⁶⁷ secondly, that the entry onto the land was unlawful;¹⁶⁸ and thirdly, who the owner of the land was which rendered any effort to prove that the occupation was without the consent of the owner futile.¹⁶⁹ In the unlikely event that government could overcome all these obstacles and obtain a conviction, it still had to convince the magistrate to exercise his discretion to order eviction in terms of section 3.

160 Prevention of Illegal Squatting Amendment Act 104 of 1988.

161 O'Regan (n 51) at 376.

162 The headings of the following three sections are based on the categorisation that O'Regan (n 51) used.

163 See *R v Zulu* 1959 (1) SA 263 (A) and *R v Malika* 1958 (4) SA 663 (T) for an interpretation in which s 1 of the Prevention of Illegal Squatting Act is seen as creating two separate offences.

164 *R v Phiri* 1954 (4) SA 708 (T) at 710A.

165 O'Regan (n 51) at 378.

166 *Ibid.*

167 *R v Mailula* 1960 (1) SA 413 (A); *R v Matsabe* 1957 (3) SA 210 (T); *R v Nompanza* 1957 (2) SA 184 (E); *S v Mchunu* 1976 (1) SA 320 (N).

168 *S v Mampura* 1964 (3) SA 477 (T).

169 *S v Peter* 1976 (2) SA 513 (C); *S v Sikwane* 1976 (2) SA 896 (T); *R v Ndabambi* 1959 (2) SA 454 (A).

The reason for the 1988 amendment to the Prevention of Illegal Squatting Act¹⁷⁰ was that the government had little success in prosecuting squatters in terms of this provision. The amended legislation attempted to solve this problem, by introducing two rebuttable presumptions that shifted onto the squatters the burden of proving that there was lawful reason and consent for their occupation of the land and/or building.¹⁷¹ Section 1(2) of the Act provided that, once it had been proved that a person had entered another person's land or building and remained on that land or in that building for purposes of section 1(1) of the Act, it would be presumed that this person did so without lawful reason and without the other person's consent. In addition, section 3(1) revoked a magistrate's discretion to grant an eviction order, and replaced it with a directive to order eviction upon conviction in terms of section 1 of the Act. The government was further aided by section 11B that provided for eviction to take place even if appeal proceedings had been launched.

Before 1977, when section 3B(4)(a) of the Act ousted the courts' jurisdiction to grant any relief, the problems that government experienced in prosecuting squatters in terms of section 1 sometimes caused owners, lawful occupiers and local authorities to take the law into their own hands, which enabled squatters to rely on the mandament van spolie with some success.¹⁷²

The mandament van spolie¹⁷³ is a remedy that only affords the applicant temporary relief in terms of a possessory suit, which temporarily restores possession until the merits of the case can be considered in a subsequent case. The purpose of the mandament van spolie is to protect the public order against breaches of the peace¹⁷⁴ by restoring possession *ante omnia* to the possessor who has been unlawfully deprived of her peaceful and undisturbed possession.¹⁷⁵ This reflects the fundamental principle of South African law that people may not take the law into their own hands.¹⁷⁶ The threat of the spoliation order serves as a warning to any person who can assert a real right over something to have recourse to the courts of law rather than succumb to the allure of self-help.

170 Prevention of Illegal Squatting Amendment Act of 1988.

171 See CH Lewis "The Prevention of Illegal Squatting Act: The promotion of homelessness?" (1989) 5 *SAJHR* 233-239 at 235 where this development is criticised for being contrary to established authorities on common law.

172 These cases are discussed at 3 3 below.

173 This remedy originated in canon law with the *condictio ex canone redintegranda* that flowed from the famous *canon redintegranda* in the *Decretum Gratiani*. Originally the *condictio* enabled a bishop who had been removed from his office by a worldly authority to insist on being restored to this office in terms of the maxim "spoliatus ante omnia restituendus est" before the merits of his dismissal could be discussed. The *condictio* was subsequently received in French law ("réintégrande"), German law (*actio spolia*) and in Roman-Dutch law (mandament van spolie). See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (Durban, 2006) at 287; DG Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD, University of Pretoria, 1986); and CG van der Merwe *Sakereg* 2 ed (Durban, 1989) at 118.

174 See Badenhorst, Pienaar & Mostert (n 173) at 288-292; Van der Merwe (n 173) at 119-122.

175 See Badenhorst, Pienaar & Mostert (n 173) at 292-296; Van der Merwe (n 173) at 129-133.

176 See *Yeko v Qana* 1973 (4) SA 735 (A) at 739G; *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) at 619H.

With the ouster clause in section 3B(4)(a) of the Act in place, landowners and local authorities could demolish buildings or structures and remove building material without a court order, knowing that the squatters would be unable to approach the court for temporary relief in terms of the mandament van spolie. This significantly increased their power to evict and ensured the safety and security of white people through swift government action.

3.2.2 Administrative provision – section 5

When the health and safety of the public in general was endangered, a magistrate, after hearing representations by the squatters,¹⁷⁷ was entrusted with the power to order their eviction from the land concerned and the demolition of any buildings or structures erected upon that land in terms of section 5.¹⁷⁸ The 1988 amendment to the Prevention of Illegal Squatting Act¹⁷⁹ restricted the magistrate's discretion by removing the requirement that before making such an order he must be satisfied that the public in general would be exposed to health and safety dangers. The owner, lawful occupier, administrator or local authority would now only have to satisfy the magistrate that squatters had entered the land without consent, were congregating there and were refusing to move. Any review of this administrative decision would not affect the operation of the decision in terms of section 11B of the Act.

The effect was that section 5 of the Prevention of Illegal Squatting Act afforded magistrates a wide discretion to order the eviction and removal of squatters from land, buildings or structures and the demolition of any buildings, without having received any guidance on which factors they should consider in exercising the discretion.¹⁸⁰ Some

177 Section 5(1)(aa) provided for three days' notice to be given to the squatters, affording them some time to obtain legal assistance and the opportunity to be heard prior to the order being made. Before *Mofokeng v Minister of Native Affairs* 1949 (3) SA 784 (T), subs (b) of the 1944 War Measure, upon which s 5 is founded, did not provide for notice to be given to the squatters before an eviction order was granted.

178 See *Thubela v Pretorius NO* 1961 (4) SA 506 (T); *Zungu v Acting Magistrate, Umlazi* 1962 (3) SA 782 (D); *Kayamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C).

179 Prevention of Illegal Squatting Amendment Act of 1988.

180 In *S v Govender* 1986 (3) SA 969 (T) Goldstone J identified a number of circumstances that might be of relevance to a court when exercising its discretion to evict someone in terms of s 46(2) of the Group Areas Act, after that person was found to be in contravention of s 26(1). In this case an Indian woman was found guilty of an offence in terms of s 26(1) and sentenced to a fine of R50 or fifteen days' imprisonment. The court *a quo* added an eviction order *mero motu* to this sentence in terms of s 46(2) of the Act. Goldstone J found that the court *a quo* erred when it added the eviction order to the sentence. He pointed out that s 46(2) was amended so as to afford a court a discretion to add an eviction order to a sentence for the contravention of s 26(1). In this regard Goldstone J (at 97II) stated that *inter alia* the following circumstances would be relevant when the court exercised its discretion: "the nature of the area concerned; the attitude of the neighbours; the policy and views of the Department of Community Development or any other interested Department of State; the attitude of the landlord; the prospects of a permit being issued for continued lawful occupation of the premises; the personal hardship which such an order may cause and the availability of alternative accommodation". Goldstone J found that the court *a quo* had applied the law incorrectly when it made the eviction order, and therefore set the order aside as requested by the appellant.

guidance could be gleaned from the general policy on the prevention of illegal squatting that the Minister of Constitutional Development and Planning could publish in the *Government Gazette* in terms of section 11A of the Act.¹⁸¹ However, Budlender argued that any guidance from the Minister would not improve the position because the general policy that underpinned the Act was not apparent from its wording and the failure to define “squatting” only exacerbated this.¹⁸²

3.2.3 Administrative provision – section 6F

Section 6F of the Prevention of Illegal Squatting Act was enacted to fill the void created by the repeal of the provisions in chapter 4 of the Development Trust and Land Act by the Abolition of Influx Control Act.¹⁸³ Section 6F afforded local authorities the power to evict black people from a farm outside their jurisdiction, where these black people had permission to stay on that farm but were not in a direct employment relationship with the owner or lawful occupier. It has been argued that increased support for the erstwhile Conservative Party in the rural areas, together with the rapidly increasing black population on white farms and the dwindling white population, may have resulted in the creation of an instrument by means of which unemployed residents on these farms could be evicted.¹⁸⁴

The eviction in terms of section 6F was triggered by an investigation¹⁸⁵ into the status of the occupation of a farm where there were reasonable grounds to believe that the farm was occupied by black people who were not in the direct employ of the owner or lawful occupier. Where the belief was confirmed, the owner or lawful occupier had to be informed of the finding through service of a notice that directed the owner or lawful occupier to evict the black people within thirty days after receipt of the notice.¹⁸⁶ It has been argued that, according to section 6F(6)(a), an owner or lawful occupier should merely have requested these black people to vacate the farm. Failure on their side to comply with this request would then result in the issue of an eviction order by the local committee, which was subject to the same procedural requirements of section 5 of the Act.

¹⁸¹ See Lewis (n 171) at 239 in which it is noted that according to *Mathebe v Regering van die RSA* 1988 (3) SA 688 (A) ministerial policy is not usually given the force of law.

¹⁸² G Budlender “Urban land issues in the 1980s: The view from Weiler’s Farm” in Murray & O’Regan (n 20) 66-85.

¹⁸³ See Lewis (n 171) at 238, where she takes issue with the meaning of the terms “legal occupier” and “lawful occupation of the land” for purposes of s 6F of Prevention of Illegal Squatting Act.

¹⁸⁴ O’Regan (n 51) at 384.

¹⁸⁵ These investigations were ordered by local committees established in terms of s 6E of the Prevention of Illegal Squatting Act. See Lewis (n 171) at 237, who regarded this extension of the scope of the Prevention of Illegal Squatting Act to include rural areas that fell outside the jurisdiction of local authorities as an “important innovation” for the promotion of homelessness.

¹⁸⁶ Section 6F(2).

3 3 Powers to demolish

Section 3B of the Prevention of Illegal Squatting Act afforded landowners, local authorities and provincial officials the power to summarily¹⁸⁷ demolish any building or structure¹⁸⁸ erected on a piece of land without the consent of the owner or lawful occupier.¹⁸⁹ It is important to note that these summary powers did not extend to the eviction of squatters who, in terms of section 1, could have possession of a building or structure in which they were residing and the land on which they were residing.¹⁹⁰

Until 1977 squatters successfully relied on the mandament van spolie to restore to them possession of the building materials they had used to erect the buildings or structures which they occupied. However, according to traditional doctrine, the mandament van spolie loses its force when it is objectively impossible to restore possession. This will occur when the spoliated thing has, on the one hand, been purchased by a third party or, on the other hand, been destroyed, irreparably damaged or lost.¹⁹¹ Local authorities accordingly adopted the practice of destroying the corrugated iron, plastic, wood and other materials used by the squatters to erect their shacks. The effect was that the squatters could not use the mandament van spolie to regain possession of their valuables. This position was legislatively enhanced with the introduction of section 3B(4)(a), which ousted the courts' jurisdiction to grant any relief to any person in civil proceedings that sought to prevent an intended or actual eviction or demolition, unless that person could first satisfy the court that the action, or intended action, was conducted *mala fide*.

In *Fredericks v Stellenbosch Divisional Council*¹⁹² the Stellenbosch Divisional Council had demolished the shacks that the applicants had erected for their families. Both

187 The Prevention of Illegal Squatting Act originally provided for a seven-day notice period before a building or structure could be demolished. This notice period, which afforded squatters time to make representations to the magistrate and/or to remove valuable possessions from the building or structure, was abolished after *Fredericks v Stellenbosch Divisional Council* (n 153), through the enactment of the Prevention of Illegal Squatting Amendment Act of 1977. The summary demolition powers were confirmed in s 3B(2), which expressly provided that no prior notice of the demolition was required.

188 Section 3B(5) provided, prior to its abrogation by the Prevention of Illegal Squatting Amendment Act of 1988, that for purposes of s 3B(1)(a) the term "building or structure" included "any shack, hut, tent or similar structure". See the discussion on the meaning of the term "building or structure" for purposes of s 3B(1)(b) in *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C).

189 See *George Municipality v Vena and Another* 1989 (2) SA 263 (A) in which Milne JA found that consent could be afforded expressly, tacitly or by implication. The issue of consent for purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 was addressed in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre for Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) in pars [40]-[85] (Yacoob J), pars [141]-[160] (Mosenke DCJ), pars [209]-[219] (Ngcobo J), pars [274]-[286] (O'Regan J) and pars [341]-[344] (Sachs J).

190 O'Regan (n 51) at 387.

191 See Badenhorst, Pienaar & Mostert (n 173) at 304; Van der Merwe (n 173) at 134-135; and *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A).

192 (n 153).

applicants stated in their affidavits that they had received no notice from the council prior to the demolition¹⁹³ and that they had to brave the rain during the weekend without any form of shelter.¹⁹⁴ The applicants sought an order directing the council to restore the building materials, re-erect the shacks and abstain from demolishing the shacks after re-erection.¹⁹⁵ In its opposing affidavit the council conceded that it had not given written notice of its intention to demolish the applicants' shacks and undertook to "return these materials to the site where the houses had stood".¹⁹⁶ However, counsel for the respondent contended that the applicants had acted unlawfully because they had occupied the land and erected structures on it without the permission of the council in its capacities of owner and local authority.¹⁹⁷ Diemont J held that "it ill behove[d] the respondent to accuse the applicants of unlawfulness"¹⁹⁸ after it had acted "in flagrant contempt of the law" without expressing any "word or regret or apology"¹⁹⁹ in the ensuing legal proceedings. Diemont J further held that the respondents' objections to the relief sought were without substance²⁰⁰ because in *Zinman v Miller*²⁰¹ the court had ordered restoration *ante omnia*. Diemont J therefore stated:

If the original sheets or corrugated iron cannot be found or if they have been so damaged by the bulldozer that they cannot now be used there is no reason why other sheets of iron of similar size and quality should not be used.²⁰²

In *Rikhotso v Northcliff Ceramics (Pty) Ltd*²⁰³ the court considered whether it could grant relief to the applicants through the mandament van spolie by ordering the respondents to re-erect, with new materials, the shacks which had originally been built with a combination of combustible materials, iron sheeting and wood before they were dismantled, removed from the premises and set alight.²⁰⁴ Nugent J emphasised that the underlying assumption of the mandament van spolie is "that the property exists and may be awarded in due course to the party who establishes an entitlement thereto".²⁰⁵ He accordingly found

193 See s 3B(2) of the Prevention of Illegal Squatting Act.

194 *Fredericks v Stellenbosch Divisional Council* (n 153) at 114F-G.

195 *Idem* at 115B-C.

196 *Idem* at 115F-G.

197 *Idem* at 116A-B.

198 *Idem* at 116C.

199 *Idem* at 116H.

200 *Idem* at 117E.

201 1956 (3) SA 8 (T).

202 *Fredericks v Stellenbosch Divisional Council* (n 153) at 117H.

203 1997 (1) SA 526 (W).

204 *Idem* at 532C.

205 *Idem* at 532I.

that the nature of the mandament van spolie rendered its application inappropriate in instances where the property had been destroyed because “[t]here is nothing upon which the order can operate, and no possessory entitlement left to be adjudicated upon”.²⁰⁶ The Judge nonetheless confirmed that it was an established principle that “a spoliator is required to restore the property in the state it was at the time of the spoliation” if the property has not been destroyed and that this “may require him to do something to place it in its former condition”.²⁰⁷ However, Nugent J found that this obligation to restore possession *ante omnia* could not be extended to “the rendering of a substitute when the property has been destroyed”²⁰⁸ because “[w]hatever the nature of the remedy may have been in ancient law, it was received into the law of this country as a possessory remedy and not as a general remedy against unlawfulness”.²⁰⁹

Nugent J conceded that “[a] remedy providing summary reparation for unlawful loss of or damage to property, irrespective of the possessor’s rights in the property, would be a most powerful one”.²¹⁰ However, he held that *Fredericks v Stellenbosch Divisional Council* could not be regarded as authority for the development of the mandament van spolie for this purpose because, according to his reading, Diemont J merely replied “to the practicality of restoring the dwellings” and could not have intended “to hold that it was competent to order that possession be restored by substitution”.²¹¹ In *Tswelopele*

206 *Idem* at 532J. See Badenhorst, Pienaar & Mostert (n 173) at 304; MJ De Waal “Naidoo v Moodley 1982 (4) SA 82 (T) – Mandament van Spolie” (1984) 47 *THRHR* 115-118; DG Kleyn “Die mandament van spolie as besitsremedie” (1986) 19 *De Jure* 1-16; Van der Merwe (n 173) at 119.

207 *Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 533B-C. See *Jones v Claremont Municipality* (1908) 25 SC 651 in which the respondent was ordered to rebuild a fence; *Zinman v Miller* 1956 (3) SA 8 (T) and *Tshabalala v West Rand Administration Board* 1980 (2) SA 520 (W), in which the respondent was ordered to restore a ceiling.

208 *Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 533G. Blecher (n 155); AJ van der Walt “Naidoo v Moodley: Mandament van spolie” (1983) 46 *THRHR* 237-240; AJ van der Walt “Nog eens Naidoo v Moodley – ‘n repliek” (1984) 47 *THRHR* 429-439 argued that the mandament van spolie could be applied outside its traditional restorative framework in specific circumstances where the property had deliberately been destroyed in order to frustrate a restoration order and where the destroyed property was fungible. Where an owner or local authority had taken the law into its own hands by demolishing and destroying squatters’ property, the mandament van spolie should be used to order them summarily to restore possession, given the general policy function of preventing breaches of the peace.

209 *Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 533I-J. AJ van der Walt “Squatting, spoliation and the new constitutional order” (1997) 60 *THRHR* 522-529 criticised Nugent J for justifying his refusal to apply the mandament van spolie by arguing that it was not a general remedy for the protection of law and order. Van der Walt argued that the strict interpretation of the requirements of the mandament van spolie should not thwart the development of an otherwise robust remedy that was uniquely equipped to respond with unparalleled urgency to government’s self-help. See, also, M Blumberg “Mandament van spolie – Restoration of the *status quo ante* revisited” (1997) 60 *THRHR* 529-533.

210 *Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 534A-B.

211 *Idem* at 534D.

*Non-Profit Organisation v City of Tshwane Metropolitan Municipality*²¹² the Supreme Court of Appeal confirmed *Rikhotso* and avoided the constitutional imperative to develop the common law by means of a constitutional remedy to discourage self-help that bore a resemblance to the relief sought in terms of the mandament van spolie.

Nugent J left the door open for the application of the mandament van spolie in cases where “there has been only partial destruction, leaving a substantial part of the property intact” because in those instances “[d]ifferent considerations may arise”.²¹³

Rikhotso v Northcliff Ceramics (Pty) Ltd removed the last option that had been available to squatters for relief in those instances where the landowners or local authorities had destroyed the materials they had used for their buildings or structures. This decision consequently gave owners and local authorities an implicit licence to destroy squatters’ building materials. This facilitated the demolition of unlawfully erected buildings or structures and proved to be a very useful addition to the power to evict squatters.

3 4 Powers to approve informal settlement areas

Local authorities had the power to relocate the squatters whom they had evicted or caused to be evicted, and whose buildings or structures they had demolished or caused to be demolished, to certain approved informal settlement areas.²¹⁴ From the time of the 1944 War Measure until the 1988 amendment to the Prevention of Illegal Squatting Act,²¹⁵ these settlement areas were known as “emergency camps”. The purpose of

212 2007 (6) SA 511 (SCA). In this case the court considered whether the appellant was entitled to relief at all after a perfectly orchestrated operation “to eradicate alien vegetation”; “to identify non-documented illegal immigrants” and to fight crime in Garsfontein resulted in the burning of shacks, which left 100 unlawful occupiers exposed to the elements. At the outset Cameron JA (as he then was) clearly expressed his inclination, much as Diemont J (*Fredericks v Stellenbosch Divisional Council* (n 153) at 118D) and Nugent J (*Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 532F) had, to order relief because of the defendant’s flagrant disregard for the law and violation of various constitutional rights of the unlawful occupiers (pars [15]-[16]). He conceded that there was no remedy at common law that simultaneously presented a disincentive to self-help and required the replacement of unlawfully destroyed property. He further conceded that this “could create a perverse incentive for those taking the law into their own hands to destroy the disputed property, rather than leaving it substantially intact” (par [25]). However, he cautioned that this “does not mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must be seized upon for its development” (par [20]). He accordingly stated that “it may sometimes be best to leave a common-law institution untouched, and to craft a new constitutional remedy entirely” (par [20]). He noted that this new constitutional remedy had to vindicate not only the claims of the occupiers, but also the Constitution (par [26]). He subsequently ordered the respondents, jointly and severally, to re-erect temporary habitable dwellings that afforded the unlawful occupiers shelter, privacy and amenities equivalent to what they had enjoyed prior to the demolition of their original shacks (par [28]). He made this order after clearly cautioning against the formulation of a constitutional remedy couched in similar terms to those of an existing common law analogy (par [26]). See AJ van der Walt “Developing the law on unlawful squatting and spoliation” (2008) 125 *SALJ* 24-36 for a critical discussion of this judgment.

213 *Rikhotso v Northcliff Ceramics (Pty) Ltd* (n 203) at 535D.

214 Lewis (n 171) at 237.

215 Prevention of Illegal Squatting Amendment Act of 1988.

these emergency camps was to accommodate homeless people²¹⁶ and once they were established their use and occupation were governed by regulations. In 1988, emergency camps were replaced by a similar form of temporary accommodation known as “transit areas”.²¹⁷ Local authorities could use land they owned²¹⁸ or, alternatively, expropriate land for the purpose of establishing these transit areas.²¹⁹

Section 6A was an amendment to the Prevention of Illegal Squatting Act made by the Abolition of Influx Control Act, which introduced a second type of informal settlement known as “designated areas”. The provision enabled the Minister of Constitutional Development and Planning to designate a portion of land owned by the local authority or that could be expropriated,²²⁰ on which people could settle and reside if they were unable to find alternative accommodation.²²¹ Unlike transit areas, these designated areas²²² would provide permanent accommodation for otherwise destitute people.

A decision by parliament to exclude the operation of the Group Areas Act,²²³ the Slums Act 76 of 1979²²⁴ and ordinary town planning rules²²⁵ in both transit areas and designated areas provided local authorities with a “flexible tool for managing urbanisation” and provided vulnerable communities with an alternative to forced removals.²²⁶

3 5 Conclusion

The Prevention of Illegal Squatting Act was a dynamic piece of legislation, which through repeated amendments was progressively tailored to minimise resistance to forced evictions. The gradual erosion of squatters’ rights and the limitation of judicial power

216 In *Makama v Administrator, Transvaal* 1992 (2) SA 278 (T) the court considered the meaning of “homeless” for the purposes of establishing an emergency camp in terms of s 6 of the Prevention of Illegal Squatting Act. Van Dijkhorst J found that the residents could not be regarded as “homeless” for the purposes of s 6 because they lived in homes of a permanent or semi-permanent nature, which sheltered them from the elements and provided some of the comforts of life.

217 In terms of s 6(5) a local authority could make regulations for the establishment of “transit areas” which, in terms of s 6(3), had to be published in the *Official Gazette* of each province. See, also, *Executive Suite (Pty) Ltd v Pietermaritzburg-Msunduzi Transitional Local Council* 1997 (4) SA 695 (N) at 710F-H.

218 See *Africa v Boothan* 1958 (2) SA 459 (A).

219 Section 6(2) read with s 6(4) of the Prevention of Illegal Squatting Act provided that, where land was occupied by homeless people, a local authority could expropriate that land without paying compensation for it unless the owner or lawful occupier could prove that occupation by these destitute people was without its consent. The purpose of this provision was without doubt to discourage landowners from allowing squatters to live on their land. See O’Regan (n 51) at 393.

220 In terms of s 6A(2) of Prevention of Illegal Squatting Act.

221 See *Kayamandi Town Committee v Mkwaso* (n 178).

222 Provincial administrators had the authority to establish these “designated areas” and to issue regulations for their administration in terms of ss 6A(3) and 6A(10) of Prevention of Illegal Squatting Act.

223 *Idem* s 6A(4).

224 *Idem* s 6A(5).

225 *Idem* ss 6A(9) and (10).

226 O’Regan (n 51) at 393.

to intervene in cases where government had departed from normal legal procedures, afforded land owners and the government draconian powers to evict squatters and demolish the buildings or structures that they occupied. Squatters' insecure tenure was perpetuated in that after eviction they could be relocated to other land, where they would be subjected to further eviction proceedings by the landowner or the local authority. The government used the Prevention of Illegal Squatting Act in its exercise of the normal police power to evict people for health, safety and public interest reasons in terms of the Slums Act of 1934, the Trespass Act, the Physical Planning Act and the Health Act. In this way the Prevention of Illegal Squatting Act conferred on owners and the government an absolute right to evict squatters from both private and public land without any regard for their personal circumstances or housing needs. The Act remained in force for four years after 1994 and was eventually repealed by section 11(1), read with schedule 1, of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998.

4 Conclusion

In *Government of the Republic of South Africa v Grootboom*²²⁷ Yacoob J stated:

Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

In this article I have attempted to set out the legal-historical context of urban forced evictions. The article shows that the law of evictions underwent a dramatic transformation throughout apartheid. During this period, government abused its normal police powers to evict people under the guise of ensuring their health, safety and security. This normal exercise of regulatory powers was in reality undertaken to further the government's "less wholesome and far more contentious ideological goals" of racial segregation and the systemic oppression of black people.²²⁸ Van der Walt argues that evictions during apartheid could not be characterised as remarkable for their political motivation but were in fact extraordinary "for the particular politics relied upon in and served by the evictions".²²⁹ In the process, a negative link was established between the regulatory powers of government and property law, because the requirements of the *rei vindicatio* accommodated the eviction of squatters "through its supposedly neutral and scientific application".²³⁰ Adherence to the strictly legal requirements of the *rei vindicatio* made it impossible for a court to take into account the personal circumstances of the occupiers

227 2000 (1) SA 46 (CC) in par [22].

228 Van der Walt (n 4) at 60.

229 *Idem* at 62.

230 *Idem* at 63.

or their housing needs or circumstances, and therefore refuse an application for eviction. The legislation discussed above

created a situation in which Black occupiers and users of land were legally classified as unlawful occupiers (or ‘squatters’) – who could therefore be evicted without any conceivable defence – by the very legislation that allowed and regulated eviction of unlawful occupiers in the first place or, even worse, by the same authorities who had established and housed them in a particular location.²³¹

The rural and urban land tenure measures discussed above extended the scope of the *rei vindicatio* far beyond its traditional application, which was to protect the stronger of competing rights “in an objective, neutral and legitimate fashion”.²³² This broadened scope of the *rei vindicatio* transformed an already powerful remedy into an even stronger remedy through which an individual owner could vindicate her property from unlawful occupiers and the government could “uphold a socially engineered, state-sponsored and state-enforced system of racially segregated land use”.²³³

In *Port Elizabeth Municipality v Various Occupiers*²³⁴ the Constitutional Court observed that apartheid land law resulted in the creation of “large, well-established and affluent” white neighbourhoods that co-existed alongside “crammed pockets of impoverishment and insecure” black ones. The spatial separation that Sachs J described above was not only premised on racial differentiation, but also served as a constant reminder of grave assaults on the equality, human dignity and freedom of those living in intolerable conditions and abject poverty. It is against this background that we must seek to “transform our society into one in which there will be human dignity, freedom and equality”²³⁵ so that we can appreciate and understand the social and historical context of, on the one hand, the right of access to adequate housing enshrined in section 26 of the Constitution of the Republic of South Africa, 1996 in general, and on the other hand, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.

Abstract

The aim of this article is to place forced evictions in their legal-historical context by analysing the rural and urban land tenure measures used during apartheid to limit the nature and duration of black people’s tenure. The hypothesis of this article is that the homelessness and extensive housing crisis in present-day South Africa have their origins in the apartheid era, when government’s rural and urban land tenure measures, together with private owners’ common-law remedies, led to large-scale forced evictions. A renewed appreciation of the legal-historical context of forced evictions should enable the courts to understand the social and historical context of section 26 of the Constitution

231 *Idem* at 65.

232 *Idem* at 60.

233 *Idem* at 66.

234 2005 (1) SA 217 (CC) in par [10].

235 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) in par [8].

of the Republic of South Africa, 1996 and the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 18 of 1998. This limited historical study places forced removals and the demolition of homes in the context of apartheid land law. The description and analysis of legislation and case law are limited to the period between 1913 when the Black Land Act was enacted and 1994 which marked the official end of apartheid.