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## Access to housing in South Africa: An overview of dimensions and mechanisms

### Summary

The historical background of influx control, group areas and the regulation of unlawful occupation of land (squatting), explain, to some extent, why unlawful occupation of land and informal settlements are still prevalent 18 years after the new Constitutional dispensation commenced. For many people in South Africa, access to land is still an ideal and not a reality. Not only have the “three pillars of apartheid” contributed to the dismal current state of affairs, but the multi-faceted and multi-dimensional nature of access to housing has also contributed to it being particularly complex. In this regard a human rights, a land reform and a property law dimension can be identified. The human rights dimension is imbedded in socio-economic rights and is founded on dignity; the land reform dimension is based on the premise that access to housing is interlinked with access to land, and the property law dimension involves the development of common law (Roman-Dutch) principles of property and ownership to provide for other (or alternative) forms of ownership. This article aims to provide an overview of the three-dimensional nature of access to housing and to highlight some of the mechanisms encapsulated within each dimension. An overview of statutory measures will be provided and, where relevant, certain aspects will be attended to in more detail. In light of its three-dimensional nature, it is clear that access to housing remains a major challenge for all role players involved.

### Toegang tot behuising in Suid-Afrika: 'n Oorsig van dimensies en meganismes

Voormalige grootskaalse gebruik van instromingsbeheer, groepsgebiede en die regulering van onregmatige okkupasie van grond (plakkery) verduidelik tot 'n mate waarom onregmatige okkupasie van grond en informele vestiging nog steeds, 18 jaar nadat 'n nuwe Grondwetlike bedeling in Suid-Afrika ingetree het, 'n realiteit is. Hoewel die “drie pillare van apartheid” tot die steeds voortdurende problematiek aanleiding gegee het, kompliseer die multidimensionele aard van toegang tot behuising, die saak verder. Hierin geleë is 'n menseregte-, grondhervormings- en sakeregdimensie. Die menseregte-dimensie is ingebed in sosio-ekonomiese regte en is op die beginsel van menswaardigheid gebou; die grondhervormingsdimensie behels dat toegang tot behuising en toegang tot grond onlosmaaklik aan mekaar gekoppel is, en die sakereg/eiendomsregdimensie behels die ontwikkeling van gemeenregtelike (Romeins-Hollandse) eiendomsbeginsels om moontlike ander (alternatiewe) vorme van eiendomsreg daar te stel. Hierdie artikel beoog om 'n oorsig te gee van die drie-dimensionele aard van toegang tot behuising en om sommige van die meganismes wat in elke dimensie ingebou is, uit te lig. 'n Oorsig van statutêre maatreëls word verskaf, en waar toepaslik, word bepaalde aspekte in meer besonderhede uiteengesit. In die lig van dié drie-dimensionele aard, is dit duidelik dat toegang tot behuising steeds 'n groot uitdaging stel aan alle rolspelers binne die verskillende dimensies.

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## 1. Introduction

For many people in South Africa access to housing is still an ideal and not a reality. Access to housing entails “opening up” existing housing possibilities or enabling more housing opportunities for all South Africans. Apart from the fact that historical imbalances continue and the legacy of apartheid remains in relation to housing and settlement patterns, access to housing as concept is complex, multi-faceted and multi-dimensional. Within the Constitutional context access to housing in its most elementary form<sup>1</sup> has a human rights dimension, a land reform dimension and a property law dimension. Its human rights dimension is located within the arena of socio-economic rights and is founded on the basis of dignity. Its land reform dimension is premised on the point of departure that access to housing and access to land are interconnected. It is also linked with the redistribution of land, tenure security and measures guarding against arbitrary eviction. Its property law dimension is linked to forms of (alternative) ownership in which access to housing is further promoted.

This article aims to give an overview of the various mechanisms that play a role in facilitating access to housing in South Africa, in general, and to embody the various dimensions set out above, in particular. In order to achieve this goal, a brief historical exposition is necessary in order to place the need for realising access to housing into perspective. This exposition will be followed with the Constitutional context whereafter the focus shifts to the various dimensions embodied in access to housing in South Africa and how these dimensions are dealt with in legislation and where relevant, case law. The various dimensions service different categories of beneficiaries, ranging from the homeless and destitute, to low-income and middle-income groups to the higher end of the housing market which includes housing for densification and recreational purposes. In this regard the different dimensions have varied levels of success. What is clear, however, is that in light of its three-dimensional nature, access to housing remains a major challenge, for all role players involved, at all levels.

## 2. Historical background

The present multi-dimensional nature of “access to housing” can be traced back to the particular South African historical background. The fact that the South African population was regulated on the basis of race had a direct impact on access to land, in general, and access to housing, in particular.<sup>2</sup> In this regard the “three pillars of apartheid” played a major role in forming the landscape of rural and urban South Africa, the remnants of which are prevalent even 18 years after the new political dispensation.<sup>3</sup>

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1 It is accepted that housing has even more dimensions, e.g. environmental, planning and financial dimensions. However, for purposes of this article the emphasis is on the property law-human rights core.

2 Van der Merwe & Pienaar 1997:334.

3 Pienaar 2011a:309.

The first pillar of apartheid consisted of influx control measures.<sup>4</sup> Officially the government embarked upon the racially based approach to land in 1913 when the *Natives Land Act 27 of 1913*<sup>5</sup> was promulgated,<sup>6</sup> resulting in a main division of rural South Africa into “scheduled areas” that were reserved for Black persons only, and the rest of South Africa.<sup>7</sup> In 1936 additional land was provided by way of the *South African Development and Trust Land Act 18 of 1936*. The newly added areas were the “released areas”, resulting in South Africa being subdivided into Black spots (consisting of both the scheduled and the released areas) and the rest of South Africa.<sup>8</sup> A racially-based approach to land within the urban areas was embodied in the *Natives (Urban Areas) Act 21 of 1923*.<sup>9</sup> The point of departure was twofold, namely spatial planning would proceed on a racial basis, and occupation of Black persons in urban areas was only temporary. This general approach gained further momentum when the *Natives (Urban Areas) Consolidation Act 25 of 1945* commenced. This Act generally provided for so-called “locations” which constituted areas where Black persons could remain as long as they were employed, with specific exceptions for the unemployed.<sup>10</sup> Occupation in these areas was linked to a specific period of time. Black persons could not acquire ownership of land or buildings located within the locations. Accordingly, Black persons generally resided and worked in urban areas on a temporary basis while their families remained in the rural areas. This resulted in a so-called “two way migration paradigm”<sup>11</sup> that impacted heavily on employment and settlement patterns in South Africa.<sup>12</sup> The provisions impacting on especially urban land was generally referred to as “influx control measures”. These were directly linked with “pass laws”, as the movement to and from these areas and occupation within these areas were strictly regulated and enforced.

The racial approach to spatial planning was embodied in various legislative measures regulating “group areas”, which constituted the second pillar of apartheid.<sup>13</sup> A “group area” was a technical term indicating that an area of land was reserved for either “White”, “Black” or “Coloured” persons.<sup>14</sup> The first *Group Areas Act 41 of 1950* was replaced with the *Group Areas Act 77 of 1957*. In 1966 the *Group Areas Act 36 of 1966* was promulgated. Spatial racial segregation entailed that the occupation,

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4 See, in general, Pienaar 2011a:311-312.

5 Later renamed to be the *Black Land Act 27/1913*.

6 For more detail, see Van der Merwe & Pienaar 1997:334-380; Van der Walt 2005:1-4; Pienaar & Brickhill 2007:48-1-3; Legassick 1995:43-59; Mostert & Pope 2010:2-15.

7 See also Bennett 1996:65-94.

8 Haines & Cross 1988:73-92.

9 McCarthy 1988:122-127.

10 Haines & Cross 1988:84.

11 Mashile 1988:57-58.

12 Van der Walt 1990:1-45; Wolpe 1995:60-90; Carey-Miller & Pope 2000:241-242.

13 See, in general, Pienaar 2011a:312-313.

14 “Coloured” areas were often further defined in accordance with Chinese, Malay or Indian origin.

acquisition of rights (or ownership) and the particular use of land differed, depending on the specific relevant group area. Essentially, this meant that in relation to a declared White group area, for example, only White persons could vest rights and occupy land within that area.

Therefore, the declaration of an area as a group area had particular implications. Not only was the racial background of the occupiers delineated, but the kind of rights that could be vested and the concomitant development that could occur in these areas, were also prescribed.

The regulation of unlawful occupation of land constituted the third pillar of apartheid.<sup>15</sup> As explained, the movement to and from rural and urban areas was monitored and the occupation within an urban area was also restricted and regulated on the basis of race. Occupation of land *without consent* was especially regulated strictly. The *Prevention of Illegal Squatting Act 52 of 1951 (PISA)* was promulgated shortly after the first *Group Areas Act 41 of 1950*<sup>16</sup> commenced.<sup>17</sup> Although the *Act* applied to the whole of South Africa, its application in particular areas was regulated by way of proclamation in the *Government Gazette*.<sup>18</sup> *PISA* contained numerous offences, although no definition of “unlawful occupation” or “squatting” was provided. Apart from *PISA* that was specifically promulgated to deal with unlawful occupation, other legislative measures also impacted on the regulation of land occupation, including the *Trespass Act 6 of 1959*, the *Slums Act 76 of 1979* and the *Health Act 63 of 1977*.<sup>19</sup>

Despite the existence of influx control measures and squatting regulations and the rather draconic enforcement thereof,<sup>20</sup> urbanisation increased in the mid-1980s.<sup>21</sup> Increased riots and the declaration of various states of emergency finally led to the abolishment of influx control in 1986 with the promulgation of the *Abolition of Influx Control Act 68 of 1986*<sup>22</sup> and the introduction of “Free Settlement Areas” in 1988. Although these developments were welcomed, the legacy of the decades’ racial approach to land control was evident: backlogs in the provision of housing and corresponding infrastructure and services, outdated survey and deeds information, a severe shortage of designated land suitable for housing, and a particular pattern of settlement.<sup>23</sup>

Apart from the racial dimension to urbanisation and settlement patterns, other factors also contributed to the increasing demand for housing, especially within urban areas. The population explosion, rising costs of material and labour, and the shortage of available land within commuting

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15 See, in general, Pienaar 2011a:313.

16 For more detail, see Liebenberg 2010:268-271.

17 See, in general, Muller 2011:33-71.

18 *S v Muchunu* 1976 1 SA 320 NPJ.

19 Pienaar & Muller 1999:384-389.

20 Pienaar & Muller 1999:378; Van der Walt 2011:521-522.

21 McCarthy 1988:122-124; Pienaar 2011a:313-314.

22 Muller 1988:46-157.

23 Pienaar & Muller 1999:370-373.

distance of city centres underlined the necessity to develop other forms of ownership that were not based on single title, individual ownership.<sup>24</sup> Although fragmented ownership started its development in the 1970s in South Africa, it became increasingly important following the abolition of influx control in the 1980s and the official demise of apartheid in 1990.

In 1991 the *White Paper on Land Reform*<sup>25</sup> was published in which access to land was set out to be a fundamental right. The publication of the *White Paper* coincided with the publication of various legislative measures, most notably the *Abolition of Racially Based Land Control Measures Act* 108 of 1991.<sup>26</sup> Officially, the racial approach to land had ended and the notorious *Group Areas Act* and other racially based land control measures were repealed. *PISA* was still on the statute books and the reality of the apartheid legacy remained. It is within this context that the new Constitutional dispensation dawned in April 1994: homelessness, informal settlement and unlawful occupation of land, on the one hand, and structured, formalised ownership models that enabled more housing opportunities within limited space, on the other.

### 3. Constitutional context

The Constitution contains a Bill of Rights that specifically provides for “housing”<sup>27</sup> and “property”.<sup>28</sup>

Section 26 provides for the following:<sup>29</sup>

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 25(5), (6) and (7) provide for the following:<sup>30</sup>

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

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24 Pienaar 2010:8-9.

25 *White Paper* B-91.

26 Badenhorst *et al.* 2006:588-590; Carey-Miller & Pope 2000:249-250; Van der Walt 2011:12-23.

27 See, in detail, Liebenberg 2010:311-316.

28 See, in detail, Van der Walt 2011:1-528.

29 *Constitution of the Republic of South Africa*, 1996; Liebenberg 2010:313-316.

30 *Constitution of the Republic of South Africa*, 1996.

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

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

It is in light of the above constitutional provisions that the legislative framework developed since 1994<sup>31</sup> and in which access to housing increasingly displayed its human rights, land reform and property law dimensions.

## 4. Human rights dimension

### 4.1 Context

The inclusion of socio-economic rights in the Bill of Rights contributes to a substantive view of a transformed South African society. They establish positive duties of the state to ensure that everyone has access to the various socio-economic goods and services enshrined in sections 26, 27, 28, 29 and other provisions.<sup>32</sup>

Within this context dignity has been identified as a key concept, with further significant reliance on freedom and equality.<sup>33</sup> This means that, in the context of socio-economic rights, a society's constitutional obligations to address poverty and inequality must be seen in its social and historical context. This also means that account must be taken of the relative urgency of the needs of different groups and individuals and to respond accordingly.<sup>34</sup> The duty to consider the circumstances of particular vulnerable groups has been recognised by the Constitutional Court in the watershed judgment in *Grootboom v The Government of the Republic of South Africa*.<sup>35</sup> In this judgment the existing, comprehensive and rational housing programme was faulted as it failed to cater for groups in particular need.<sup>36</sup> The brief historical exposition above underlines the disparity in access to housing and services connected therewith. It is thus clear that particular measures and programmes must be in place to address the unique South African position.

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31 For more detail regarding the particular developments within this context, see Van der Walt 2011:1-11.

32 Liebenberg 2005:73.

33 Liebenberg 2005:73; Liebenberg 2010:271-281.

34 Liebenberg 2005:178.

35 *Grootboom v The Government of the Republic of South Africa* 2000 11 BCLR 1169 CC. See also De Vos 2001:258.

36 *Grootboom v The Government of the Republic of South Africa*: [44].

The next section will provide an overview of the current legislative framework and mechanisms that aim to realise access to housing within the human rights dimension.

## 4.2 Legislative framework

Apart from the overarching “National Housing Code” that embodies housing policy in South Africa,<sup>37</sup> various legislative measures have been promulgated since 1994 to promote access to housing:<sup>38</sup>

- The *Housing Act* 107 of 1997 and consecutive amendments thereto.<sup>39</sup>
- The *Rental Housing Act* 50 of 1999. The main thrust of the *Act* is to protect tenants from unscrupulous landlords and to provide for a Rental Housing Tribunal to mediate between tenants and landlords.<sup>40</sup>
- The *Home Loan and Mortgage Disclosure Act* 63 of 2000. This *Act* ensures that banks lend money to all communities and do not refuse to give mortgage bonds to some communities without good motivation.<sup>41</sup>
- The *Housing Consumer Protection Measures Act* 95 of 1998.<sup>42</sup> This *Act* protects new home-owners from getting poor-quality houses by ensuring that all builders are registered with the National Home Builders Registration Council. It also provides that all new houses be enrolled under the Defect Warranty Scheme. House builders must comply with certain building standards, and houses must be at least 30 square metres in size.
- The *Social Housing Act* 16 of 2008.<sup>43</sup> The aim of the *Act* is to provide for social housing and everything associated with it. Essentially, the *Act* provides for a rental or co-operative housing option for low- to medium-income households that find it difficult to access rental housing on the open market. Under this *Act* the Social Housing Regulatory Authority was established in 2010. The main function of the Authority is to invest in social housing and to regulate this sector. The Authority also provides institutional support to social housing institutions, thereby enabling them to achieve accreditation required to deliver social housing services to communities involved.
- The *Housing Development Agency Act* 23 of 2008.<sup>44</sup> The main purpose of the *Act* is set out in section 2, namely to (a) establish the Housing

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37 The overall Housing Code embodies the following policies: Social Housing, Rental Housing, Emergency Housing and Human Settlement Redevelopment.

38 See, in general, Liebenberg 2010:311-316.

39 For the most recent exposition of the *Act*, see McLean 2007:55-1-53. See also Liebenberg 2007:33-1-63; Van der Walt 2011:536-537.

40 For more detail, see Badenhorst *et al.* 2006:427-440.

41 See the discussion of Du Plessis *et al.* 2001:203-206.

42 For more detail, see Du Plessis *et al.* 1999:548-550.

43 GN 1199 *Government Gazette* 2008:1 (31577).

44 Commenced on 31 October 2008 – GN 54 *Government Gazette* 2008:1 (31604).

Development Agency which will facilitate the acquisition of land in a way that aligns with the capacities of Government across all spheres; (b) to provide for the objects, roles, powers and duties of the Agency, and (c) to fast-track the acquisition of land and housing development services. Funds for achieving the objectives of the *Act* are to be appropriated by Parliament, from donations, interest on investments, loans raised by the Agency, proceeds from the sale of land, fees for services rendered, and subsidies and grants received from the State.<sup>45</sup>

### 4.3 The government's housing subsidy scheme

The housing subsidy scheme is the single largest mechanism that is presently employed to realise access to housing.<sup>46</sup> It results in either home ownership or rental accommodation, and functions in light of the overarching above-mentioned statutory framework and the Housing Code. The subsidy is a grant from government to qualifying beneficiaries for housing purposes. Beneficiaries must comply with the following requirements:<sup>47</sup>

- Married or financial dependants. An applicant must be married or constantly be living with any other person. A single person with financial dependants (e.g. children or family members) may also apply.
- Residents. The applicant must be a South African citizen or be in possession of a permanent residence permit.
- Competent to contract. The age of majority is 18 years.
- Monthly household income. An applicant's gross monthly income must not exceed R3500. Adequate proof of income must be submitted.
- Not yet benefited. An applicant or anyone in the household must not have received previous housing benefits from the government, except if the applicant qualifies for a Consolidation Subsidy or is a disabled person.
- First-time property owner. Except for specific exceptions, the applicant may not own or previously have owned a house.

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45 *Housing Development Agency Act 23/2008*:section 25.

46 For the period 1994-2008 3.132.769 housing subsidies were approved and 2.358.667 units were completed to a cost of R48.5 billion. This brought housing to 9.9 million citizens who could access state-subsidised housing opportunities. See 'Towards a Fifteen Year Review' p.28 – [http://www.info.gov.za/otherdocs/2008/toward\\_15year\\_review.pdf](http://www.info.gov.za/otherdocs/2008/toward_15year_review.pdf) (accessed on 13 January 2012). For the financial year ending 31 March 2011 the total delivery of housing units were 185.425 which comprised 63.546 serviced sites and 121.879 houses – <http://www.dhs.gov.za/Content/Stats/2010%2011%20Financial%20Year.htm> (accessed on 21 February 2012).

47 For more detail, see <http://www.dhs.gov.za/Content/Generic%20Subsidy%20Information/Subsidy%20Info/5%20Subsidy%20Programmes.pdf> (accessed on 21 February 2012).

The particular amount for which an applicant qualifies would depend on the category of housing subsidy the beneficiary is accessing and the relevant household income. The latest amounts range from R55.706 to R84.000.<sup>48</sup> Beneficiaries with a household income of between R1.501 and R3.500 per month are required to pay a financial contribution of R2.500 upfront in order to gain access to the subsidy scheme. Alternatively, participants are required to participate in the building of their houses through an approved People's Housing Process Project.

The following categories of housing subsidies are available:<sup>49</sup>

- Consolidation subsidy. This mechanism affords previous beneficiaries of serviced stands the opportunity to acquire houses. A top-up subsidy to construct a house is granted to beneficiaries with a household income not exceeding R3.500 per month. The subsidy may only be used for building as services have already been installed.
- Individual subsidy. This enables the applicant to acquire ownership of improved residential properties (stand and house) or to acquire a house building contract which is not part of approved housing subsidy projects. The latter option is available to beneficiaries who access housing credit.
- Project-linked subsidy. This mechanism enables a qualifying household to access, in ownership, a complete residential unit, which is developed within an approved project-linked housing subsidy. This usually operates within a municipal housing scheme. The subsidy is paid directly to the municipality that is building the housing unit.
- Institutional subsidy. This is available to qualifying institutions to enable them to create affordable housing stock for persons who qualify for housing subsidies. These institutions must be non-profit organisations and usually include churches, local authorities, or housing associations (also called "social housing institutions"). This mechanism provides capital for the construction of housing units in respect of qualifying beneficiaries who do not earn more than R3.500. The subsidy is paid to institutions to provide subsidised housing on deed of sale, rental or rent-to-buy options, on condition that the beneficiaries may not be compelled to pay the full purchase price and take transfer within the first four years of receipt of the subsidy. Institutions must also invest capital from their own resources into the projects. A family who lives in this kind of rented accommodation does not jeopardise their opportunity to apply for their own subsidy at a later stage.

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48 <http://www.dhs.gov.za/Content/Generic%20Subsidy%20Information/Subsidy%20Info/Quantum%20table?202010-2011%20without%20contribution.pdf> (accessed on 21 February 2012).

49 <http://www.dhs.gov.za/Content/Generic%20Subsidy%20Information/Subsidy%20Information/7%20National%20Housing%20Programmes%20per%20Intervention.pdf> (accessed on 21 February 2012). See also Huchzermeyer 2003:591-612; Mathebula 2005:125-127.

- Discount benefit scheme. This scheme promotes home ownership among tenants of State-financed rental stock, including formal housing and serviced sites. Tenants receive a maximum discount of up to R7.500 on the selling price of the property. Where the discount equals or exceeds the purchase price or loan balance, the property is transferred free of any further capital charges.
- Rural subsidies. This subsidy is available to beneficiaries who only enjoy functional tenure rights to the land they occupy. The land belongs to the State and is usually governed by traditional authorities.<sup>50</sup> The subsidies are available on a project basis and beneficiaries are supported by implementing agents. Beneficiaries also have the right to decide on how to use their subsidies either for service provision, building of houses or a combination thereof.
- People's housing process. This process aims to support households who wish to enhance their housing subsidies by building or organising the building of their own homes themselves. The beneficiaries are usually communities or organised groups of households. This process is a method of accessing the projects-linked, linked consolidation, institutional or rural subsidies as well as technical and other forms of assistance in the house-building process. This process may also include the following support: access to land that can be serviced; training opportunities, and technical assistance.
- Relocation assistance. This is for home owners who are locked into paying for home loans which they cannot afford. The loan must have been granted by an accredited lender and the borrower must have defaulted on at least three payments. This subsidy will help them purchase a home they can afford. A person who is eligible for relocation assistance must enter into a relocation agreement in order to relocate to more affordable housing.
- Rental options. Although some categories of subsidies, as set out above, provide for rental options, the main thrust of the housing subsidy scheme is aimed at home ownership. As this is not always possible or even desirable for beneficiaries, for many reasons,<sup>51</sup> more emphasis has recently been placed on rental housing. In this regard the National Housing Code: Part 3 – Social and Rental Interventions has played a major role in creating new impetus for the development of rental housing stock.<sup>52</sup>

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50 Traditional authorities preside in traditional or communal areas in specific regions within South Africa where communities adhere to the Customary (or Indigenous) Law. For more detail, see Bennett 2004:101-134.

51 For example, incomplete funds or the inability to take on additional responsibilities as owner (e.g. tax and maintenance implications).

52 See also the legislation related to social housing – 4.2 above.

## 5. The land reform dimension

### 5.1 Context

In light of the brief historical exposition above, the need for land reform is clear. An all-encompassing land reform programme was embarked on in 1994.<sup>53</sup> In this regard three separate, though interlinked subprogrammes were lodged: a redistribution programme under section 25(5) of the Constitution;<sup>54</sup> a tenure reform programme under section 25(6),<sup>55</sup> and a restitution programme under section 25(7).<sup>56</sup> Various statutes were promulgated under each of these programmes.<sup>57</sup> Although some statutes are programme-specific, it frequently happens that a statute falls comfortably between two programmes, resulting in some overlapping between two subprogrammes in some instances.<sup>58</sup> Although none of these particular programmes is especially focused on access to housing as such, some aspects of the promotion of access to housing are found, to some extent, in all of the subprogrammes, which will be set out briefly below. Apart from the specific mechanisms provided for in these subprogrammes, access to housing is also indirectly addressed in provisions regulating unlawful occupation of land and arbitrary eviction. To that end, a brief discussion of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (*PIE*) will follow.

### 5.2 Redistribution

Section 25(5) of the *Constitution of the Republic of South Africa*, 1996 reads as follows:

The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.<sup>59</sup>

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53 When the racial approach to land was abolished in 1991, the former government embarked upon a restitution programme of limited scope. See Badenhorst *et al.* 2006:585-586; Pienaar & Brickhill 2007:chapter 48 in general.

54 For more detail, see Badenhorst *et al.* 2006:593-606; Carey-Miller & Pope 2000:398-455.

55 See further Badenhorst *et al.* 2006:607-628; Carey-Miller & Pope 2000:456-554.

56 For a detailed exposition, see Badenhorst *et al.* 2006:629-652; Carey-Miller & Pope 2000:313-397.

57 For a detailed discussion of the various statutes, see Badenhorst *et al.* 2006:594-652; Mostert *et al.* 2010:116-172; Pienaar & Brickhill 2007:chapter 48 in general.

58 E.g., the *Extension of Security of Tenure Act* 62/1997 has provisions dealing with redistribution (chapter 2) and tenure reform (chapter 4) – see Mostert *et al.* 2010:136-142.

59 *Constitution of the Republic of South Africa*, 1996.

Access to housing is inextricably linked with access to land.<sup>60</sup> In this context, the redistribution programme plays an important role. The main aim of the redistribution programme is to provide access to land for the landless, in both residential and agricultural or productive contexts.<sup>61</sup> Numerous legislative measures were promulgated to achieve this goal.<sup>62</sup> Each particular legislative measure is aimed at a specific category of beneficiary, thereby indicating the particular set of requirements that have to be complied with in each instance. For example, the *Land Reform (Labour Tenant Act) 3 of 1996* is specifically aimed at labour tenants and provides for access to land (and thereby indirectly housing) under Chapter III of the Act.<sup>63</sup> In terms of this chapter, applicants who meet the requirements may apply for a specific portion of land and concomitant rights. The end result of a successful application is that the former labour tenant becomes a land owner in his/her own right.<sup>64</sup>

Apart from the individual statutes that are aimed at focus groups,<sup>65</sup> a general facilitation measure is also provided for in the *Provision of Land and Assistance Act 126 of 1993*. Under this Act, State and private land may be made available for settlement in general.<sup>66</sup>

### 5.3 Tenure reform

Section 25(6) of the *Constitution of the Republic of South Africa, 1996* reads as follows:

A person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided for by an Act of Parliament, either to tenure which is legally secure or to comparable redress.<sup>67</sup>

As explained above,<sup>68</sup> the kind of right or land control form that individuals or communities had in the pre-constitutional era was not only racially based, but was in essence insecure and based on a permit system.<sup>69</sup> Accordingly, the tenure reform programme aims to strengthen these insecure rights,

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60 See Van der Walt 2011:522; Pienaar & Mostert 2006:277-299.

61 Department of Land Affairs 1997:ix.

62 See, in general, Carey-Miller & Pope 2000:398-455; Badenhorst *et al.* 2006:593-606; Mostert *et al.* 2010:120-130.

63 Badenhorst *et al.* 2006:594-601; Pienaar & Brickhill 2007:48-17-19.

64 Badenhorst *et al.* 2006:601-602.

65 The *Extension of Security of Tenure Act 62/1997* is aimed at occupiers who occupy land with consent that belongs to someone else – essentially farm workers and farm dwellers – for more detail, see Pienaar 2011b:115-120.

66 See further Badenhorst *et al.* 2006: 604-606; Mostert *et al.* 2010:131-150.

67 *Constitution of the Republic of South Africa, 1996*.

68 See Historical Background above.

69 For a detailed historical exposition of land control forms (tenure), see Pienaar 2011b:108-111; Pienaar & Kamkuemah 2011c:724-728.

as well as rationalise and streamline the varied land control forms and demands, in line with the spirit of the Constitution.<sup>70</sup>

In the context of access to housing, the *Interim Protection of Informal Land Rights Act* 31 of 1996 provides that even persons who occupy land without formal, official or valid occupancy rights are protected against arbitrary eviction for the duration of the tenure reform programme.<sup>71</sup> Some sections of other legislative measures also address tenure insecurity by regulating eviction procedures strictly.<sup>72</sup> The latter includes, *inter alia*, eviction procedures for persons occupying agricultural land, in general, and farm workers, in particular. In this regard the strict substantial and procedural requirements under the *Extension of Security of Tenure Act* 62 of 1997 (*ESTA*) aim to curtail evictions from farm land.<sup>73</sup> An additional measure to prevent arbitrary evictions has been inserted in the *Act* in that automatic review procedures prescribe that all eviction orders granted by the lower courts<sup>74</sup> must be reviewed by the Land Claims Court and must be confirmed before an eviction order can be executed.<sup>75</sup>

Regulating eviction strictly embodies one leg of the two-pronged approach towards protecting tenure security and housing rights. The other leg of protection is embodied in provisions enabling the development of agri-villages, either by way of “on the farm” or “off the farm” developments.<sup>76</sup> This category of occupiers is especially vulnerable as housing on farms is usually linked with employment.<sup>77</sup> Accordingly, the establishment of agri-villages, in terms of which independent housing rights are exercised separate from employment, will go a long way in making access to housing a reality for this vulnerable section of the population. Unfortunately, for many reasons,<sup>78</sup> these developments have not occurred on the scale and degree as was expected at the time when *ESTA* was promulgated.<sup>79</sup>

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70 For a critical analysis of the whole of the tenure programme, see Pienaar 2011b:111-133.

71 For a detailed discussion, see Badenhorst *et al.* 2006: 619-621; Carey-Miller & Pope 2000:461-467; Mostert *et al.* 2010:133.

72 The *Land Reform (Labour Tenant) Act* 3/1996, mentioned above, also regulates eviction strictly by providing for (a) normal eviction proceedings under section 7 and (b) urgent eviction proceedings under section 15. See also Badenhorst *et al.* 2006:598-600; Pienaar & Brickhill 2007:48-17-18; Mostert *et al.* 2010:124-126.

73 See Pienaar & Geys 2010:248.

74 Magistrates courts.

75 For more detail, see Badenhorst *et al.* 2006:614-615.

76 *ESTA* 62/1997:sections 4-8; see also Badenhorst *et al.* 2006:610-611.

77 Pienaar 2011b:24-126.

78 E.g., the unavailability of land, complex legal provisions, the interconnectedness of survey, planning and development and incapacity within local authorities and a general lack of viable partnerships between private land owners, developers, the state and local authorities.

79 Pienaar 2011b:124-129.

## 5.4 Restitution

Section 25(7) of the *Constitution of the Republic of South Africa, 1996* reads as follows:

A person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.<sup>80</sup>

The restitution procedure and the requirements thereof are found in the *Restitution of Land Rights Act 22* of 1994. As the main aim of this programme is to restore land or rights in land to persons or communities dispossessed, as set out in the *Act*,<sup>81</sup> broadening or facilitating access to housing is not the main objective. However, inevitably access to housing is addressed, though indirectly, when land or alternative land is indeed restored.<sup>82</sup> The restoration of land invariably coincides with the drafting of development and settlement plans in terms of which housing is addressed.

## 5.5 The regulation of unlawful occupation of land

Unlawful occupation of land entails the occupation of land without the express or tacit consent of the land owner or person in charge, or occupation without another right in law.<sup>83</sup> If land, buildings or structures are occupied unlawfully for residential purposes or as shelter, *PIE* applies.<sup>84</sup> Although this *Act* is, in principle, not aimed at broadening access to housing, but focused on regulating unlawful occupation on an equitable basis and in line with the constitutional imperative of human dignity, some procedural<sup>85</sup> and substantive measures<sup>86</sup> may, in practice, result in accommodation

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80 *Constitution of the Republic of South Africa, 1996.*

81 Section 2 contains both formal and legal requirements. For a detailed exposition, see Badenhorst *et al.* 2006:629-637; Pienaar & Brickhill 2007:48-55-63; Mostert *et al.* 2010:151-156.

82 Badenhorst *et al.* 2006:646-648. See also *Concerned Land Claimants' Organisation v PELCRA* 2007 1 SA 371 CC where, in principle, the constitutional right to restitution was confirmed. There is, however, no constitutional right to *specific restitution*. Accordingly, restoration of alternative land would, in some instances, suffice.

83 For more detail, see Pienaar 2011a:315-316; Badenhorst *et al.* 2006:652-660; Van der Walt 2005:32-64; Pienaar & Muller 1999:389.

84 Unlawful occupation of business, trade and industrial premises is still regulated by the common law, the *rei vindicatio* in particular. See Badenhorst *et al.* 2006:242-247. As the focus of this contribution is on *housing*, this matter will not be explored further.

85 *PIE* 19/1998:sections 4, 5 and 6 set out the procedure regarding eviction by private land owners, on an urgent basis and by state organs, respectively. See also Badenhorst *et al.* 2006:247-255; Van der Walt 2011:296-297.

86 An eviction order may only be granted by a court after considering all relevant circumstances and may only be granted if it is just and equitable in the particular circumstances – *PIE* 19/98:sections 4(7) and 6(7), respectively. See

being made available to occupiers. Recent developments in case law have especially underlined the duties and responsibilities of local authorities, organs of State and government departments in making land and accommodation available in specific instances.<sup>87</sup> Some mechanisms that have been employed recently include (a) joinder of relevant bodies and organs of State in order to participate in the legal process;<sup>88</sup> (b) the granting of orders forcing said institutions to provide information to the court or lodge reports indicating the various possibilities available that may resolve the particular housing issue in question,<sup>89</sup> and (c) orders of meaningful engagement forcing authorities to become actively involved in seeking a possible solution.<sup>90</sup>

An eviction order may only be granted once the court has taken into account all the circumstances and is convinced that the granting of an eviction order is just and equitable in the specific case. In this regard, the circumstances of female-headed families, the elderly, the disabled and children must be considered in particular.<sup>91</sup> If the relevant land that is unlawfully occupied is privately owned, the possibility of suitable alternative accommodation is considered if the period of unlawful occupation has been longer than six months.<sup>92</sup> If the land is State-owned or public land, the possibility of suitable alternative accommodation must always be taken into account when considering an eviction order.<sup>93</sup> Informal settlements, squatting and unlawful occupation of land are still prevalent in modern-day South Africa,<sup>94</sup> despite the various mechanisms attempting to address the housing shortage, as set out above.

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also Badenhorst *et al.* 2006:653-659; Van der Walt 2011:296-297; Liebenberg 2010:311-316.

87 *Omar v Omar and 11 other respondents* (unreported – Case no: 9643/2007, judgment handed down on 1 November 2011, Western Cape High Court); *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2011 7 BCLR 723 (CC); *City of Johannesburg Metro Municipality vs. Lawyers for Human Rights* 2011 JDR 1844 (CC); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 1 SA 470 W and *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 3 SA 208 CC. See also Liebenberg 2010:311-316; Van der Walt 2009:133-160.

88 See Muller 2011:231-250.

89 Muller 2011:252-253.

90 See also, in general, Muller 2011:257-282.

91 PIE 19/1998:sections 4(7) and 6(7), respectively. See also Liebenberg 2010:311-316; Van der Walt 2009:46-159; Muller 2011:285-306.

92 PIE 19/1998:section 4(6).

93 PIE 19/1998:section 6(3).

94 Huchzermeyer 2003:591-612; Pienaar 2011:314-315; Liebenberg 2010:268-271; Van der Walt 2009:133-135.

## 6. Property law dimension

### 6.1 Context

Broadening or facilitating access to housing has also been achieved, to some extent, by improvising or developing new or alternative forms of ownership, often referred to as fragmented ownership.<sup>95</sup> Development has occurred from the point of departure that single, individual ownership is not and should not be the only form of ownership available.<sup>96</sup> Depending on the particular need, a different approach may result in a more suitable form of control.<sup>97</sup> By contrast to the above two dimensions, the property law dimension did not directly result from the new constitutional dispensation. Instead, over many decades, the following forms have come to the fore: sectional title schemes, share block schemes and later even further adaptations to the basic uses of sectional title and share block schemes.<sup>98</sup> These constructions developed due to, *inter alia*, the need for densification in the urban context, combating building costs, transport and infrastructure considerations, and adapting to lifestyle changes and new demands of urban populations, in particular.<sup>99</sup> These developments have become increasingly important since the inception thereof in the 1970s in South Africa. Although initially developed for the middle- and higher income groups, fragmented ownership may in future be employed on a greater scale for the lower income groups as smaller land units are needed, construction costs are lower and the installation of basic services is generally more cost-effective.<sup>100</sup>

On the other hand, communal property associations,<sup>101</sup> a new juristic form to acquire and hold property on a community basis, resulted from land reform initiatives.<sup>102</sup> It is included under this discussion as it embodies an adaptation of a property law concept that promotes access to land and therefore, in principle, also access to housing. Each of these developments will be briefly discussed only in relation to its relevance to “opening up” housing opportunities.

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95 See, in general, Pienaar 2010.

96 See, in general, Pienaar 2010:3-4; Badenhorst *et al.* 2006:493-494.

97 Mostert & Pope 2010:100-114.

98 For historical background, see Pienaar 2010:4-22; Badenhorst *et al.* 2006:441-446.

99 Pienaar 2010:10-13.

100 Pienaar 2010:8-9.

101 Badenhorst *et al.* 2006:620-622; Mostert & Pope 2010:105-107.

102 As it provides for a new kind of juristic person to acquire, hold and dispose of ownership and property, a communal property association was developed *in lieu* of the tenure reform programme as provided for under the Constitution 108/1996:section 25(6).

## 6.2 Discussion

Sectional title schemes were introduced in the early 1970s and regulated in terms of the *Sectional Titles Act* 95 of 1986.<sup>103</sup> Sectional titles provide the basis for apartment ownership and are employed in densification of residential and commercial use of buildings.<sup>104</sup> In this way several persons can simultaneously own the land and individually own a part of a building. A sectional title unit consists of a section of the building and an undivided co-ownership share in the common parts of the building and the land.<sup>105</sup> The section is the principle component and the undivided share is the accessory. A further characteristic of sectional ownership is the compulsory membership of the juristic person responsible for the management of the sectional title scheme. Accordingly, the unit is a statutory form of immovable property.<sup>106</sup>

In a share block scheme a juristic person, the particular share block company, owns or leases a building and the members of that juristic person (the block shareholders) acquire a right of use in relation to a part of the building on the basis of their shareholding.<sup>107</sup> The particular part of the building to which a right is vested can be a flat or an apartment, for example. This form of landholding is governed by the *Share Block Control Act* 59 of 1980.<sup>108</sup>

A modification of either the sectional title option or the share block option may entail time-share.<sup>109</sup> However, in South Africa time-share seems to be a popular option for the recreational use of property, for example different holiday resorts around the country. The *Property Time-sharing Control Act* 75 of 1983 regulates time-share in South Africa.<sup>110</sup>

A communal property association resulted from land reform measures that envisaged a new kind of juristic person that would enable landholding on a community basis, but in line with constitutional principles. In this regard, the *Communal Property Associations Act* 128 of 1996 provides for a communal property association with the express purpose of owning, managing and controlling property on a basis agreed to by the members in terms of a written agreement.<sup>111</sup> In this manner, access to land, and thereby access to housing, is promoted on a community basis. As the establishment of the communal property association is complex and

103 See, in general, Pienaar 2010:57-233. See also Mostert & Pope 2010: 100-101; Badenhorst *et al.* 2006:447-492.

104 Pienaar 2010:8-13.

105 Pienaar 2010:59-61; Badenhorst *et al.* 2006:477-490; Mostert & Pope 2010:100-102.

106 Pienaar 2010:57-64; Badenhorst *et al.* 2006:466-476; Mostert & Pope 2010:102-104.

107 See, in general, Pienaar 2010:287-337; Mostert & Pope 2010:101-102; Badenhorst *et al.* 2006:494-509.

108 For further detail regarding the management of a share block scheme, see Pienaar 2010:338-410.

109 See, in general, Pienaar 2010:411-462; Badenhorst *et al.* 2006:513-515; Mostert & Pope 2010:104.

110 Pienaar 2010:411-462; Mostert & Pope 2010:104-105.

111 Badenhorst *et al.* 2006:620-622; Carey-Miller & Pope 2000:469-472.

requires professional assistance, and as managing these associations is difficult to realise in practice, the effectiveness of this mechanism to realise access to land in reality has been disappointing.<sup>112</sup>

## 7. Conclusion

Although numerous options are available to promote access to housing, the need for housing continues and the housing backlog is still immense, eighteen years after the new constitutional dispensation commenced.<sup>113</sup> There are various reasons for the current state of affairs. Institutional problems in accessing housing subsidies, insufficient funding within the national budget,<sup>114</sup> increasing costs of building, difficulty in determining the subsidy brackets in light of inflation, poor quality of housing, corruption within housing agencies,<sup>115</sup> as well as survey and planning complications all contribute to the overall shortfall.<sup>116</sup> Instead of alleviating the problem, complex new juristic creations have apparently exacerbated the issue. It appears that the plethora of legislative measures and policy documents has not had the desired impact. Whereas some property law developments in relation to forms of ownership had some measure of success in the higher income groups,<sup>117</sup> the same degree of success was not noted in relation to the lower income groups. In addition, the particular nature of the various land reform programmes regarding redistribution, tenure reform and restitution, makes it difficult to quantify the *exact impact* of these developments in relation to access to housing.

Despite the right to access to housing being enshrined in the Constitution, the prevalence of informal settlement is still a reality, and

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112 Badenhorst *et al.* 2006:622 and the sources noted there.

113 Minister of Human Settlements 2012 *Estimates of National Expenditure* 2012: 688 per <http://www.treasury.gov.za/documents/national%20budget/2012/ene/FullENE.pdf> (accessed on 23 February 2012).

114 In the 2012 Annual Budget Speech the Finance Minister underlined the need for further financial support in this regard and announced that investment in municipal infrastructure and human settlements will grow from R120 billion in 2012/13 to R139 billion in 2014/15. Additional allocations of R9.9 billion over the medium term were also proposed which would, *inter alia*, be used for informal settlement upgrading. The Minister also announced tax relief for housing developers and employers who provide housing below R300,000 a unit – see <http://www.treasury.gov.za/documents/national%20budget/2012/speech.pdf> (accessed on 23 February 2012).

115 Department of Housing “Housing introduces improvements to housing subsidy system” 2009-03-17, <http://www.sabinetlaw.co.za/housing/articles/housing-introduces-improvements> (accessed on 13 November 2011). One of the improvements included a new built-in second tier authorisation to prevent fraud and corruption within the system.

116 See, for example, the case study done relating to informal settlement in the West Rand – Gauteng province Mathebula 2005:1-9.

117 Pienaar 2010:17-18.

unlawful occupation of land is increasing on a daily basis.<sup>118</sup> Accordingly, the complexity of the issue and its human rights, land reform and property law dimensions of access to housing continue to pose major challenges. For the housing crisis to be dealt with successfully and effectively, the active participation of all role players within all its dimensions is imperative.

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118 See, in general, Minister of Human Settlements *2012 Estimates of National Expenditure* 2012:688-714 <http://www.treasury.gov.za/documents/national%20budget/2012/ene/FullENE.pdf> (accessed on 23 February 2012).

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