



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Response to Questionnaire: Access to justice for the right to housing

Submission to the Special Rapporteur on the Right to Adequate Housing

November 2018

A. Background

The Constitution of the Republic of South Africa, 1996 (Constitution) guarantees everyone the right of access to adequate housing.¹ The Constitution also guarantees the right to have access to courts.² South Africa is currently grappling with high levels of poverty, unemployment and inequality.³ Thus, access to justice has become prohibitive for the majority of the population.⁴

B. Questions

- 1. Are the following components of the right to housing subject to hearings and effective remedies before courts and/or tribunals in your country? If yes, please explain which law provides this protection, who has standing to bring claims forward and what court or tribunal adjudicates the claim. Provide an example of**

¹ Section 26 of the Constitution of the Republic of South Africa, 1996.

² Section 34 of the Constitution of the Republic of South Africa, 1996.

³ See the National Development Plan 2030. Our Future-make it work is available at: <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20lo-res.pdf> and also see the Poverty Trends in South Africa *An examination of absolute poverty between 2006 and 2015*, (2017) available at <http://www.statssa.gov.za/?p=10334> which notes that poverty levels are now at 55,5% of the population.

⁴ AfriMAP & Open Society Foundation of South Africa *South Africa: Justice sector and the rule of law (A discussion paper)* (2005) which noted that the average South African household would need to save a week's income in order to afford a one-hour consultation with a legal practitioner.

a leading case and explain briefly how this may have advanced protection of the right to housing.

1.1. All the below listed are subject to hearings and effective remedies before courts in South Africa. The Constitution of the Republic of South Africa, 1996 (Constitution) provides for the supremacy of the Constitution and contains justiciable Bill of Rights. The Constitution also provides for locus standi. In terms of section 38 of the Constitution, anyone has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The Constitution Court is the apex Court on all constitutional matters. A number of laws, which will be highlighted below, have been promulgated to address issues incidental to the right to housing, such as non-discrimination and security of tenure.

a) Non-discrimination (including accommodation of disabilities) Yes/No

1.2. The Constitution of South Africa provides in section 9 that everyone is equal before the law. In terms of section 9(3) a number of grounds are listed upon which the State may not unfairly discriminate upon. Some of the grounds listed in section 9(3) include disability, sex and gender.

1.3. In the *Blue Moonlight case*⁵ the Constitutional Court found that the City of Johannesburg's housing policy was unconstitutional in that it differentiated between persons evicted by a private landowner and those relocated by the City.

1.4. The South African government in its report to the Committee on the Rights of Persons with Disabilities which was considered by the Committee at its session in August 2018, reported that although a total of 25 361 beneficiaries with disabilities applied and qualified for access to the housing subsidy between 2008 and March 2012, "progress has been slow, with 163 beneficiaries obtaining the additional amount to cover reasonable accommodation measures".⁶ This is concerning as it inhibits the effective enjoyment of the right to housing by persons with disabilities and falls short

⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) 2012 (2) SA 104 (CC)*.

⁶ Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention, Initial reports of State parties due in 2009: South Africa, 26 November 2014, CRPD/C/ZAF/1, para 329, available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CRPD%2fC%2fZAF%2f1&Lang=en

of the “universal design” requirements of the Convention on the Rights of Persons with Disabilities.

b) Security of tenure (including prohibition of eviction without appropriate alternative housing) Yes/No

1.5. The Constitution of South Africa in terms of section 26(3) provides that “No one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances”. The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 provides for the prohibition of unlawful eviction and the procedures for the eviction of unlawful occupiers. The Constitutional Court in the *Port Elizabeth Municipality case*⁷ held that courts should consider the availability of alternative accommodation when granting an eviction order.

c) Adequacy standards (habitability, access to water, sanitation, services, health and safety etc.) Yes/No

1.6. The Constitution provides for the right of access to water⁸, sanitation and an environment⁹ which is not harmful to one’s well-being. The Upgrading of Informal Settlement Programme (UISP) provides for municipalities to apply for funding from provincial government to redevelop informal settlements by incrementally providing occupiers with infrastructure, tenure security, and access to basic services in an inclusive and participatory manner. The Court in the *Melani case*¹⁰ ruled that the UISP is binding. In the *Nokotyana case*¹¹ the Constitutional Court held that a three-year delay by the provincial government to make a decision in respect of a municipality’s application for upgrading of the Harry Gwala informal settlement into a township, was inconsistent with section 237 of the Constitution as well as not being reasonable as required by section 26(2) of the Constitution.

1.7. However, despite the existence of a progressive Constitution with justiciable socio-economic rights those residing in informal settlements Commission often faces

⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

⁸ Section 27 of the Constitution of the Republic of South Africa, 1996.

⁹ Section 24 of the Constitution of the Republic of South Africa, 1996.

¹⁰ *Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ).

¹¹ *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC)

challenges regarding the provision of basic services, such as water and sanitation which impacts their ability to enjoy other human rights¹²

d) Non-retrogression (review of effect on right to housing of program cuts, removal of legal protections or austerity measures) Yes/No

1.8. Although South Africa's state-subsidised housing programme compares to none globally, in recent years the levels of housing delivery have waned.¹³ An affordability gap exists due to the high cost of housing, the deep-seated levels of poverty and high levels of indebtedness. This means that the housing backlog will continue to grow exponentially and the austerity measures adopted by state accompanied by the resultant significant budget cuts in the housing sector might be retrogressive to the realisation of access to adequate housing. Although the legislation is non-retrogressive in principle, there are a few instances where action by the State (either national or provincial) has led to retrogressive measures:

- (i) The eviction of people without the provision of adequate alternate accommodation or alternate accommodation that is not of an adequate standard.
- (ii) The relocation to formal settlements (i.e. state-subsidised housing) that is a distance from public transport, economic opportunities, schools etc.

e) Progressive Realization – (obligation to take reasonable measures, establish and meet goals and timelines, prioritize the most disadvantaged, allocate maximum available resources, etc.) Yes/No

1.9. The Constitution provides in section 26(2) that the state must take reasonable, legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing.

¹² See South African Human Rights Commission, *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa (2014)* 30 and Department of human settlements & Department of planning, *Monitoring and evaluation report on a baseline assessment for future impact evaluation of informal settlements targeted for upgrading (2016)*, available at <http://dhssummit.co.za/REPORT%20IUSP%20BASELINE%20ASSESSMENT.pdf>

¹³ Hopolang Selebalo & Dennis Webster, *Monitoring the Right of Access to Adequate Housing in South Africa, SPII Working Paper No 16 (2017)*, p. 8, available at: http://www.spil.org.za/wp-content/uploads/2018/02/Right-to-Housing_2017.pdf.

- 1.10. In the *Grootboom case*¹⁴ the Constitutional Court held that a reasonable housing programme cannot disregard those who are most in need. The court held that a programme that leaves out the most desperate and vulnerable, even if conceived with the best of intentions, will fail to respond to the actual circumstances that section 26 is intended to ameliorate. The Court emphasised that access to housing must be enjoyed by everyone at all economic levels of society.
- 1.11. The country has adopted the National Development Plan 2030 (NDP), which is a strategic blue print envisaged to eliminate poverty, tackle unemployment and reduce inequality by 2030. The NDP is divided into a number of outcomes, with Outcome 8 devoted to transforming human settlements seeking to respond to a number of challenges such as rapid urbanisation; legacy of apartheid racially based planning which continues to perpetuate spatial dislocation of many households; inadequately housed people residing in informal settlements and poor living conditions of many people who lack basic services such as water, sanitation, refuse removal and electricity.
- 2. What measures have been taken or are planned to improve access to justice for the right to housing? Please include, where applicable, measures relating to i) education of lawyers, advocates and potential rights claimants; ii) barriers facing women and other groups; iii) access to legal representation; iv) making hearings and other procedures more accessible and less intimidating or costly; v) more effectively addressing systemic issues; and vi) ensuring implementation of remedial orders.**

Education of lawyers, advocates and potential rights claimants

- 2.1. The South African Human Rights Commission (Commission) conducts public outreach initiatives aimed at educating potential rights claimants on how they can access justice for the right to housing. The Commission has developed educational materials on the right to housing.
- 2.2. In the context of land redistribution, which is crucial for the realisation of the right of access to adequate housing, the Commission convened a Public Inquiry on the Impact of Rural Land Use and Ownership Patterns on Human Rights in March 2018. During this Inquiry, the Commission was informed that the State should ensure that

¹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

a training programme for the South African Police Services (SAPS), prosecutors and magistrates on the interpretation and implementation of ESTA is developed and implemented. The Land Rights Management Facility (LRMF) was established to provide specialised legal skills and to assist land dwellers and evictees with legal advice. It was explained that this programme is an Nkuzi¹⁵ initiative in which it sought legal assistance for the beneficiaries of land reform after the courts ruled that indigent farm dwellers are entitled to legal defence of ESTA rights at state expense. It was submitted to the Commission that the programme has not been a success.

Barriers facing women and other groups

- 2.3. The socio-economic realities of women and vulnerable groups such as children and the elderly inhibit them from accessing justice in the right to housing. These barriers include poverty; lack of knowledge of rights; physical inaccessibility of adjudication institutions; procedural hurdles in adjudication; inordinate delays in resolution of disputes; and geographic location of adjudication institutions.¹⁶

Access to legal representation

- 2.4. As previously indicated above, the cost of litigation has become prohibitive. The Legal Aid South Africa (LASA)¹⁷ provides legal assistance to indigent persons. LASA has established an Impact Litigation Unit which undertakes strategic matters for litigation.
- 2.5. Further, a number of non-governmental organisations which provide services free of charge exist. These organisations litigate on behalf of individuals or communities where violations of the right to housing have occurred. There are also community-based paralegals who render socio-legal services to the marginalised and vulnerable segments of the population in South Africa.
- 2.6. However, the “continued existence and efficacy of this service is threatened by its exclusive reliance on donor funding and volunteerism, the lack of accredited

¹⁵ *Nkuzi Development Association v The Government of the Republic of South Africa and the Legal Aid Board (LCC 10/01) [2001] ZA LCC 31* where It was held inter alia, that the persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the costs thereof from their own resources

¹⁶ See Nyenti *Access to justice in the South African Social Security system: Towards a conceptual approach (2013) De Jure*, available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602013000400004#top60

¹⁷ The Legal Aid South Africa obtains its mandate from the Constitution of the Republic of South Africa, 1996; the Legal Aid South Africa Act 39 of 2014 as read with the Legal Aid Regulations and Legal Aid Manual. The Legal Aid South Africa is designed “to ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available”.

education and training and lack of recognition and regulation.”¹⁸ Furthermore, the Commission has observed inequality in access to justice especially in rural areas. Moreover, where the right of access to adequate housing is threatened through discrimination based on a prohibited grounds, affected individuals should be able to approach an Equality Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

2.7. Rental housing tribunals have been established which serve as an affordable avenue of resolving disputes between landlords and tenants on matters of unfair practices.

3. Please identify where responsibility lies for education and training of judges and administrative decision-makers regarding their international human rights obligations. What measures have been taken to ensure that domestic law is interpreted as far as possible to provide for effective remedies for the right to housing?

3.1. The South African Judicial Education Institute (SAJEI) SAJEI established in terms of the South African Judicial Education Institute Act 14 of 2008 provides continuing judicial education in order to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts.

3.2. The Constitutional Court has held that the right of access to adequate housing is closely linked and interconnected with other socio-economic rights.¹⁹ Thus, the Court in determining whether the state has met its constitutional obligations in terms of section 26, has adopted an interpretative approach which is informed by the fact that the state is constitutionally enjoined to adopt measures which “meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.”²⁰

4. Are you aware of examples in your country of community-based initiatives to provide hearings and remedies for the right to housing outside of formal court or tribunal processes? How have they been supported and how effective have they been? Do these operate at the national or subnational level, and do decisions create precedents that can be relied upon by others?

¹⁸ Noleen Leach *The Paralegal and the Right of Access to Justice in South Africa* (2018) LLD thesis available at <http://etd.uwc.ac.za/>

¹⁹ Ibid para 24.

²⁰ Id.

4.1. A number community based initiatives exist both at national and subnational level. They rely mostly on donor funding. They do not have the authority to make decisions per se, however, they can lobby government for policy changes; they can litigate in courts; they can picket and demonstrate; and/or lodge complaints with the national human rights institution in instances of housing related violations.

5. What role does your National Human Rights Institution play in ensuring access to justice for the right to housing? Are there other human rights bodies that play a role in this respect, such as an ombudsperson?

5.1. The South African Human Rights Commission (Commission) is an independent institution mandated to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic of South Africa.²¹ The Commission is recognised as an 'A' status national human rights institution. The Commission is an avenue of accessing justice for the right to housing and has exercised this function by receiving complaints;²² conducting national inquiries;²³ regularly monitoring the extent to which the state has taken measures to progressively realise the right to housing; carrying out research on the right to housing;²⁴ and pursuing public interest litigation and making amicus interventions to

²¹ Sections 181(1) (b) and 184 of the Constitution of the Republic of South Africa, 1996.

²² The Commission has offices in all the 9 provinces of the country and has a complaints handling procedure which enables it to receive complaints regarding the right to housing. According to the 'Annual Trends Analysis Report 2015/16' (2017) for the 2015/16 financial year, the Commission received 290 housing-related complaints.

²³ See South African Human Rights Commission *Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery* (2015) Available at www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf where the Commission after receiving numerous complaints related to the right to housing, the Commission held an investigative national hearing into access to housing, local governance and service delivery after having numerous complaints regarding the right to housing and directed recommendations to government.

²⁴ Section 184(3) of the Constitution requires that "[e]ach year the SAHRC must 'require relevant organs of state, to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.'" In terms of section 184 (1) (c) the Commission must "monitor and assess the observance of human rights in the Republic" (184 (1) (c)). The information that organs of state submit is part of this assessment. See South African Human Rights Commission *Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Needs Housing Policy and Programme', Economic and Social Rights Research Policy Brief 2016/2017* (2017) available at <https://www.sahrc.org.za/home/21/files/SAHRC%20Research%20Policy%20brief%202016-2017%20--The%20Right%20to%20Adequate%20Housing%2031%20March%202017%20-v3.pdf> where the Commission conducted a study and recommended that the South African government finalises and adopt a Special Needs Housing Policy and Programme to cater for the needs of the most vulnerable in the provision of housing.

guide courts on how to interpret and appropriately apply international human rights instruments.²⁵

- 5.2. Public Protector South Africa is a Chapter 9 institution established in terms of sections 181 and 182 of the Constitution and mandated with investigating impropriety, abuse of power and corruption by state organs to ensure the facilitation of good governance.²⁶ The Public Protector thus also serves as an avenue for accessing justice for housing related violations in certain instances such as where there are allegations of corruption, impropriety and maladministration.²⁷

- 5.3. The Human Settlements Ombudsman has been established by the Department of Human Settlements to deal with issues of conflict between contractors, provinces and municipalities, cut out red tape and stem out corruption in the human settlements sector.

²⁵ The Commission intervened as amicus in the seminal case of the *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

²⁶ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

²⁷ See Carlos Mbiada, *The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa (2017)(20) PER / PELJ 2017(20)* available at <http://www.scielo.org.za/pdf/pej/v20n1/31.pdf> where it is argued that the Public Protector is an institution that may be used to enforce the right to housing and plays a complementary role to the courts in the enforcement of the realisation of the right to housing.