

**State, Law and Community in the Politics of Housing in South Africa: 1990-2000**

**Elsa van Huyssteen**

**VHYELS001**

**Department of Historical Studies**

**University of Cape Town**

**Masters: Minor Dissertation**

**HST5011W**

**February 2025**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## Declaration

This work has not been previously submitted, in whole or in part, for the award of any degree. It is my own work. Each contribution to, or quotation in, this thesis for the work, or works, of other people has been attributed, and has been cited and referenced.

Signed by candidate

---

Elsa van Huyssteen

14 February 2025

## **Contents**

|  |    |
|--|----|
| <b>Introduction</b>  | 1  |
| The housing crisis   | 2  |
| Waiting and the contestation of state power  | 5  |
| Agency, law and justice  | 9  |
| The focus on the transitional period of 1990-2000                                      | 11 |
| Thesis architecture and sources  | 13 |
| <br>   |    |
| <b>Chapter 1   Urbanisation and housing policy under apartheid</b>                     | 18 |
| Influx control, the apartheid state and the courts: 1940-1970                          | 18 |
| Community resistance, state repression, and housing policy in the courts:<br>1970-1990 | 23 |
| The Dassenberg community   | 40 |
| Conclusion   | 46 |
| <br>   |    |
| <b>Chapter 2   The state in transition</b>   | 47 |
| The evolution of state housing policy during the early 1990s                           | 47 |
| Diepsloot  | 51 |
| Housing policy and the transition to democracy   | 57 |
| Courts and the Prevention of Illegal Squatting Act                                     | 62 |
| Conclusion   | 73 |
| <br>   |    |
| <b>Chapter 3   Community agency and rights-based strategies for social change</b>      | 74 |
| Constitutionalism, the Constitutional Court and socio-economic transformation          | 75 |
| Democracy, administrative law and the Constitutional Court                             | 77 |
| Rights-based strategies and the pursuit of housing by waiting communities              | 78 |
| Conclusion   | 93 |
| <br>   |    |
| <b>Conclusion</b>  | 94 |
| <br>   |    |
| <b>Bibliography</b>  | 96 |

## Introduction

This project is concerned with state power and the ways in which it was imposed, negotiated and contested by citizens in South Africa during the period 1990 to 2000, in the area of housing policy and politics, and with the experience of waiting, first for democracy and then for housing on the part of marginalised communities, as a central motif. This experience of waiting is described and analysed both as a passive experience of the power of the state, and as a terrain where state power is resisted, contested and negotiated. During late apartheid, and then the early post-apartheid era, the housing and homelessness crisis that had its roots in apartheid-era urbanisation and housing policies became a central site of contestation which was shaped throughout this period by the experience of waiting as well as the strategies to challenge the power relations that informed that experience.

The research presented and analysed in this thesis explores the ways in which this waiting and the resultant contestation shaped the development and implementation of policy in respect of housing and informal settlements, in the Cape Town metropolitan area during the transitional period of 1990 to 2000. In particular, the research focuses on the respective roles of the state, courts, and community and civil society activism and mobilisation in this process. The post-apartheid state's approach to the provision of housing has in many ways been shaped against the background of what became a justiciable "right to have access to adequate housing" guaranteed in section 26 of the final Constitution,<sup>1</sup> which can be described as "symbolic of democracy", but which has in practice translated into "the experience of waiting": "Across South African cities, waiting for state-provided homes is normal, a taken-for-granted, everyday, intergenerational condition".<sup>2</sup> The waiting happens in make-shift shelters on pavements and in parks, informal settlements, backyard shacks and overcrowded homes. Although it can take decades, "people continue to wait, to hope for, and to

---

<sup>1</sup> The 1996 Constitution, drafted by the Constitutional Assembly and certified by the Constitutional Court. The text of the Constitution can be accessed at <https://www.justice.gov.za/constitution/pdf.html>. For an account of the process, see Hassen Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa* (Cape Town: Oxford University Press, 1998) and Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

<sup>2</sup> Sophie Oldfield and Saskia Greyling, "Waiting for the state: a politics of housing in South Africa", in *Environment and Planning*, Vol. 47 No. 5 (May 2015), 1100-1101.  
DOI:10.1177/0308518X15592309

expect a formal house. Registering and then waiting to become a beneficiary of a house funded and built by the state persists as common sense, a logical strategy”.<sup>3</sup> Waiting as both process and politics “shapes citizen encounters with the state”. On the one hand, “waiting highlights the centrality of the state”, on the other hand, “the often illegal situations in which people live while waiting”, namely the “quiet encroachments... that are overlooked by the state and that side step planning rules and procedures” proceed outside of the state and its reach.<sup>4</sup> These quiet encroachments include unlawfully constructed backyard structures and shacks, occupying land, and self-help electricity and water connections. In this way, “citizens both invoke and ignore the state in struggles to secure and gain a permanent formal home”.<sup>5</sup> Waiting for housing in both late apartheid and post-apartheid South Africa accordingly constitutes a site where the imposition, negotiation and contestation of state power and the construction of post-apartheid citizenship over time can be investigated. This requires an understanding of the relationship and power relations between the state and poor, marginalized communities in respect of their demands for services.

### **The housing crisis**

The pursuit by the apartheid state of white political supremacy and economic prosperity required it to grapple with the fundamental dilemma of “controlling the growth of the urban African population without thereby undermining the economic benefits of African labour”.<sup>6</sup> This balancing act demonstrated the “importance of spatiality in the construction of state power” – indeed, “the survival of the apartheid state was centrally dependent on the geographies that it created”, and “the spatiality of apartheid South Africa was a crucial component of the creation of state power and of the specific forms of citizenship that characterized this political order”.<sup>7</sup> This rendered influx control critical to the wider apartheid project.<sup>8</sup> Apartheid spatiality was

---

<sup>3</sup> Oldfield and Greyling, “Waiting”, 1100.

<sup>4</sup> Oldfield and Greyling, “Waiting”, 1101.

<sup>5</sup> Oldfield and Greyling, “Waiting”, 1102.

<sup>6</sup> Deborah Posel, *The Making of Apartheid 1948-1961* (Oxford: Clarendon Press, 1991), 8.

<sup>7</sup> Jennifer Robinson, “The geopolitics of South African cities: States, citizens, territory”, in *Political Geography*, Vol. 16 No. 5 (June 1997), 365, 370-371, [https://doi.org/10.1016/S0962-6298\(96\)00019-4](https://doi.org/10.1016/S0962-6298(96)00019-4)

<sup>8</sup> Influx control can be defined as “the system of laws and regulations which governed Africans’ residence and employment in so-called ‘white’ urban areas” (Posel, *The Making*, 7).

pursued by means of a range of measures, all of which “disrupted and physically fragmented the fabric of South African society”.<sup>9</sup> One of the most notorious and inhumane of these measures was the forced removal of at least three and a half million people from their homes and communities.<sup>10</sup> This measure was designed to create “white” areas, and together with influx control formed the foundation of spatial apartheid.

As a consequence of these measures, apartheid resulted in the development of extensive informal settlements in urban areas, and a housing and homelessness crisis, exacerbated by urban poverty produced by low wages and the apartheid state’s failure to provide adequate urban social services. Despite attempts during the 1980s to address aspects of this crisis, conceptualised by the apartheid state as the replacement of influx control by “orderly urbanisation”, the situation deteriorated, with the continued growth of informal settlements and the intensification of the housing crisis.<sup>11</sup> This crisis represented a fundamental challenge to the post-apartheid state from 1994 onwards, and the provision of low-cost housing was intended to be “one of the key pillars of post-apartheid transformation”.<sup>12</sup> According to the key governance programme statement of the African National Congress (“ANC”), the Reconstruction and Development Programme of 1994 (“RDP”), the “lack of adequate housing and basic services in urban townships” had by then reached “crisis proportions”, with the “urban housing backlog... conservatively estimated at 1.3 million units” in 1990.<sup>13</sup> Furthermore, every year “about 200,000 new households seek a home but in 1992 only 50,000 homes were built”.<sup>14</sup> Accordingly, the RDP was said to aim at “decent, well-located and affordable shelter for all by the year 2003. In the short-term, the aim

---

<sup>9</sup> Richard Tomlinson and Mark Addleson (eds.) *Regional Restructuring Under Apartheid: Urban and Regional Policies in Contemporary South Africa* (Johannesburg: Ravan Press, 1987), xv.

<sup>10</sup> Christina Murray and Catherine O’Regan (eds.), *No Place to Rest: Forced Removals and the Law in South Africa* (Cape Town: Oxford University Press, 1990), vii.

<sup>11</sup> Philip Harrison, Alison Todes and Vanessa Watson, *Planning and Transformation: Learning from the Post-Apartheid Experience* (London: Routledge, 2008), 33.

<sup>12</sup> Sophie Oldfield, “The Centrality of Community Capacity in State Low-income Housing Provision in Cape Town, South Africa”, in *International Journal of Urban and Regional Research*, Vol. 24 No. 4 (December 2000), 858, <https://doi.org/10.1111/1468-2427.00283>

<sup>13</sup> ANC, *The Reconstruction and Development Programme*, 1994 [https://www.sahistory.org.za/sites/default/files/the\\_reconstruction\\_and\\_development\\_programm\\_1994.pdf](https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf), para 2.5

<sup>14</sup> ANC, *A basic guide to the Reconstruction and Development Programme*, 1 May 1994 <https://www.anc1912.org.za/policy-documents-1994-a-basic-guide-to-the-reconstruction-and-development-programme/>, para 1 “Meeting Basic Needs”

is to build one million new low-cost houses in five years”.<sup>15</sup> However, nearly thirty years later, the main target is ever more unattainable, and the short-term target was reached two years late: by 2002, 1.4 million subsidised houses had been built.<sup>16</sup> In any event, this made little difference to the plight of what was by the year 2000 estimated to be a homeless population in South Africa of close to three million families.<sup>17</sup> The situation in Cape Town mirrored that in South Africa as a whole. By 1998, two hundred thousand families were registered on housing waiting lists and qualified for the state’s means-tested housing subsidy, and many homeless families lived in “informal settlements or in the backyards of townships across the city. Some are literally homeless, sleeping in alleyways and public spaces; others crowd into relatives’ flats or rented rooms”.<sup>18</sup>

For these reasons, policy and its implementation in respect of housing, and informal settlements more broadly, became a central focus of post-apartheid social and political contestation and mobilisation.<sup>19</sup> This was a continuation of a set of relationships between the state and communities that had developed during apartheid. Since, for most of the apartheid period, “the state was the provider of formal housing to low-income black communities and actively prohibited private-sector housing developments”, state housing developments were used “as a means of control and regulation” and “defined the relationship between state and neighbourhood. In most cases in poor black communities, these relationships were built around shortages, illegality and intentionally insufficient servicing”.<sup>20</sup> Of course, many aspects of apartheid-era housing and services provision were transformed by the post-apartheid state, but the resultant “radical restructuring of local government from apartheid-era racially based structures to democratic institutions... has led repeatedly to institutional and policy change” in this area, and as a consequence, “policies that shape housing

---

<sup>15</sup> ANC, *A basic guide*, para 1.

<sup>16</sup> Marie Huchzermeyer, *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (Trenton, New Jersey: Africa World Press, 2004), 2.

<sup>17</sup> Oldfield, “The Centrality”, 858.

<sup>18</sup> Oldfield, “The Centrality”, 858.

<sup>19</sup> See, for example, Marie Huchzermeyer, “Housing rights in South Africa: Invasions, evictions, the media, and the courts in the cases of Grootboom, Alexandra, and Bredell”, in *Urban Forum*, Vol. 14 (2003), 101–103, <https://doi.org/10.1007/s12132-003-0004-y>; and Sophie Oldfield and Patricia Zweig, “The Contested Politics of Housing Allocation in Ikapa, Cape Town, 1981-1994”, in *Journal of Southern African Studies*, Vol. 26 No. 1 (March 2010), 133-134, <https://www.jstor.org/stable/40600236>

<sup>20</sup> Oldfield, “The Centrality”, 859.

access remain especially difficult to trace, barely comprehensible to state officials and waiting residents”.<sup>21</sup> This means that even well-intentioned policy changes are in most cases not translated to state officials and other actors, including waiting residents, who have no way of navigating this complexity, and the contestation continues.

### **Waiting and the contestation of state power**

Pierre Bourdieu has argued that “waiting is a way of experiencing the effects of power”, a form of social domination and control. Power is imposed by “making people wait”, by “delaying without destroying hope”, and by “adjourning without totally disappointing”.<sup>22</sup> Similarly, Elizabeth Kirtsoglou and Bob Simpson have developed the concept of “chronocratic rule” as a term that “draws attention to the ways in which governance is shot through with the power to shape the temporalities in which people live out their everyday lives” – in particular, “the ways in which inequality and exclusionary practices and the ontological and economic insecurity they engender are not just spatial matters but also have important temporal dimensions”.<sup>23</sup> This formulation evocatively describes the experience of waiting for housing in South Africa, and the role of the state in the production of such inequality and exclusion and the attendant insecurities. A further dimension of the interaction of waiting and power has been conceptualised against the background of the historicist account of world history. Dipesh Chakrabarty formulates historicism as the form that “the ideology of progress or ‘development’ took from the nineteenth century on”, and which “enabled European domination” during that period.<sup>24</sup> This is a linear approach to the development of modernity and capitalism which made it look like it “became global *over time*”: “first in Europe, then elsewhere”.<sup>25</sup> This required the colonized to learn the “art of waiting”: waiting until sufficient time had elapsed to enable them to become developed and civilized – until then, they were consigned to the “waiting room of history”.<sup>26</sup> The apartheid state can be seen as embodying this approach in some ways – black South

---

<sup>21</sup> Oldfield and Greyling, “Waiting”, 1105.

<sup>22</sup> Pierre Bourdieu, *Pascalian Meditations* (Stanford: Stanford University Press, 2000), 227-228.

<sup>23</sup> Elisabeth Kirtsoglou and Bob Simpson (eds.) *The Time of Anthropology: Studies of Contemporary Chronopolitics* (London: Routledge, 2020), 3.

<sup>24</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000), 7.

<sup>25</sup> Chakrabarty, *Provincializing Europe*, 7 (emphasis in the original).

<sup>26</sup> Chakrabarty, *Provincializing Europe*, 8.

Africans had to wait, in the “waiting room of history”, for their development and civilization to permit democracy, equality and inclusion. Once democracy had arrived, however, the waiting, the inequality and exclusion persisted, particularly in the area of the provision of housing. Of course, black South Africans engaged in a range of acts of resistance against the apartheid regime, so it would be a mistake to characterise their waiting “in the waiting room of history” as entirely passive. This was particularly apparent against the background of the radicalisation of resistance after 1976.<sup>27</sup>

Craig Jeffrey’s research among young unemployed men in the north Indian state of Uttar Pradesh addresses the ways in which “neoliberal economic change has unsettled people’s experience of time and space, for example, by accelerating social life or instilling feelings of inertia and limbo”.<sup>28</sup> This resonates with the notion of waiting as an experience of the power of the state, but on this version, waiting is not simply an experience of powerlessness – Jeffrey points to research that shows how such groups may act as “instigators of broad-based social development”.<sup>29</sup> In South Africa, the neoliberal approach was said to have become “institutionalised into the [post-apartheid] housing policy” while the approach of the civic movement, which emphasised “grassroots democracy and the decommodification of land”, became marginalised.<sup>30</sup> In this sense, Jeffrey’s notion of neoliberal economic change engendering a sense of limbo contributes to an understanding of the experience of waiting for a house in South Africa. However, as indicated, Jeffrey’s account of waiting and limbo does not exclude “community capacity”<sup>31</sup> and “strategic [if at times provisional] agency” on the part of “citizens as political actors”.<sup>32</sup> Waiting is on the one hand “embedded in the legitimacies of state processes”, and on the other “marked by the often illegal and informal circumstances in which waiting takes place”: “the state is both present and absent and citizens are legitimate and illegal”.<sup>33</sup> This implies that

---

<sup>27</sup> This period is addressed in chapter 1.

<sup>28</sup> Craig Jeffrey, “Timepass: Youth, class, and time among unemployed young men in India” in *American Ethnologist*, Vol. 37 No. 3 (August 2010), 465.  
<https://anthrosource-onlinelibrary-wiley-com.ezproxy.uct.ac.za/doi/pdf/10.1111/j.1548-1425.2010.01266>.

<sup>29</sup> Jeffrey, “Timepass”, 466.

<sup>30</sup> Huchzermeyer, *Unlawful Occupation*, 117, 124.

<sup>31</sup> Oldfield, “The Centrality”. The term “community capacity” is used in the title of the article, while the term “community-based capacity” is used in the body of the article.

<sup>32</sup> Oldfield and Greyling, “Waiting”, 1110.

<sup>33</sup> Oldfield and Greyling, “Waiting”, 1110.

waiting citizens are not properly seen as simply submissive to the state, because there is the (perhaps limited) possibility of collective mobilisation and protest in resistance to the state. In this way, waiting “is performed in a diversity of ways which supersede the binary of agency and submission so often present in analyses of everyday politics”.<sup>34</sup> For these reasons, it is possible to conceive of the contestation of state power and policy, as has been seen in both late and post-apartheid community mobilisation on the terrain of housing politics. A possibly important dimension of “community capacity”, “strategic agency”, and community organisation and mobilisation on this terrain, is the role of rights-based strategies in the post-apartheid constitutional regime in South Africa, and the potential role of the courts in the development and implementation of housing policy.<sup>35</sup>

In this regard, Partha Chatterjee argues that in post-colonial India, founded on a “liberal democratic constitution”, the “space of politics” was split between “a narrow domain of civil society” characterised by relations between state and citizens framed by “legally enforceable rights”, and “a wider domain of political society” where the state dealt with groups of population (instead of citizens) by means of political negotiation to deliver benefits or services.<sup>36</sup> One of the characteristics of “political society” is that the administrative policies used to address the demands for these benefits or services “often tend to hover around a grey zone between legality and illegality”.<sup>37</sup> While there is the possibility of retaining agency and sidestepping the reach of the state by means of instances of “quiet encroachments”, Chatterjee’s formulation emphasises the extensive parameters of state function within which the encounters with state power, and the waiting, occurs and this warns against an unwarranted celebration of agency on the part of poor and marginalised communities operating outside of the reach of the state. The “grey zone” is thus conceptualised not as outside the reach of the state, but as a particular way in which the state negotiates the demands of these communities which are dealt with not as citizens pursuing legal claims in their capacity

---

<sup>34</sup> Yoni Pakleppa, *Tempered Tempos: The Politics of Waiting for Public Services in Contemporary Cape Town.* (Cape Town: Faculty of Humanities, African Studies, 2019), 60.

<http://hdl.handle.net/11427/31027>

<sup>35</sup> There are also examples of legal strategies in respect of housing under the apartheid legal system. These will be discussed in following chapters.

<sup>36</sup> Partha Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* (New York: Columbia University Press, 2011), 13-14. Chatterjee (at 205) defines these as “groups of population that count according to calculations of political efficacy”.

<sup>37</sup> Chatterjee, *Lineages*, 68.

as members of civil society, but as inhabitants of political society. Of course, the state remains ever-present in the lives of such communities through, for example, evictions and the criminalisation and prosecution of self-help strategies. Similarly, Veena Das observes that the state is present in law, and law in turn can be experienced as a “distant but over-whelming power that is brought into the framework of everyday life”,<sup>38</sup> so that there remains an immediacy to the state as experienced by such communities, which instead of making claims as citizens, must “exploit... the political obligations that governments have of looking after poor and underprivileged sections of the population”.<sup>39</sup>

This emphasis on the deployment by the state of administrative policies to address the claims of marginalised communities is similar to a conceptualisation of the interaction between state and citizens during both the late-apartheid period and the post-apartheid era, as “techno-politics”.<sup>40</sup> On this version, apartheid in many ways was about infrastructure, as it relied on segregated infrastructure like schools, transport and public spaces, separate amenities, passbooks, influx control, the construction of townships and “homelands”, and “innumerable technologies, large and small”.<sup>41</sup> Techno-politics develop when infrastructure becomes a terrain of contestation where claims on the state and questions of citizenship are expressed, negotiated and contested, and when infrastructure functions as a vehicle for political actions and struggles over power – “political actions are embedded within technical forms... and the technical shapes political questions”.<sup>42</sup> Underlying this phenomenon is the fact that “infrastructures of all types have encountered and provoked some deeply felt tensions... infrastructures in their moments of formation can be sites of intense conflict”, and therefore can be described as “distinctly agonistic phenomena, imagined, produced, challenged and refined in an uneven and deeply conflictual field”.<sup>43</sup> There are clear parallels between the conceptualisation of techno-politics and the notion of

---

<sup>38</sup> Veena Das, *Life and Words* (Berkeley: University of California Press, 2007), 162.

<sup>39</sup> Chatterjee, *Lineages*, 205.

<sup>40</sup> Antina von Schnitzler, *Democracy's Infrastructure: Techno-Politics and Protest after Apartheid* (Princeton: Princeton University Press, 2016), 8-11.

<sup>41</sup> Von Schnitzler, *Democracy's Infrastructure*, 13.

<sup>42</sup> Von Schnitzler, *Democracy's Infrastructure*, 4-5; 10-11.

<sup>43</sup> Steven J. Jackson, Paul N. Edwards, Geoffrey C. Bowker, and Cory P. Knobel, “Understanding Infrastructure: History, Heuristics, and Cyberinfrastructure Policy”, in *First Monday*, Vol. 12 No. 6 (2007), 4-5.

<http://journals.uic.edu/ojs/index.php/fm/article/view/1904/1786>

“political society”: both indicate the limits of a public sphere model where citizens make claims responded to by the state – instead, poor and marginalised communities are an aggregate to be managed and controlled, including by means of the provision of a particular mode of infrastructure.

Infrastructure became particularly important in the aftermath of the 1976 uprisings. As the apartheid state moved away from strict influx control and towards managing urbanisation, “housing and urban services and infrastructure became central”.<sup>44</sup> As a result, the interaction with the state on the part of most ordinary South Africans was on the administrative terrain, and central political problems of the anti-apartheid struggle were recast as “administrative problems”.<sup>45</sup> This was apparent in the byzantine administrative machinery of housing provision in apartheid South Africa, where the question of housing was largely a matter of dealing with a bureaucrat sitting behind a desk in an office – housing allocation was an administrative issue. The experience of ordinary people pursuing housing allocation did not change with the advent of democracy: for them, changes in housing policy “were not typically explained or understood in terms of the shifts in regime and in institutional configurations of government. Rather, these variations were noted as a change in the officials at the front desk and a move in the location of offices”, and a change of the colour of housing waiting lists books or application cards.<sup>46</sup> The post-apartheid waiting lists are integrated lists, including the apartheid-era local council housing waiting lists, but these are “integrated on paper, in practice families and officials alike continue to invoke the waiting lists of the past”.<sup>47</sup> In this way, waiting, which characterised the experience of marginalised communities under apartheid, continues in much the same way in the post-apartheid democratic era.

### **Agency, law and justice**

The reliance by poor and marginalised communities on law, including rights-based strategies and litigation, to pursue their claims on the state is controversial. Chatterjee,

---

<sup>44</sup> Von Schnitzler, *Democracy's Infrastructure*, 34.

<sup>45</sup> Von Schnitzler, *Democracy's Infrastructure*, 4; 7; 9-10; 197-198.

<sup>46</sup> Oldfield and Greyling, “Waiting”, 1106.

<sup>47</sup> Oldfield and Greyling, “Waiting”, 1107.

for example, is at best sceptical about the possibilities of such strategies.<sup>48</sup> On the other hand, Das rejects the “binary division between law and justice” and argues that “even when projects of seeking justice do not achieve the results” sought, “the struggle for such justice shapes... state processes in some ways”.<sup>49</sup> This is demonstrated to some extent by the pursuit, in post-apartheid South Africa, by communities, social movements and activists (often supported by scholars) of rights-based strategies to claim a range of benefits, the rights to which were included in the Constitution as what are often termed socio-economic rights, and on an understanding of the Constitution as “transformative”.<sup>50</sup> Rights-based litigation typically proceeds eventually to the Constitutional Court, as the apex court with the power to declare invalid and set aside any law or conduct inconsistent with the Constitution (including the Bill of Rights, contained in Chapter 2 of the Constitution).<sup>51</sup> However, despite a number of celebrated victories on the part of social movements and activists, or individual claimants supported by public interest litigation organisations like the Legal Resources Centre,<sup>52</sup> the initial enthusiasm for such rights-based litigation strategies quickly waned, with the Constitutional Court’s socio-economic rights jurisprudence criticised for “its failure to attribute any content” to these rights, and in this way “proceduralising” them,<sup>53</sup> and even for an “implicit judicial endorsement of the government’s neoliberal policies”,<sup>54</sup> to the point where there is now said to be “little incentive to litigate these rights”.<sup>55</sup> These criticisms are to a large extent misplaced, and proceed from unwarranted and unrealistic expectations of what courts are able to accomplish. As Theunis Roux argues, the Constitutional Court has understandably attempted to avoid getting tied down to “a standard of review that was both too interventionist and too inflexible”, against the background of the “political sensitivity” of its role on the post-

---

<sup>48</sup> Chatterjee, *Lineages*, 205-206.

<sup>49</sup> Das, *Life and Words*, 182-183.

<sup>50</sup> See, for example, Huchzermeyer, “Housing rights”; Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta, 2010); Von Schnitzler, *Democracy’s Infrastructure*, 173-176.

<sup>51</sup> Sections 2, 167 and 172 of the Constitution.

<sup>52</sup> Probably most famously the Treatment Action Campaigns’ successful litigation to oblige the state to provide anti-retroviral medication to prevent the mother-to-child transmission of HIV/AIDS. See *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); Mandisa Mbali, *South African AIDS Activism and Global Health Politics* (Houndmills and New York: Palgrave Macmillan, 2013); Theunis Roux, *The Politics of Principle: The First South Africa Constitutional Court, 1995-2005* (Cambridge: Cambridge University Press, 2013), 262-303.

<sup>53</sup> Roux, *The Politics of Principle*, 263.

<sup>54</sup> Von Schnitzler, *Democracy’s Infrastructure*, 176.

<sup>55</sup> Roux, *The Politics of Principle*, 263.

apartheid political landscape.<sup>56</sup> Moreover, as Bruno Latour argues, “law cannot replace the hard work of composing the political collective”: “Law does not save; nor does it humanize; administer or spare us any problems. *Law replaces nothing else.*”<sup>57</sup> Put differently, courts can rarely solve problems that are “unsolvable in the political context”.<sup>58</sup>

It is clear that justiciable socio-economic rights in a “transformative” Constitution and a powerful Constitutional Court do not guarantee a direct impact on the distribution of resources. However, the mobilisation of socio-economic rights, to a limited extent on the terrain of the legal system, and more effectively in the social and political arena, viewed more broadly and not in terms of what the outcome of a particular case is, can have important redistributive consequences and avoids the often-disempowering effect of translating social claims into legal claims. The advantages and disadvantages of litigation in the pursuit of such claims, the empowering possibilities of rights discourse, and the importance of composing and mobilising the “political collective” have been demonstrated in the area of the formulation and implementation of housing policy in South Africa.<sup>59</sup>

### **The focus on the transitional period of 1990-2000**

Against this background, this research focuses on housing politics and the development and implementation of policy in respect of housing and informal settlements, in the Cape Town metropolitan area, as reflected in and shaped by community mobilisation and rights-based strategies, during the transitional period of 1990 to 2000. In particular, the research focuses on the respective roles of the state, courts, and the mobilisation of the political collective, or what Oldfield terms

---

<sup>56</sup> Roux, *The Politics of Principle*, 264.

<sup>57</sup> Bruno Latour, *The Making of Law: An ethnography of the Conseil d'Etat* (Cambridge: Polity Press, 2010), 271 (emphasis in the original).

<sup>58</sup> Gerald N. Rosenberg, *The Hollow Hope* (Chicago: Chicago University Press, 1991), 338.

<sup>59</sup> An important example of these processes is the litigation in what has become known as the *Grootboom* case. This judgment has been reported in South Africa law reports as *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). It is also available on the Constitutional Court website at <https://collections.concourt.org.za/handle/20.500.12144/2107>. The judgment in the lower tier Cape High Court, which was largely overturned on appeal to the Constitutional Court, has been reported as *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). It is also available at <http://www.saflii.org/za/cases/ZAWCHC/1999/1.html>. This case is discussed in Chapter 3.

“community capacity”<sup>60</sup> and “strategic agency” on the part of “citizens as political actors”<sup>61</sup> over time, in the design and implementation of housing and informal settlement policy in Cape Town, with the experience of waiting on the part of marginalised communities as a means of analysing the contestation of state power. The research focuses on the period 1990 to 2000 for a range of reasons. The period of 1990 to 1994 can be described as the last stage of apartheid, when many dramatic changes already took shape, including in the area of housing policy and politics. The period 1994 to 2000 represents the early stage of post-apartheid state formation, and resulted in fiercely contested developments in housing and homelessness policy as well as fundamental changes in both the institutions and policies of the apartheid era, together with interesting and revealing continuities in ideology and policy. The year 2000 is significant in this context, as the judgment of the Constitutional Court that concluded the litigation in the *Grootboom* case was delivered then. This case, together with its background and aftermath, resulted in what was (and still is) the most important judgment in respect of housing and informal settlement policy in South Africa, and provides an opportunity to investigate the interaction between state, courts and communities in housing politics.

To this end, the research proceeds from the central question which explores the interaction between the state, courts and communities in the design and implementation of housing and informal settlement policy and in the politics of housing in the Cape Town metropolitan area during the transitional period of 1990 to 2000. This requires firstly a focus on the historical background to this period, including the construction of apartheid spatiality, and legislation, regulation and policy in respect of urbanisation, the provision of urban services, land tenure, and housing. This includes a number of case studies of housing-related litigation during this time. Secondly, the research addresses the role of the state in the design and implementation of housing and informal settlement policy and in the politics of housing in Cape Town during the period 1990-2000, including a focus on the evolution of state policy during this period. In particular, the focus is on the ways in which transitional processes in respect of the state shaped national and local approaches to housing policy, including the

---

<sup>60</sup> Oldfield, “The Centrality”.

<sup>61</sup> Oldfield and Greyling, “Waiting”, 1110.

constitution-making processes during the period 1992-1996, the institutional transformation of the state housing sector, and the evolution of theories and ideologies on the part of state actors and institutions. Finally, the question of the nature of citizens' and communities' encounters with the state in housing politics during the period 1990-2000 and the role of communities (including community-based and non-governmental organisations) in the shaping of the design and implementation of housing policy during that period, is considered. This includes an investigation of capacity and strategic agency on the part of communities and citizens as political actors in these processes, and of waiting as a way of experiencing the effects of power while retaining agency and sidestepping the reach of the state. Throughout the analysis, the role of litigation and court judgments is considered. During the period 1994-2000, the focus includes the role of rights-based strategies on the part of marginalised communities in the pursuit of claims related to housing and homelessness, including the role played in this regard by courts, especially the Constitutional Court.

### **Thesis architecture and sources**

There is an ongoing and worsening housing and homelessness crisis in South Africa. In that context, an understanding of the role of community agency and of courts as a forum for rights-based litigation strategies in respect of the formulation and implementation of policy by the state in this area is important. Furthermore, the project aims to contribute to an understanding of the ways in which state power in the post-apartheid area is negotiated and contested in the arena of housing politics. Chapter 1 sets out the historical background to the urban housing crisis in South Africa in general, and Cape Town in particular, including a focus on litigation around housing issues during that time. Chapter 2 provides an account of the South African state in transition with a focus on housing politics, again including litigation on the issues. Chapter 3 analyses the role of community agency and mobilisation, particularly in interaction with rights-based strategies, in housing politics, supported by a discussion of a number of case studies.

The central primary source for the research is reported judgments by South African High Courts, the Supreme Court of Appeal, and the Constitutional Court.<sup>62</sup> In a few cases, the sources used include the court files that presented the particular case for adjudication. The advantage of this is that the voices of the litigants themselves are heard, although of course mediated through their legal representatives. This mediation presents fundamental challenges, as the role of a lawyer representing a particular litigant is to present the case in a manner calculated to advance their particular version of events. Janet Malcolm, when describing her experience of defending a defamation suit, proclaims that “[o]f pleasurable reading experiences there may be none greater than that afforded by a legal document written on one’s behalf”, which “proclaims with every sentence ‘I am right! I am right! I am right!’” (while on the other side, “the same orgy of justification is taking place”).<sup>63</sup> In any event, access to case files in the context of this research is limited to the cases heard by the Constitutional Court, for a number of reasons. Firstly, the Constitutional Court is the only court that makes the contents of case files available online. Secondly, the South African law reports started including original case numbers in reported judgments only from 1994 onwards. This is the only way in which to access court files at the High Courts, where case files are stored according to case numbers. However, accessing court files at the High Courts presents fundamental challenges. While there is a recent drive by the Office of the Chief Justice to digitalise court records and make them available online, this is most unlikely to include older files.<sup>64</sup> The state of case file storage in the High Courts is notoriously lamentable. South African case files are mainly still contained in brown soft cardboard folders, with handwritten notes on the outside cover indicating the journey and current status of the file, including court

---

<sup>62</sup> These are sourced in the South African Law Reports, which are regularly published in hard copy format, in chronological order, according to the date of the publication of a particular judgment. They are also available online on a paid subscription basis through Jutastat, a product of the publisher Juta and Company, or on the website of the Southern African Legal Information Institute (Saflii) which offers free public access at [www.saflii.org](http://www.saflii.org). It is important to note here that the reported judgments are mainly those marked “Reportable” by the judge in the case, although Saflii is a good source of unreported judgments. It may be useful for purposes of identifying the source of judgments (and reading the analyses of various judgments in the following chapters) to note that prior to 1993, the court system consisted of a Supreme Court with a number of local and provincial divisions, and with an Appellate Division (AD) at the apex. In 1993, the Constitutional Court was introduced. In 1996, the AD became the Supreme Court of Appeal (SCA), and the erstwhile divisions of the Supreme Court became the High Courts in the various geographical seats. For example, a reported Cape High Court judgment will be indicated by a (C) at the end of its citation.

<sup>63</sup> Janet Malcolm, *The Journalist and the Murderer* (New York: Vintage Books, 1990), 148.

<sup>64</sup> See <https://www.judiciary.org.za/index.php/court-online/about-court-online>

orders. Once the litigation is concluded, the file is stored. Some High Courts, notably the Cape High Court, has a storage system that at least theoretically makes access possible. However, files very often go missing and duplicates have to be made if the case is still current. Files are stacked on shelves, desks and the floor, and finding one could be near impossible.<sup>65</sup> The state of storage in other jurisdictions can be even worse. For example, in 2019, The Citizen newspaper reported on the Pretoria High Court's filing system, and called it a "mountain of unruly paper mayhem", with more than 500,000 court files dumped in the basement, "stacked up to the ceiling, with much of it inaccessible for court proceedings", let alone for researchers.<sup>66</sup>

There has been some scholarly interest in files, and their role in making states and law, on the part of historians and other social scientists. Cornelia Vismann notes that historians "suspect that files contain the entire drama of political action condensed into writing, so they search for the struggles that preceded decisions and succeeded the processes of decision making".<sup>67</sup> This analysis is at the meta-level, and does not focus on the role of files in adjudication, but it does point to the importance of case files in tracing historical processes and the making of law: "Files are constitutive of the law... They lay the groundwork for the validity of the law, they work toward the law... Files are, or more precisely, make what, historically speaking, stands before the law."<sup>68</sup> Similarly, in his exploration of the role of a file in the process of adjudication by the *Conseil d'Etat*, Latour traces the journey of a file, as "law at the beginning", from its first arrival at a court, containing the claim of a litigant, to the final decision.<sup>69</sup> He describes the significant distance between the "groaning, growling or protest" of the original claim which often has its source in anger and sadness, and the court file where these events and emotions are transformed into a legal claim by lawyers writing on behalf of a litigant.<sup>70</sup> The file then travels through a number of stages, with further documents added, until it becomes "ripe for use", or ready for adjudication.<sup>71</sup> This is

---

<sup>65</sup> This was my own experience when practising as an advocate at the Cape High Court.

<sup>66</sup> Rorisang Kgosana, "Pretoria high court's 'filing' system a mountain of unruly paper mayhem" *The Citizen*, 26 February 2019. <https://www.citizen.co.za/news/south-africa/courts/pretoria-high-courts-filing-system-a-mountain-of-unruly-paper-mayhem/>

<sup>67</sup> Cornelia Vismann, *Files: Law and Media Technology*, (Stanford: Stanford University Press, 2008), 9.

<sup>68</sup> Vismann, *Files*, 13.

<sup>69</sup> Latour, *The Making of Law*, 70.

<sup>70</sup> Latour, *The Making of Law*, 72.

<sup>71</sup> Latour, *The Making of Law*, 82-83.

the time when the “fragile bridge of texts” is formed – the linking of the contents of the file (the claim) to the law.<sup>72</sup> This is the act of adjudication: studying the facts, and applying the law (in the form of legislation, regulations and the common law). Once this point is reached, “[t]he case is closed; and so is the file”, but only for the adjudicators. The file lives on in a sense: the litigants now have to take action on the basis of the judgment, and the judgment gets reported, where it, in turn, becomes part of case law, or authority, to be applied to future claims.<sup>73</sup>

In this project, the research relies on judgments to record the facts as they appear in the files, in the absence of access to the files themselves. Of course, this introduces a further layer of mediation or translation. In his study of the VOC criminal records from the eighteenth century, which he relied on to attempt a history from below of “the eighteenth century Cape”, Nigel Penn emphasises the importance of keeping in mind that the evidence generated in a court is shaped by its context, particularly the fact that litigants are presenting their stories in a way intended to present their case in a favourable light.<sup>74</sup> This process extends to the judgment, where the presiding officer would, once again, tailor the evidence to develop a justification for the outcome.<sup>75</sup> These difficulties were compounded in the apartheid legal system by the role of race, and of course racism, in the process of adjudication, as well as by the cultural or social traditions of judges, lawyers and litigants.<sup>76</sup> In his analysis of the culture of

---

<sup>72</sup> Latour, *The Making of Law*, 83-85, 103.

<sup>73</sup> Latour, *The Making of Law*, 103-104.

<sup>74</sup> Nigel Penn, *Rogues, Rebels and Runaways* (Cape Town: David Philip Publishers, 1999), 6. Similarly, in the context of a different project, Penn points to the tailoring of evidence “to impress the court”, and by the role played by officials and scribes in shaping evidence (Nigel Penn, *The Forgotten Frontier* (Cape Town: Double Storey Books, 2005), 4).

<sup>75</sup> This does not imply that judges are acting in “bad faith” by denying their subjectivity and ideological position, as claimed by Duncan Kennedy in *A Critique of Adjudication* (Cambridge: Harvard University Press, 1998), 2, 56. It simply indicates an acceptance that judges apply the law to the facts as they see them, and that judges may differ in good faith in their interpretation of facts and law – of course, some judges do have an ideological position that shapes their decision-making. For a historical discussion in the South African context, see CF Forsyth, *In Danger for their Talents* (Cape Town: Juta & Co, 1985). This debate is beyond the scope of this project.

<sup>76</sup> Martin Chanock argues that, relying on “the prevailing images in white South African society, both courts and legislatures in the early twentieth century fashioned an African institution to fit not only the administrative needs of the state but also the symbolic needs of white discourses, legal and general, about the nature of African political institutions”. In this way, courts contributed to establishing and perpetuating an invented African institution of law and power, which in turn contributed to placing Africans “according to their own ways, beyond the scope of association with political democracy and the rule of law” (Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001), 283). Also see Stephen Ellman, “A Bittersweet Heritage: Learning from the Making of South African Legal Culture” in *Law in Context: A Socio-Legal Journal*, Vol. 28 No. 2 (2010), 77-79.

adjudication in the Appellate Division from 1950 to 1980, CF Forsyth points to the growth of “executive-mindedness” on the part of the judges from the 1950s onwards, which assisted the apartheid state’s repression, after an earlier period during which the Court was willing to restrain the government despite “controversy and unpopularity in powerful circles”.<sup>77</sup>

Despite all this complexity, court judgments remain a valid and useful primary source. Martin Chanock notes that, for his research, he located “law” in the discourses of both bureaucrats and courts, and that he rarely went “beyond what is on the public record, because a legal culture is within the public realm”: “If one goes in search of law beyond the statutes and the law reports, and if one’s methodological premise is that all societal discourses on law are sources, then one is faced with a virtually endless range of possibilities...”.<sup>78</sup> This resonates with Latour’s analysis which indicates that, if the life of a file is considered, it remains present in the ruling or judgment at the end of the case, where the “fragile bridge of texts” is completed. In this way, it remains a worthy source. With all the reservations in mind, this research therefore relies on court judgments as a primary source, focusing on the facts of claims as presented in the judgment, and the approaches of judges to the process of adjudication. The project further relies on reports on case studies in the area of housing policy and implementation, the housing crisis and related litigation, produced by non-governmental organisations (including their accounts of particular communities and their actions); newspaper reporting, especially on the housing crisis and litigation; reports on housing policy and practice by various actors including commissions of enquiry and state actors, and other records including those of the South African constitution-making process. These sources are explored with the aim of understanding the interaction between state, courts and communities in the evolution of housing policy.

---

[https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1868&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1868&context=fac_articles_chapters)

<sup>77</sup> Forsyth, *In Danger for Their Talents*, 225.

<sup>78</sup> Chanock, *The Making of South African Legal Culture*, 26.

## Chapter 1

### Urbanisation and housing policy under apartheid

In order to understand housing policy and politics during the period 1990 to 2000, it is essential to explore the historical background to the urban housing crisis in South Africa in general, and Cape Town in particular, as well as the interaction between state, community and courts in that arena. While this was very much a period that black South Africans spent in “the waiting room of history”, and waiting for housing, this waiting cannot be seen as entirely passive. There were examples of quiet encroachments, and acts of resistance to the apartheid state on the part of communities, which were in some cases aided by community-based or progressive non-governmental and legal aid organisations, as well as lawyers in private practice. As a result, there were even occasional successes in the apartheid-era courts.<sup>1</sup> Housing policy and politics were shaped by that interaction, culminating in the transition to democracy. To that end, the following sections trace the evolution of the urban housing crisis up to 1990, and the role of the different actors in that process.

#### Influx control, the apartheid state and the courts: 1940-1970

Deborah Posel argues that one of the “distinguishing features” of the South African process of capitalist development was “the extent to which the state intervened directly in controlling the movement of African labour, by means of influx control” : influx control was “built at the interface of Apartheid and capitalism” in South Africa.<sup>2</sup> In turn, influx control was fundamentally linked to access to housing, land and land tenure, and of

---

<sup>1</sup> I note that this thesis does not engage at all with the complex debate regarding the moral justification or otherwise of lawyers participating in the apartheid legal system. The thesis is concerned only with the ways in which courts, in interaction with the state, communities and civil society organisations, including progressive lawyers, shaped the formulation and implementation of housing policy. The underlying debate is beyond the scope of the thesis. One of the long-standing international jurisprudential debates that informed this discussion in South Africa was the legal positivism – natural law debate, also known as the “Hart-Fuller debate”, named after two of the most prominent theorists writing in this field: H.L.A. Hart and Lon Fuller (see H.L.A Hart *The Concept of Law* (Oxford, Oxford University Press, 1961) and Lon L. Fuller *The Morality of Law* (New Haven, Connecticut: Yale University Press, 1964)). For South African discussions, see Hugh Corder (ed.) *Democracy and the Judiciary* (Cape Town: IDASA, 1989) and Suren Pillay “The Prerogative of Civilized Peoples: Apartheid, Law, and Politics” in *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 34, No. 2 (2014). 34, Number 2, 2014, pp. 294-313

<sup>2</sup> Posel, *The Making*, 8-9. Posel discusses the long-standing controversy and debates around the relationship between apartheid and capitalism (see pp 8-18), but a discussion of these debates falls outside the scope of this thesis.

course racial segregation.<sup>3</sup> However, the influx control system exhibited “many glaring failures”: the size of the urban African population increased by 71.4% between 1904 and 1921, and “appalling living conditions in African urban communities” caused a number of epidemics as well as dangerous “political inflammability”.<sup>4</sup> This resulted in the process which eventually produced the Natives (Urban Areas) Act of 1923, which intended to establish “hostels, locations and native villages” in urban areas.<sup>5</sup> It was directly concerned with racial segregation and empowered local government to “proclaim ‘white’-only areas, and then move black residents to segregated ‘locations’”.<sup>6</sup> The Act “laid the foundation for influx control for the following two and a half decades”.<sup>7</sup> From the start, the implementation of these influx control measures was problematic, partly due to “intra-state conflict over the proper methods of influx control”, and several amendments to the Act followed.<sup>8</sup> During this period, the Housing Act of 1920 was promulgated – it was the first Act directly regulating housing provision, and was the start of the role of government in the provision of housing in South Africa.<sup>9</sup> In the meantime, during the 1930s, urbanisation continued apace.<sup>10</sup> Moreover, living conditions remained dire. For example, by 1943, in Cape Town, there were 25 000 “Coloured private households in Cape Town” of which 34% were living in single rooms, and a further 19% in two rooms, with high levels of over-crowding.<sup>11</sup> During the 1940s,

---

<sup>3</sup> Prior to 1910, the British colonies and Boer Republics had relied on a “vast number of land laws” to control a number of aspects of land use and ownership by black South Africans, as well as their movement, but this process was taken much further by the Natives Land Act of 1913. Bundy points out that unequal access to land, regulated by law, “underpinned the domination of the majority of South Africans”, and in this way constituted a “central process” in the history of South Africa (Colin Bundy, “Land, Law and Power: Forced Removals in Historical Context”, in *No Place to Rest*, 3-4). The 1913 Act divided South Africa into areas where Africans could own land (the reserves, constituting 13% of the land, set aside for over 70% of the population), and the rest, and regulated the ways in which African labour could live and work on white-owned farms (Bundy, “Land”, 5-6).

<sup>4</sup> Posel, *The Making*, 39. Also see Pauline Morris, *A History of Black Housing in South Africa* (South Africa Foundation, 1982), 13-22.

<sup>5</sup> Morris, *A History*, 26.

<sup>6</sup> The Act was not, however, widely implemented (Harrison, Todes and Watson, *Planning and Transformation*, 24). The authors here point out that the one exception to this general lack of implementation was Johannesburg, where almost the whole city was declared “white” in 1933, leaving almost 50 000 African residents with no right of residence – they were forced to move to the newly constructed Orlando township (now part of Soweto): “a bleak residential outpost in the veld”.

<sup>7</sup> Posel, *The Making*, 40.

<sup>8</sup> Posel, *The Making*, 42-44.

<sup>9</sup> The Act established a Central Housing Board, which was the first state mechanism to finance housing. During its more than two decades of operation, the majority of its expenditure concerned “the housing plight of poor whites” (J.H De Loor, *Housing in South Africa : proposals on a policy and strategy*. South African Housing Advisory Council Task Group on National Housing Policy and Strategy (Pretoria: Government Printer, 1992) 60).

<sup>10</sup> Morris, *A History*, 26.

<sup>11</sup> The Cape Co-Ordinating Council of Social Welfare Organizations, *Report of the Proceedings at a Symposium on Social Aspects of Housing*. Report Series No. 7 (Cape Town, August 1945), 25-34. The

the Smuts administration “failed to manage urbanization processes” at a time when industrialisation and urbanisation were “rapidly accelerating”.<sup>12</sup> This dilemma is illustrated by the *Hleka* case, finally determined by the Appellate Division.<sup>13</sup> The case concerned an informal settlement outside Johannesburg where “approximately 40,000 native squatters” were living on a square mile with no services (including water and sanitation). This, according to the Court, presented a “very grave danger” to public health (of the white inhabitants of Johannesburg), as well as “a grave threat to public peace” because of a lack of “control or discipline” in the settlement.<sup>14</sup> In order to deal with this (and more generally the fact that “from 1939 onwards large concentrations of natives grew up in and around Johannesburg”) in a manner which did not deprive the city of cheap labour, a number of “War Measures” were passed. War Measure 31 promulgated in 1944, amended by War Measure 96 of 1944, introduced regulations which enabled the establishment of “emergency camps” to which people who were “unlawfully occupying land” could be removed, and where services and accommodation would be provided. Rent was to be paid by the occupants. Mr Hleka had been convicted of the criminal offence of refusing to pay the rent, and sentenced to a fine and five days imprisonment with hard labour, as well as having to pay the arrear rent. Mr Hleka insisted that he would not pay rent until he had been provided with a house on the site. His counsel attempted to convince the Court that the reference to “accommodation” in the regulations required housing to be provided, but the Court adopted (with a significant degree of contortion) an extremely narrow definition of accommodation in order to find that an empty site with services qualified as accommodation.<sup>15</sup> Mr Hleka had been living in a hessian shelter, and the Court held that, interpreting the legislation in context, a hessian shelter provides adequate “accommodation” because it provides a roof overhead, and services are provided. In addition, the Court held that the provisions did not envisage a house, because building materials were in short supply, and the emergency camp was in any event “showing a [financial] loss”.<sup>16</sup> The one concession made by the Court was to delete the reference

---

data used in this report was drawn from “The Social Survey of Cape Town” conducted by the University of Cape Town during 1943.

<sup>12</sup> Harrison *et al*, *Planning*, 24.

<sup>13</sup> *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A). The facts set out here are drawn from the judgment.

<sup>14</sup> At 846-847.

<sup>15</sup> At 850-851.

<sup>16</sup> At 848, 850-851 and 853-854.

to “hard labour” from the sentence. While ultimately unsuccessful, Mr Hleka’s stance can be seen as an early example of a small act of resistance to the state-imposed waiting for housing, by attempting to force the state to provide a house. It is not apparent from the judgment how Mr Hleka obtained legal representation (attorneys and counsel), and we do not know what kind of work those lawyers did generally, but it does provide an early example of lawyers attempting to assist disadvantaged litigants.

In light of the large population increases during the 1940s, and rapid post-war industrialisation, the Union government appointed the Native Laws Commission, chaired by Justice Fagan.<sup>17</sup> Of course, after the National Party came into power in 1948, the implementation of the Fagan Commission’s recommendations was out of the question.<sup>18</sup> By the time of the 1948 election, it had become clear to the National Party that the issues which influx control policies were intended to address were “looming larger than ever, but the state’s existing capacity to tackle these problems was manifestly inadequate”.<sup>19</sup> As a result, the early 1950s saw the proliferation of legislative measures designed to impose influx control and racial segregation.<sup>20</sup> The implementation of the Group Areas Act led to large-scale forced removals.<sup>21</sup> The case of *Zulu*<sup>22</sup> demonstrates the devastating impact of the criminal provisions of the Prevention of Illegal Squatting Act. Mr Zulu had been born on the farm Onverwacht and had lived there all his life (56 years), with the permission of the farmer and payment of rent for a hut and levies for the keeping of cattle. In 1948, the apartheid state expropriated the farm for purposes of nature conservation. Until 1956, the state permitted the community (which by then comprised 231 families) to stay, whereafter only those families who agreed to certain (unspecified) conditions were allowed to

---

<sup>17</sup> The Commission’s report, tabled in 1948, concluded that the migration of African people into urban areas was “a natural economic phenomenon which could be regulated and guided but not reversed... and rejected the total segregation of the races as utterly impracticable” (Morris, *A History*, 40).

<sup>18</sup> Morris, *A History*, 42.

<sup>19</sup> Posel, *The Making*, 47.

<sup>20</sup> These included the Group Areas Act of 1950 (see Alan Dodson, “The Group Areas Act”, in *No Place to Rest*, 137); the Prevention of Illegal Squatting Act of 1951 (see Catherine O’Regan, “The Prevention of Illegal Squatting Act”, in *No Place to Rest*, 162); and the Trespass Act of 1959 (see Raylene Keightly, “The Trespass Act”, in *No Place to Rest*, 180). In 1957, a new Housing Act was adopted and a National Housing Commission was appointed, responsible for “the financing of White, Coloured and Indian housing”, while a separate Bantu Housing Board was established for black housing (De Loor, *Housing*, 61-62).

<sup>21</sup> Harrison *et al*, *Planning*, 26.

<sup>22</sup> *R v Zulu* 1959 (1) SA 263 (A). The facts set out here are drawn from the judgment.

remain. Mr Zulu refused to agree, and in 1958 was given one month to vacate the farm with his family. When he refused, he was prosecuted, convicted, and sentenced to a fine or 16 days imprisonment. In case he refused to leave, the police were empowered to remove him to a local township and to demolish his home. On appeal, the adjudication relied on a particular interpretation of the legislation which favoured the state, and Mr Zulu's appeal was dismissed.<sup>23</sup>

Between 1959 and 1961, apartheid policy in general, and influx control policy in particular, shifted into a discrete second phase, prompted by the fact that "the escalation of urban African resistance had exposed serious gaps in the state's control over the urban proletariat".<sup>24</sup> This new approach included "a sustained onslaught on the concept of residential rights" and an aggressive escalation of forced removals from urban areas, partly because of the decision to transform the reserves into "self-governing homelands".<sup>25</sup> All of this was possible because by the early 1960s, "organised black opposition had been smashed".<sup>26</sup> The 1960s accordingly saw the pursuit of a "ruthless programme of social engineering, which stripped the majority of Africans of their South African citizenship, and forcibly removed over three and a half million from allegedly 'white' areas of the country to putative ethnic 'homelands'".<sup>27</sup> Also during this time, there are some examples of the courts coming to the aid of individuals convicted of offences under the Prevention of Illegal Squatting Act by adopting narrow definitions of offences and generous interpretations of the requirements for state action.<sup>28</sup> These examples are not provided as evidence of any general trend, but it does show that the interaction between the state and the courts in respect of this aspect of housing policy was characterised by at least some complexity. The 1960s show the limited room for agency on the part of communities that had been disempowered by the development and implementation of brutal state legislation and policy, and the suppression of any attempt by civil society organisations to participate, although there were progressive lawyers who had an impact on the lives

---

<sup>23</sup> See Forsyth, *In Danger for their Talents*, 30-75 for a discussion of the executive-minded nature of adjudication in the Appellate Division during this time.

<sup>24</sup> Posel, *The Making*, 6, 227.

<sup>25</sup> Posel, *The Making*, 6, 233-235.

<sup>26</sup> Posel, *The Making*, 1.

<sup>27</sup> Posel, *The Making*, 1.

<sup>28</sup> Two examples are *R v Gorekwang* 1961 (3) SA 407 (A); *S v Tofile* 1963 (1) SA 387 (T). It is beyond the scope of this thesis to do a detailed analysis of the litigation around this Act, and it is therefore not possible to determine how rare or widespread these kinds of judgments were.

of people who had fallen foul of apartheid legislation. Counsel in the *Tofile* case, for example, was Jack Unterhalter, an activist lawyer active in liberal politics.<sup>29</sup> Ms Tofile had been found guilty of being present in an area “set aside according to the laws relating to the administration of native affairs without the permission of the local authority”, in contravention of the Prevention of Illegal Squatting Act, and of resisting her arrest.<sup>30</sup> The Court held that the government had not proved that the area had indeed been so set aside, and that she was therefore not present in contravention of the Act. Furthermore, she had been unlawfully arrested and thus was entitled to defend herself. In the result, she was acquitted on both counts.<sup>31</sup> In *Gorekwang*, Mr Gorekwang had been served with a notice to leave an area that had not been declared a location under the Native (Urban Areas) Consolidation Act of 1945, and upon his refusal had been charged and convicted. The Court held that the notice had not been properly authorised, and was thus invalid. Furthermore, he could also not be convicted on an alternative charge under the Prevention of Illegal Squatting Act, as the Council had not proved that its permission for Mr Gorekwang to reside in that area had been properly withdrawn.<sup>32</sup> In the result, the conviction was set aside. Of course, there is no indication that such litigation had any impact on state policy, unless it was to prompt the legislature to amend the relevant legislation to close down such loopholes found by the courts.<sup>33</sup>

### **Community resistance, state repression, and housing policy in the courts: 1970-1990**

In contrast to the 1960s, the 1970s saw the renewed mobilisation and resistance of communities and the impact of that on state policy. By 1973, more than a decade of relative political quiescence ended with a series of labour strikes, followed by a country-wide uprising starting in Soweto in 1976. While that era was characterised by the ruthless and violent repression by the apartheid state of contestation and resistance, it also set in motion a number of far-reaching changes in state policy and

---

<sup>29</sup> Southern African Legacy Project, “Profile of Karrie Weinstock”.  
<https://www.ojasalp.org/profile/karrie-weinstock/>

<sup>30</sup> At 388-389.

<sup>31</sup> At 390.

<sup>32</sup> At 412 and 414.

<sup>33</sup> See Columbia University, “Oral History Interview with Arthur Chaskalson (1999), 19-20.  
[https://www.columbia.edu/cu/lweb/digital/collections/oral\\_hist/carnegie/pdfs/arthur-chaskalson.pdf](https://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/arthur-chaskalson.pdf)

increased civil society participation, including in the area of urbanisation and housing policy. The 1976 uprising radicalised opposition to apartheid, and is said to have demonstrated both the ruthlessness and vulnerability of the apartheid state.<sup>34</sup> Furthermore, as Jeremy Seekings notes, “the uprising indicated the potency of collective action”,<sup>35</sup> and as a direct result of this major shift in community and civil society action, the apartheid state and capital started investigating new approaches to housing and urbanisation policy. This demonstrates the point made earlier, that the range of acts of resistance by black South Africans means that their waiting “in the waiting room of history” cannot be described as passive, especially from 1973 onwards.

As a result of the resistance from 1973 onwards, there was a growing realisation that new housing and urbanisation policies were required. Accordingly during this time, the apartheid state appeared to attempt efforts at investigating the state of affairs.<sup>36</sup> By then, increasing numbers of migrants were settling in rapidly expanding informal settlements, and the black local authorities faced intense popular resistance, severe financial constraints, and lack of legitimacy.<sup>37</sup> There was also an influx of migrants to Cape Town. By 1977, there were at least 120 000, and possibly 180 000 “coloured squatters” in the Cape Peninsula, and “possibly some 30 000 Africans”, and a vast shortage of housing, combined with overcrowding.<sup>38</sup> The reasons for this included the Group Areas Act, insufficient public funds directed to housing, especially for African residents, low wages resulting in an inability to afford to build or buy houses (with African people of course not even allowed to do so), and urbanisation driven by poverty and lack of employment opportunities in rural areas.<sup>39</sup> At that stage, the housing available to black residents of Cape Town (including around 90 000 “illegals”) was

---

<sup>34</sup> Steven Mufson “Introduction: The Roots of Insurrection”, in *All, Here and Now: Black Politics in South Africa in the 1980* edited by Tom Lodge and Bill Nasson (Ford Foundation, 1991), 8.

<sup>35</sup> Jeremy Seekings, *The UDF: A History of the United Democratic Front* (Cape Town: David Philip, 2000), 30.

<sup>36</sup> The Fouche Commission of Enquiry in 1978 investigated the high cost of housing (De Loor, *Housing*, 68) and the Riekert Commission report of 1979 aimed at stabilising a black urban middle class with a limited degree of self-government through black local authorities (Harrison *et al*, *Planning*, 33).

<sup>37</sup> Harrison *et al*, *Planning*, 33.

<sup>38</sup> George Ellis, Delia Hendrie, Alide Kooy, and Johann Maree, *The Squatter Problem in the Western Cape: Some Causes and Remedies* (Johannesburg: South African Institute of Race Relations, April 1977), 2-3, 6-7.

<sup>39</sup> Ellis *et al*, *The Squatter Problem*, 2-3, 19-43. Also see Margaret Nash, *Home? An Introduction to the Housing Crisis in Cape Town* (Cape Town: Board of Social Responsibility Anglican Diocese of Cape Town and The Cape Flats Committee for Interim Accommodation, 1976), 3-5.

confined to Langa, Nyanga and Gugulethu, where all property was owned by the Cape Peninsula Bantu Affairs Administration Board, and was overcrowded and of dismal quality.<sup>40</sup>

During this time, there were indications that the courts in Cape Town were losing patience with the brutal approach of the state. In two cases decided in terms of the Prevention of Illegal Squatting Act, the Cape High Court assisted litigants who had been evicted or convicted in terms of the Act, and the judgments in both cases describe the dire situation by that time. In the *Peter* case,<sup>41</sup> Mrs Peter had been convicted under the Act for being present on land unlawfully, as she was said to have no permission from the Bantu Affairs Administration Board who allegedly owned the land. The area in question was a portion of land in Nyanga, known as Crossroads. The Court seized on lack of clarity over the ownership of the land, which appeared to be owned, in fact, by the Cape Divisional Council, to find that the state had not proved that Mrs Peter did not have the consent of the Council (and that the Board was in fact the unlawful occupier), and set aside the conviction. The Court noted that while there were at first 600 structures erected on the land within two weeks during April 1975, by September 1975, there were 6 000 or 7 000 people living on the land, and 1 000 had been convicted of illegal squatting.<sup>42</sup> The history of Crossroads and the fight against evictions there, were described in detail in the work of Koni Benson, who conducted extensive archival and oral history research,<sup>43</sup> and by the Black Sash in an August 1976 newsletter.<sup>44</sup> Crossroads developed as an informal settlement when people

---

<sup>40</sup> Roger Granelli and Ronald Levitan, *Urban Black Housing: A Review of Existing Conditions in the Cape Peninsula with Some Guidelines for Change* (Cape Town: Urban Problems Research Unit, University of Cape Town, 1977), 9, 13, 15, 17.

<sup>41</sup> *S v Peter* 1976 (2) SA 513 (C). The facts set out here are drawn from the judgment. The case was heard on 9 February 1976 and judgment was handed down on 18 February. The attorneys were Mallinck, Ress, Richman & Co., known for progressive work.

<sup>42</sup> At 514.

<sup>43</sup> The references here are to Koni Benson, "A 'Political War of Words and Bullets': Defining and Defying Sides of Struggle for Housing in Crossroads, South Africa" in *Journal of Southern African Studies* Vol. 41 No. 2 (2015).

<https://doi.org/10.1080/03057070.2015.1013358>

The article is based on her PhD thesis: "Crossroads continues: histories of women mobilizing against forced removals and for housing in Cape Town South Africa, 1975-2005" (University of Minnesota, 2009)

<sup>44</sup> [https://disa.ukzn.ac.za/sites/default/files/pdf\\_files/BSAug76.0036.4843.018.006.Aug1976.12.pdf](https://disa.ukzn.ac.za/sites/default/files/pdf_files/BSAug76.0036.4843.018.006.Aug1976.12.pdf)

The Black Sash was formed in Johannesburg in 1955 as a "non-violent resistance organisation for liberal white women": "As the apartheid system began to reach into every aspect of South African life, Black Sash members demonstrated against the Pass Laws and the introduction of other apartheid legislation. It would later open advice offices to provide information concerning their legal rights to non-

were forcibly removed from Brown's farm and sent to Crossroads, where there was no accommodation, and they had to erect shelters. The residents also included people who had previously lived in overcrowded areas in Nyanga, as well as male migrants from Nyanga hostels who wanted to live with their wives, who had been prohibited from visiting men in the hostel. Police raids for passes or permits were common. In 1975, officials issued eviction orders to relocate the residents to Khayelitsha. According to the Black Sash, these orders could not be enforced as a result of the work of a Men's Committee and a Women's Committee, which were "particularly successful at gaining support from within and outside the community and managed to get the government to postpone the execution of the decision". Benson notes that it was in fact the resistance and mobilisation initiated and sustained by the Crossroads Women's Committee, who "worked both together with and separately from two men's committees that were established... and reached out to a range of 'white liberal' progressive organisations".<sup>45</sup> After repeatedly returning "after multiple violent removals, the women are credited with turning the building of shacks on the edges of the city into a highly visible political campaign". Benson confirms the Court's figure of 7 000 people living there in 1975, and adds that by 1978, "there were 20 000 people, 9,000 of whom were 'illegal' children in Crossroads, attending the two informal schools organised by women leaders".<sup>46</sup> The court's 1976 judgment was said to have aided the residents, and eventually Crossroads was declared an "emergency camp". The Cape Divisional Council was accordingly forced to install rudimentary water supplies and refuse collection for a nominal fee.<sup>47</sup>

A further case under the Act was *Fredericks*.<sup>48</sup> The Divisional Council of Stellenbosch had, without notice (which was required by the Act), demolished a number of shacks on land in the Kraaifontein area. Mr Fredericks and the second applicant, Mr Cyster, had constructed their shacks there; in Mr Cyster's case the Court recorded that he had been on a waiting list for many years but had failed to obtain a house in that way.

---

white South Africans affected by that legislation. These advice offices were a critical role of the organisation's brave and principled role as a vital component of civil society".

<https://www.blacksash.org.za/overview/>

<sup>45</sup> Benson, "A 'Political War of Words and Bullets", 371.

<sup>46</sup> Benson, "A 'Political War of Words and Bullets", 371.

<sup>47</sup> Black Sash, "Newsletter".

<sup>48</sup> *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C). The facts set out here are drawn from the judgment.

These families with small children were left in the open veld during heavy rain, treated by the authorities with “ruthless disregard” for their rights.<sup>49</sup> An urgent application for a spoliation order was brought.<sup>50</sup> The Court held that the Council had acted “in flagrant contempt of the law”. It saw the case as a “test case”, as there had been “widespread public concern at the manner in which squatters are being evicted from their homes”, and ordered the Council to reinstate the shacks, even if that meant purchasing sheets of corrugated iron to replace those lost.<sup>51</sup> A spoliation application was a clever and creative approach, as the lawfulness of the occupation is not considered at all by the court. Unfortunately, these two cases initially had the opposite effect to that sought. The apartheid state in each case simply amended the Act in order to prevent these judgments from derailing evictions and demolitions in future cases, and in fact attempted to oust the authority of the courts entirely.<sup>52</sup> These are of course examples of the interaction of courts and the state in the development and implementation of housing policy, albeit in the form of a regressive development. More importantly, they illustrate to some extent the relative lack of power on the part of courts alone to bring about meaningful change in the face of a ruthless state. In *Fredericks*, there is mention of a Cape Flats committee for interim accommodation that appeared to be involved in attempting to address evictions, which indicates that there was already community organisation activity at that stage. In *Peter*, there is some indication that litigation, in the context of interaction between communities, civil society organisations and progressive lawyers with a creative approach, can shape outcomes. In the event, shortly thereafter the Riekert Commission’s recommendations resulted in yet a further amendment to the Act (in 1980), which altered the demolition power under the Act, as a result of a realisation on the part of the state that “the demand for low-income labour

---

<sup>49</sup> At 116.

<sup>50</sup> A spoliation order is made under the Roman Dutch common law, where a “mandament van spolie” (or the restoration of the *status quo ante* – the state of affairs prior to the spoliation) is granted to a successful applicant. Spoliation is the unlawful dispossession of the possessor of land/property without a court order, viewed by the courts as taking the law into one’s own hands or self-help, which is unlawful. The lawfulness of the possession in question is not taken into account at all – the mandament applies even if the possessor obtained the land/property unlawfully (even fraudulently). The aim of the remedy is to prevent self-help.

<sup>51</sup> At 116 and 118.

<sup>52</sup> Gustav Muller “The Legal-Historical Context of Urban Forced Evictions in South Africa” in *Fundamina* Vol. 19 Number 2 (Pretoria: UNISA Press, 2013), 383-384.  
<https://journals.co.za/doi/pdf/10.10520/EJC149298>

required the strict influx control policy to be changed”.<sup>53</sup> In this way, the approach required by the two judgments did eventually come to pass.

Against this background, and during this time, a number of civil society actors took steps to resist or at least challenge apartheid housing and urbanisation policy, and these eventually had a significant impact. An important part of this development was the involvement of private capital in the provision of low-cost housing, mainly through the medium of the Urban Foundation (“the UF”).<sup>54</sup> In August 1976, Harry Oppenheimer and Anton Rupert met in London to discuss the idea of a “businessmen’s conference on the quality of life in urban communities”.<sup>55</sup> The conference was held in November, and it was decided to form a foundation financed and managed by the private sector “to ‘promote improvement of the quality of life’ in the black townships ‘on a nonracial, non-political basis’”.<sup>56</sup> The primary objective was to obtain “a secure form of tenure for Africans in urban areas”, which was achieved to some extent in the form of the 99-year leasehold legislation as an amendment to the Bantu (Urban Areas) Act in June 1978.<sup>57</sup> Patrick Bond describes the UF as “a corporate think-tank and development agency” which was seen as a proponent of neoliberal development policy,<sup>58</sup> and the approach of the UF to informal settlement intervention is now considered to be of a “neo-liberal nature”, particularly in its vision of the “transformation of informal occupiers of land into individual consumers of a standardised, technically defined and private sector delivered product”.<sup>59</sup> The UF has also been described as having intended to search for “minor palliatives for apartheid” without presenting a fundamental challenge to apartheid policy.<sup>60</sup> It is important, however, to consider the UF in context, and with more nuance, so as not to simply dismiss its impact on these

---

<sup>53</sup> Muller, “The Legal-Historical Context”, 384.

<sup>54</sup> The UF was a non-profit development organisation which was established in 1977 by the Anglo American Corporation, as a direct result of the 1976 uprising (Firoz Khan, “Continuities, Ambiguities and Contradictions”, in *Housing Policy and Practice in Post-Apartheid South Africa* edited by Firoz Khan and Petal Thring (Johannesburg: Heinemann, 2003), 12).

<sup>55</sup> Peter Wilkinson, “Straddling Realities: The Urban Foundation and Social Change in Contemporary South Africa” (University of the Witwatersrand African Studies Institute, Seminar Paper No. 117, May 1982), 2.

<https://wiredspace.wits.ac.za/server/api/core/bitstreams/050667c4-8b18-4cd5-8908-5a6b89b9e4af/content>

<sup>56</sup> Wilkinson, “Straddling Realities”, 2.

<sup>57</sup> Wilkinson, “Straddling Realities”, 2: and then in the Black Communities Development Act 4 of 1984.

<sup>58</sup> Patrick Bond, *Cities of Gold, Townships of Coal* (New Jersey: Africa World Press Inc, 2000) 146.

<sup>59</sup> Marie Huchzermeyer, *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (Trenton, New Jersey: Africa World Press, 2004), 123.

<sup>60</sup> Khan and Thring, *Housing Policy*, 12.

grounds. Of course, the UF certainly aimed to “maintain the existing process of capital accumulation” – the UF’s executive director, for example, was reported as saying that the continuation of “the free enterprise system” required the private sector “to get off their butts, and make contributions to housing”.<sup>61</sup> But Wilkinson argues that a “radical critique” which portrays the UF simply as complicit in apartheid and as a partner of the apartheid state in a “joint project aimed at co-opting the black ‘middle-classes’ under the guise of implementing an essentially hollow reform strategy” is over-simplified and naive.<sup>62</sup> A good example of this complexity can be found in the work of Bond.<sup>63</sup> He acknowledges the UF’s role in the dropping of pass laws, formalising permanent housing tenure in townships, and “the apartheid regime’s relaxation of racial controls over urban form”, while lamenting the “privatisation of the housing stock”, with the “World Bank’s neoliberal policy argumentation” directly shaping the UF’s approach.<sup>64</sup> Similarly, the UF’s ties with the Progressive Party (the liberal parliamentary opposition party) have been noted, and the UF’s urging of the state “to accept the reality of urbanization and argued for the promotion of individual ownership of housing, self-help housing, and informal settlement upgrading” - in the 1980s the UF played an important role in the development of new legislation aimed at the rapid release of land for urban development.<sup>65</sup> Furthermore, it played a significant role in “redefining South African planning to include concerns about the living conditions and housing needs of the urban poor”.<sup>66</sup> These descriptions can perhaps be seen as uncritically accepting the UF’s own description of its motives, and insufficiently interrogating its market orientation and drive to ensure a stable black workforce, by conceptualising black South Africans as clients in a housing market. The UF nonetheless was an

---

<sup>61</sup> Dhuru V. Soni, “The Apartheid State and Black Housing Struggles” in *The Apartheid City and Beyond* edited by David M. Smith (Johannesburg: Routledge, 1992), 45.

<sup>62</sup> Wilkinson, “Straddling Realities”, 1.

<sup>63</sup> Despite being a fierce critic of the “neoliberal policy drift in the early 1980s” in which the UF was implicated, Bond describes the UF as an influential actor “with strong connections to the late-apartheid government” that together with others “embarked upon surprisingly effective advocacy and implementation strategies on behalf of deracialised and liberalised cities” (Patrick Bond, “Are those Planact fingerprints?” in Planact, *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005* (Johannesburg: Planact, 2009), 101.

<sup>64</sup> Bond “Are those Planact fingerprints?”, 101. Bond is not correct that the UF’s activities led directly to the abolition of the pass laws. An important factor in this process was litigation by the Legal Resources Centre (although it also operated with some funding from Anglo American – see Columbia University, “Oral History Interview with Arthur Chaskalson”, 36.) Their activities are discussed below.

<sup>65</sup> Harrison *et al*, *Planning*, 42.

<sup>66</sup> Harrison *et al*, *Planning*, 42. Similarly, the De Loor report described the UF as “an independent, non-profit-making development organisation, accountable to its board of governors”, with the aim of contributing to “a viable, democratic and non-racial South Africa by focusing on the critical development needs of disadvantaged South Africans, particularly in the urban areas” (De Loor, *Housing*, 180).

organisation outside the state, aiming to influence state policy.<sup>67</sup> Accordingly, the UF can possibly be seen as a civil society organisation interacting with the state and communities to represent its interests by shaping housing policy, or at least as a non-state actor interacting with the state and communities in that arena.

Another fundamentally important civil society organisation was established during this time, and was to have a significant disruptive impact on the implementation of apartheid housing and urbanisation policy, by means of litigation. The Legal Resources Centre (“LRC”) was established in 1979 by a group of anti-apartheid activists and prominent human rights lawyers, who created the LRC “with two goals in mind: use the law to resist the oppressive apartheid system, and provide a training ground for public interest lawyering and young black lawyers”.<sup>68</sup> The LRC quickly became well known for “using the law as an instrument to challenge apartheid injustices and for representing black South Africans against the apartheid state”.<sup>69</sup> In this way, the LRC played an important role in resistance to apartheid legislation and policy in a range of areas, including housing and urbanisation. Forsyth describes the work of the LRC as bringing “test cases” before the courts in order to persuade courts to interpret legislation that affected communities in a more progressive manner, with “powerful arguments”.<sup>70</sup> Arthur Chaskalson explains that the LRC looked for issues “which would have an impact upon people beyond the particular clients that we were representing, so there was an attempt to identify issues of importance within the communities and to deal with them”.<sup>71</sup> He calls these “impact cases”, and identifies the pass laws or what he describes as the euphemistically termed “influx control”, as the first such issue targeted.<sup>72</sup> The LRC had significant successes in this area.

---

<sup>67</sup> Jean Cohen and Andrew Arato conceptualise civil society as “a sphere of social interaction between economy and state”, including the “sphere of associations” and “forms of public communication” - economic society (as distinct from civil society) is composed of “organizations of production and distribution” and this relates to civil society where “workers and others... try to represent their interests through... strategies based on economic and political pressure” (Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992, ix, 464).

<sup>68</sup> These included Arthur Chaskalson (who became the President of the newly-created Constitutional Court in 1994, and Chief Justice in 2001), Felicia Kentridge and Geoff Budlender. <https://lrc.org.za/who-we-are/>

<sup>69</sup> <https://lrc.org.za/who-we-are/>

<sup>70</sup> Forsyth, *In Danger for their Talents*, 90.

<sup>71</sup> Chaskalson became the first director of the LRC, leaving an established and very successful commercial practice at the Johannesburg Bar, although he had by then already defended accused in terrorism trials (Columbia University, “Oral History Interview with Arthur Chaskalson”, 12, 16).

<sup>72</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 17.

Chaskalson also emphasises the role of the left-wing media in giving “tremendous publicity” to these cases, including their meaning and implications decision – this “made a very, very big impact”.<sup>73</sup> The first dramatic success achieved by the LRC was the case of *Komani*.<sup>74</sup> The litigation started in the mid-seventies, and final judgment was handed down by the Appellate Division in 1980. Chaskalson recalls that the case had been brought to the LRC by the Black Sash in Cape Town. It concerned the notorious section 10 of the Blacks (Urban Areas) Consolidation Act 1945 and regulations under it, in terms of which Mrs Komani had been prosecuted for living with her husband. Forsyth describes this Act as “the economic and political heart of apartheid: the attempt to exclude from the urban areas... permanently resident black persons” in order to “justify the denial of political rights to blacks in the cities, as well as to control the movement of cheap labour from the countryside to the cities”.<sup>75</sup> These regulations were enforced by the Bantu Affairs Administration Boards. Chaskalson describes these Boards as “really terrible institutions... They were at the heart of apartheid. They were run by people who were ideologues committed to keeping South Africa white”.<sup>76</sup> The case concerned “the position of a wife, it really was a couple, but the man had rights to be in the city and the wife didn’t. For the wife had to get a permit to visit her husband and those permits would be for a very short space of time and you had to go through a terribly long, complicated process, humiliating process to get them and when you came, you could stay for seventy two hours or whatever the permit was for and then you’d have to go back to the homeland again”.<sup>77</sup>

The case turned on the effect of a regulation promulgated under the Act. The Act in sections 10(1)(a) and (b) provided a black person with the right to remain in an urban area in certain circumstances (for example when they had since birth resided there continuously), and section 10(1)(c) provided that a person who had entered the area lawfully, and ordinarily resided with the person who had the rights granted in the

---

<sup>73</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 18.

<sup>74</sup> *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A)

<sup>75</sup> Forsyth, *In Danger for their Talents*, 85.

<sup>76</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 18-19.

<sup>77</sup> LRC Oral History Project: Interview with Arthur Chaskalson (Johannesburg: Historical Papers, William Cullen Library, University of the Witwatersrand, 2012) Item ZA HPRA AG3298-25

<http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/d/e/deea5515832268a3bc31c16bd5a18a7f9114b3dff10d77ed636eb4a1a288e6ea/AG3298-1-025-text.pdf>

previous sections, also qualified to remain. However, Regulation 20(1) provided that no person could reside in the area without a “lodger’s permit” obtained from the superintendent of the area. This contradicted the Act, because a person with the right to reside under its provisions, nonetheless had to obtain a lodger’s permit. The LRC argued, and the Court held, that this in effect “changed the right to reside into a right which is subject to the discretion of the superintendent.”<sup>78</sup> The regulation was therefore *ultra vires*<sup>79</sup> and void.<sup>80</sup> In the result, Mrs Komani’s residing with her husband became lawful under the Act.<sup>81</sup> The effect would be wider, though, as unmarried children under eighteen were also permitted to reside with the right-holder in terms of section (10)(1)(c), and also no longer required a lodger’s permit.

The second major case brought by the LRC to challenge section 10 of the Act was *Rikhoto*.<sup>82</sup> The section provided that workers who had worked continuously for one employer in an urban area for ten years would have the right to remain in the urban area. However, in order to prevent this from actually happening, a work contract was limited to 360 shifts or one year, whichever was the shorter, after which the worker had to return to the rural area, and then on return had to seek a new contract with the same employer, which meant that it was impossible to work “continuously” for that employer. The Appellate Division upheld the judgment of the lower court, which had held that Mr Rikhoto’s employment by the same employer over ten years, albeit in terms of separate annual contracts, and despite his annual leave taken in a rural area, constituted continuous employment under the Act. In the result, Mr Rikhoto was declared to have earned the right to remain permanently in the urban area.<sup>83</sup> Chaskalson says that *Komani* “had a big impact because it allowed families to stabilise themselves and once families stabilised themselves in the cities, it meant that the city population would be growing,” but the *Rikhoto* case “meant that many, many people, thousands of people...I don’t know the figures, but I think it was in the hundreds of thousands of people, had...could claim rights. Because the system had been in place

---

<sup>78</sup> At 469.

<sup>79</sup> In other words, outside the lawful authority of the person that promulgated the regulation, as regulations may not contradict the provisions of the Act under which they were made.

<sup>80</sup> At 472-473.

<sup>81</sup> For a discussion of the legal reasoning, see Forsyth, *In Danger for their Talents*, 84-88.

<sup>82</sup> *Oos-Randse Administrasieraade n 'n ander v Rikhoto* 1983 (3) SA 595 (A)

<sup>83</sup> Forsyth, *In Danger for their Talents*, 88-89.

for a very long time... there was a huge number of people to whom this case applied.”<sup>84</sup> Initially, these judgments were ignored by the Boards, and the LRC had to make further applications to ensure that individuals entitled to protection under the judgment (and who were not getting it), would be protected.<sup>85</sup> Chaskalson recalls that the Boards “found all sorts of reasons not to” apply *Rikhoto*, and that during one of the cases they brought to enforce the judgment, Judge Goldstone reacted angrily (especially because the relevant Board did not even bother to appear in court to explain its actions), and demanded explanations – the following day, one newspaper reported it under a big banner headline saying “Judge slams Minister”.<sup>86</sup> That seemed to be a turning point, and the Boards started giving effect to the judgments, at least in the case of LRC clients: “In fact, if you had a letter from the LRC, they didn’t even look at the letter, they would just stamp the man’s reference book, stamp and send him away. I don’t know what was happening to others, but it did have a big impact, that case”.<sup>87</sup> Richard Abel describes the campaigns that resulted in these judgments as helping to “lay the foundation of a decade of cumulative, and ultimately victorious, challenge to the apartheid regime”,<sup>88</sup> but also describes in detail the fundamental difficulties experienced in achieving the consistent enforcement of the judgments by bureaucrats.<sup>89</sup>

Forsyth notes that these judgments represented a “relatively distinct break with the past” on the part of the Appellate Division, which demonstrated “a willingness to challenge government policy regarding urban blacks” which it had not done before.<sup>90</sup> He argues that the reasons for this willingness “remain obscure”, but he speculates that the harshness of the cases may have elicited some “natural sympathies”, and emphasises that the cases were decided on fairly narrow technical grounds.<sup>91</sup> Forsyth may not be entirely correct in this. It can be argued that a number of the conditions for progressive judgments that bring about social change identified by Rosenberg may

---

<sup>84</sup> LRC Oral History Project, 9-10.

<sup>85</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 18-19.

<sup>86</sup> LRC Oral History Project, 9-10. Judge Goldstone was known as a progressive judge, and was later appointed to the first Constitutional Court.

<sup>87</sup> LRC Oral History Project, 9-10.

<sup>88</sup> Richard L. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge, 1995), 65.

<sup>89</sup> Abel, *Politics by Other Means*, 28-43; 49-60.

<sup>90</sup> Forsyth, *In Danger for their Talents*, 90.

<sup>91</sup> Forsyth, *In Danger for their Talents*, 90.

have been present here, including a number of non-deferent earlier judgments in the lower courts as discussed earlier, developments in highly regarded civil society organisations during the late 1970s (like the UF and LRC), shifts in views on the part of state actors, like the Riekert Commission, and market factors, illustrated by the lobbying by the UF against influx control.<sup>92</sup> Abel also indicates the important effects on courts of the “intensified wave of resistance in the 1980s” and of support for progressive judgments from the media, civil society, the legal profession, and courts themselves.<sup>93</sup> This argument will be taken up again in later chapters.

Chaskalson says that he thought that these cases were “certainly one of the reasons which led to the whole collapse of the influx control system, the pass law system. It would be quite wrong to say that it was the only reason. It certainly wasn’t. There were all sorts of different pressures at work at the time. But the fact that the law now had become very unworkable and then the government had then to face it, a situation of devising a totally new system at a time of what was considerable public disturbance going on”.<sup>94</sup> This “considerable public disturbance” at that time, namely the 1980s, was what Lodge calls “the most massive and prolonged rebellion” in South African history, which shifted the balance of power between the apartheid state and the forces of resistance.<sup>95</sup> Resistance to the apartheid state and its policies accelerated during the 1980s, and the United Democratic Front (“UDF”), formed in Mitchell’s Plain, Cape Town in 1983, has been described as inspiring “an insurrectionary movement that was without precedent”.<sup>96</sup> The UDF and several other organisations addressed housing policy. For example, Mzwanele Mayekiso notes that the local council governing Alexandra in Johannesburg was forced by community mobilisation to withdraw a 100% rent increase in 1985,<sup>97</sup> and the UDF ran an extensive campaign of rent boycotts, together with campaigns addressing other “bread-and-butter issues of immediate

---

<sup>92</sup> Rosenberg, *The Hollow Hope*, 33-35.

<sup>93</sup> Abel, *Politics by Other Means*, 540, 548.

<sup>94</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 24.

<sup>95</sup> Tom Lodge, “Reform, Recession and Resistance”, in *All, Here and Now: Black Politics in South Africa in the 1980s*, edited by Tom Lodge and Bill Nasson (Ford Foundation, 1991), 23.

<sup>96</sup> Tom Lodge, “Reform, Recession and Resistance”, 23. The debate about the relative importance of the ANC in exile and resistance inside the country is beyond the scope of this discussion (see, for example, Lodge pp 23-32). In addition, a range of other community and civil society organisations continued the momentum initiated in 1976. See Seekings, *The UDF*, for a detailed account.

<sup>97</sup> Mzwanele Mayekiso, *Township Politics: Civic Struggles for a new South Africa* (New York: Monthly Review Press, 1996), 50.

relevance to ordinary people” which were very effective tools to mobilise communities.<sup>98</sup> Chaskalson also emphasises the role of communities and community organisations in the work of the LRC:

“You know, what happened was that as we worked with community organizations, we always related to organizations, because it seemed to us that once a decision were given or a litigation strategy were (sic) devised, it was important that it would go back into the community where people would be able to take advantage of what the outcome was, if it was a favorable (sic) outcome. So we always had links with community organizations”.<sup>99</sup>

The LRC next focused on a campaign to stop prosecutions under the Group Areas Act, which consisted of flooding the lower courts with lawyers to defend the accused, and which resulted in severe difficulties for the prosecution authorities, making such prosecutions virtually impossible.<sup>100</sup> Eventually, in the *Govender* case,<sup>101</sup> Judge Goldstone held that in cases involving evictions under the Group Areas Act, courts should take into account a number of factors, including whether there is alternative accommodation available.<sup>102</sup> Mrs Govender had spent 11 years on a waiting list, waiting for a house in an “Asian” area, and in the meantime had been living in Mayfair, a white suburb of Johannesburg, as an act of quiet encroachment widespread at the time. She had been convicted, fined and evicted under the Act by the lower court. Her appeal was upheld, on the grounds that there was no alternative accommodation available to her (at that stage, there was a shortage of 96 000 houses for coloured and Asian people).<sup>103</sup> John Gardner points out that this judgment largely stopped prosecutions under the Act: while there were 893 prosecutions between 1978 and 1981, there was only one in 1983.<sup>104</sup> Alan Dodson notes that, predictably, the state sought to amend the Act to reverse the effects of the judgment, but ultimately withdrew

---

<sup>98</sup> Ineke van Kessel, “*Beyond our wildest dreams*” *The United Democratic Front and the Transformation of South Africa* (Charlottesville: University Press of Virginia, 2000), 54.

<sup>99</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 28.

<sup>100</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 29.

<sup>101</sup> *S v Govender* 1986 (3) SA 969 (T). The judgment as given in 1982, but only reported in 1986.

<sup>102</sup> Muller “The Legal-Historical Context”, 387 fn 10.

<sup>103</sup> John Gardner, *Politicians and Apartheid: Trailing in the People’s Wake* (Pretoria: Human Sciences Research Council, 1997), 45-46.

<sup>104</sup> Gardner, *Politicians and Apartheid*, 45-46.

the draft legislation that was to do so: “the government now appears to be willing to accept and live with the effects of *Govender*”.<sup>105</sup>

Chaskalson emphasises that the work of the LRC and its interaction with communities demonstrates that law and litigation became “a site of - a form of struggle... it was a different form of resistance. You were resisting authority through the law, because it was all put in place by the law. Everything was a legal structure. And since it was put in place by the law, it had to be enforced by the law, and therefore the law became a site at which you could challenge it, ...challenging government policy through the courts. A great deal of publicity would be attracted. The press would report on it. So the media must also come into this”.<sup>106</sup> An important part of such legal and rights-based strategies is providing mechanisms to individuals and communities to pursue them. Chaskalson explains it as follows:

“the other thing about LRC is it really did involve people in thinking about their rights... [T]o me it's absolutely crucial that people claim the rights that they have and that people stand up to the abuse of power. And if you claim your rights and you stand up to the abuse of power, you change your own society. And I think the LRC gave people the opportunity to do that, but the people who were really the brave people were the people who came to the LRC to ask for that to be done, because they were the people who were being victimized. They were the people who ran the repercussions if something went wrong. I think if you're looking at the story of the LRC, the client communities were the real heroes of the whole story”.<sup>107</sup>

By the mid-1980s, it had become clear that the extensive urbanisation of black South Africans was inevitable. The developing housing crisis prompted a number of state investigations,<sup>108</sup> and the Development Bank of South Africa (“DBSA”) was

---

<sup>105</sup> Alan Dodson, “The Group Areas Act: Changing Patterns of Enforcement” in *No Place to Rest*, 153.

<sup>106</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 47-48.

<sup>107</sup> Columbia University, “Oral History Interview with Arthur Chaskalson”, 55.

<sup>108</sup> Including the Fouche Subcommittee of the Housing Matters Advisory Committee to investigate the promotion of private property ownership for the “Coloured and Asian population groups” in 1980, the Viljoen Committee to investigate private sector involvement in resolving the housing backlog in Soweto in 1981 (De Loor, *Housing*, 68) and the Commission of Inquiry into Township Establishment and Related Matters in 1982 (City of Cape Town, *A Memorandum to the Commission of Inquiry into Township Establishment and Related Matters*, July 1982). The memorandum details the City’s attempts to provide

established in 1983.<sup>109</sup> The President's Council report entitled *An Urbanisation Strategy for the Republic of South Africa*, which appeared in September 1985, called for the abolition of influx controls and the pass laws.<sup>110</sup> These proposals were largely accepted in the 1986 "*White Paper on Urbanization*", which marked a "substantial shift" in the apartheid state's policy on African urbanisation: instead of attempting to contain African urbanisation by coercive means, it was now viewed as inevitable, and even desirable in some respects.<sup>111</sup> Instead of coercive influx control, the approach would now be to encourage "orderly urbanization", including focusing state urban management strategies on "where and how African people live in cities".<sup>112</sup> All of this culminated in the Abolition of Influx Control Act of 1986. The 1980s saw an "unprecedented rate of urbanization" in South African cities: by May 1987, in Cape Town, the African population had grown from an "official" 200 000 in 1980 to an estimated 800 000 people.<sup>113</sup> In the Crossroads informal settlement alone, the population grew from 70 000 in 1975 to 202 000 in 1985.<sup>114</sup> All this exacerbated the housing crisis. In 1982 there were fewer than 13 000 family units and 28 000 "bedspaces" in hostel blocks to accommodate the entire African population of Cape Town, and the majority of that population lived in shacks or in seriously overcrowded conditions in built accommodation. A significant consequence of influx control was the accommodation of migrant African men who did not qualify as "permanent" urban dwellers terms of section 10 of the Blacks (Urban Areas) Consolidation Act, in single-sex, poor quality, overcrowded and supposedly temporary hostel dwellings in Nyanga, Langa and Gugulethu.<sup>115</sup> In June 1985, the Western Cape Hostel Dwellers Association was formed in an attempt to improve these living conditions by negotiating

---

housing to squatters and calls for the repeal of the Group Areas Act, and the recognition that the housing problem "must be accorded the highest priority as one of the most serious issues being faced by both national and local government today" (at pp 8 and 12).

<sup>109</sup> The DBSA was meant to assist in "addressing the needs of the poor and reducing economic inequalities by improving the quality of life of the less privileged communities." (De Loor, *Housing*, 165).

<sup>110</sup> Doug Hindson, "Orderly Urbanisation and Influx Control: from Territorial Apartheid to Regional Spatial Ordering in South Africa", in *Regional Restructuring Under Apartheid: Urban and Regional Policies in Contemporary South Africa*, edited by Richard Tomlinson and Mark Addleson (Johannesburg: Ravan Press, 1987), 74.

<sup>111</sup> Michael Sutcliffe, Alison Todes and Norah Walker, "Managing the Cities, An Examination of State Urbanization Policies since 1986", in *No Place to Rest*, 86.

<sup>112</sup> Sutcliffe et al, "Managing the Cities", 86, 99.

<sup>113</sup> Urban Problems Research Unit, University of Cape Town, *Western Cape Hostels Housing Upgrade Programme*, Working Paper No. 36, Occasional Paper No. 23 (University of Cape Town, May 1987), 3.

<sup>114</sup> Gardner, *Politicians and Apartheid*, 41.

<sup>115</sup> See Posel, *The Making*, 99-103.

“the upgrade and expansion of the hostel buildings and their conversion into family units”.<sup>116</sup> To this end, the Association approached a number of professionals for assistance, including the LRC, the Urban Problems Research Unit at UCT, the UF, and architects, quantity surveyors and engineers.<sup>117</sup> The project raised funds and pursued a pilot project of construction, which was evaluated by the Urban Problems Research Unit.<sup>118</sup> The reports produced by this evaluation in some ways demonstrate the central role of an active and mobilized community with political and strategic agency, and relationships with actors both in the state and in civil society developed by the community as active participants. They also demonstrate the often destructive role of the state, shaped at best by indifference and at worst by the racist policies of the era, as well as the many problems that beset such developments in a complex community operating in a hostile policy and funding context.

Against this background, “orderly urbanization” was clearly a failure, as the state’s “squatter, health and trespass laws did not prevent land invasions or the continued growth of informal development”.<sup>119</sup> In addition, the Group Areas Act “was fast failing”, with a growing movement of other races into “white” group areas.<sup>120</sup> Fanie Cloete describes the gradual movement of African, coloured and Indian residents who could not find accommodation in “their own areas” into some officially white suburbs as “illegal occupiers of properties”, often at exorbitant prices, in an attempt to be closer to workplaces and other amenities.<sup>121</sup> This process can be described as acts of resistance or at least as quiet encroachments while waiting for housing. Indeed, “orderly urbanization” could possibly be seen as having “accelerated the final collapse of apartheid’s spatial order” while it did “leave its imprint on the urban landscape with the creation of ‘semi-formal’ settlements on the urban periphery”.<sup>122</sup>

---

<sup>116</sup> By 1987, the Association had 14 000 signed-up members out of a total of 25 000 migrants in the Western Cape (Urban Problems Research Unit, *Western Cape Hostels*, “Preface”).

<sup>117</sup> Urban Problems Research Unit, *Western Cape Hostels*, “Preface”

<sup>118</sup> See the reports produced in 1993 and 1994 by Vanessa Watson for the Urban Problems Research Unit. A detailed discussion of this project is beyond the scope of this thesis.

<sup>119</sup> Harrison *et al*, *Planning*, 33-34.

<sup>120</sup> Such as Hillbrow, Mayfair and Yeoville in Johannesburg, Albert Park and Clairwood in Durban, and Woodstock, Salt River, Wynberg and Observatory in Cape Town (Harrison *et al*, *Planning*, 33-34; Gardner, *Politicians and Apartheid*, 47).

<sup>121</sup> Fanie Cloete, “Greying and Free Settlement” in *Apartheid City in Transition* edited by Mark Swilling, Richard Humphreys and Khehla Shubane (Cape Town: Oxford University Press, 1991), 93-94.

<sup>122</sup> Harrison *et al*, *Planning*, 33-34.

However, at the same time as this general relaxation of influx control measures, the apartheid state's repressive activities intensified, aimed at repressing the widespread insurrection of the 1980s. These two strands of state action at the time illustrate the pull between the ruthlessness and vulnerability of the apartheid state referred to earlier. A state of emergency was declared on 21 July 1985 and again on 12 June 1986, and permitted comprehensive repression by the state, including mass detentions without trial, torture and murder.<sup>123</sup> While the revolt appeared to have been crushed by the end of 1987, cemented by the banning of the UDF and seventeen other organisations in February 1988 – it appeared that the UDF had been driven off the streets during 1988 – by 1989 the revolt was resurgent, with the announcement of a “defiance campaign” of civil disobedience by a new alliance between the UDF and COSATU, called the Mass Democratic Movement (“MDM”). In February 1990, FW de Klerk announced the unbanning of the ANC, the release of Nelson Mandela, and the move towards negotiations.<sup>124</sup> This resulted in dramatic changes to the legal framework of housing and urbanisation policy, manifested in the Abolition of Racially Based Land Measures Act of 1991,<sup>125</sup> followed by “measures to accelerate urban land development for low-income groups” through the Less Formal Township Establishment Act of 1991, and the establishment of the Independent Development Trust (“IDT”) which “pioneered the housing subsidies, that were eventually adopted by the post-apartheid government”.<sup>126</sup>

This account of apartheid-era housing and urbanisation policy demonstrates the interaction between communities, civil society organisations, courts, and state policy and actions in shaping housing politics. It further indicates the ways in which notions of techno-politics and chronocracy, together with an understanding of waiting (as both a passive or submissive state, and the potential for quiet encroachments and often unlawful mobilisation and resistance), are able to frame the events of this era. Waiting for a house (at least for so-called coloured and Indian families) dates back to the early years of apartheid rule, and in later years also for black families. This legal activity

---

<sup>123</sup> Lodge, “Reform, Recession and Resistance”, 78-116

<sup>124</sup> Lodge, “Reform, Recession and Resistance”, 114-115. FW de Klerk had become first the leader of the National Party and then the President, in 1989.

<sup>125</sup> This Act scrapped the Group Areas Act, the Land Acts of 1913 and 1936, and the Black Communities Development Act of 1984.

<sup>126</sup> Harrison *et al*, *Planning*, 37.

(waiting) was intertwined with “quiet encroachments” like informal settlements and backyard structures, unlawful residence by families in hostels, and families living in violation of the law. At the same time, there was community mobilisation and resistance, assisted in many cases by civil society organisations, particularly legal aid organisations and progressive lawyers in private practice. All of this, together with other pressures on the apartheid state, resulted eventually in the evolution of a more progressive state housing and urbanisation policy (although of course not in the resolution of the housing crisis or the end of waiting for housing). The apartheid state during this period firstly consigned black South Africans to the “waiting room of history”, in the context of a racist notion of the “development” and “civilization” of these communities, and secondly imposed chronocratic rule by utilising the power of the state to “shape the temporalities in which people live out their everyday lives” – in particular, by engendering inequality and exclusion and the attendant insecurities in both temporal and spatial dimensions.<sup>127</sup> This is evident in the situation of people who surreptitiously lived in the “wrong” Group Area while waiting for a house in the “right” Group Area, or people “squatting” illegally while waiting for a house. These years can also be framed as an example of techno-politics, where the issue of housing as infrastructure functioned “as a vehicle for political actions and struggles over power”.<sup>128</sup> These features of housing politics only intensified into the transitional years and the post-apartheid era, as discussed in the next chapters.

### **The Dassenberg community**

In order to demonstrate concretely the possibilities of the interaction between state, law and community in shaping housing policy during this era, the final section of this chapter provides an account of the story of the Dassenberg community in Noordhoek, Cape Town. The story in some respects started in 1986, although the history of the community dates back to the 1950s, partly came to an end in 1990 with an Appellate Division judgment, and then continued into the 1990s.<sup>129</sup> In this way, the story spans

---

<sup>127</sup> Kirtsoglou and Simpson, *The Time of Anthropology*, 3.

<sup>128</sup> Von Schnitzler, *Democracy's Infrastructure*, 11.

<sup>129</sup> The facts used in this account are drawn from the report by the Development Action Group, *Masiphumelele: A Case Study of the Role of the Development Action Group in the Informal Community in Noordhoek* (Cape Town: Development Action Group, June 1996) <https://www.dag.org.za/wp-content/uploads/2023/10/masiphumelele-noordhoek-case-study.pdf>;

almost the entire period discussed in this chapter. The aim is to consider this as a story of quiet encroachments and waiting; community mobilisation and resistance assisted by civil society organisations; the contestation and negotiation of state power, including by means of litigation; and the everyday experience of law and the state by the community. A central actor in the story was the Development Action Group (“DAG”).<sup>130</sup> DAG was formed as a volunteer organisation in 1986, after the destruction of Crossroads as the result of community violence.<sup>131</sup> This resulted in a movement calling for “development professionals to refuse to participate in replanning Crossroads, unless the community, as it had existed before the violence, was fully involved”. This led to a meeting

“to gauge support for the idea of ‘establishing a planning aid group to assist community and worker organisations wanting to develop strategies to improve or transform the conditions of the places in which they live and work’. Such a group, it was hoped, could contribute to a growing resistance to the undemocratic planning methods being used by the state to achieve its political objectives. After extensive consultation with progressive community organisations, the Development Action Group was born”.<sup>132</sup>

The Dassenberg community’s struggle began in the 1950s, when the apartheid government declared the Southern Peninsula a white Group Area and forcibly removed all coloured people from the area to Ocean View, “a dormitory town” near Kommetjie. However, no provision was made for African residents, who had to move to Langa, Gugulethu or Khayelitsha and travel 30 km daily to get to work, or settle illegally on vacant land.<sup>133</sup> Many had no choice but to settle illegally in the area,

---

and from the reported judgments by the Cape Provincial Division (now the Cape High Court) and the Appellate Division (now the Supreme Court of Appeal). The judgments are reported as *Ntshwaqela and Others v Chairman, Western Cape Regional Services Council and Others* 1988 (3) SA 218 (C) and *Administrator of Cape of Good Hope and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) (the latter is also available at <https://www.saflii.org/za/cases/ZASCA/1989/167.html>).

<sup>130</sup> Their account of the facts, together with the facts as set out in the two court judgments in respect of the community’s struggle, provides the material for the analysis.

<sup>131</sup> This was as a result of conflict between factions in the community, later confirmed as having been instigated and supported by the South African police, who armed one of the factions. A discussion in beyond the scope of this thesis. See <http://www.sahistory.org.za/place/crossroads-township> and <https://sabctrc.saha.org.za/glossary/witdoeke.htm?tab=report> from which the Truth and Reconciliation Commission’s report on these events can be accessed.

<sup>132</sup> <https://www.dag.org.za/who-we-are/history/>

<sup>133</sup> DAG, *Masiphumelele*, 3.

building shacks in the bush around Noordhoek, Fish Hoek, Kommetjie and Hout Bay. They were subject to constant police harassment over the years, getting arrested and having their shacks demolished, but many returned and rebuilt every time, as they were employed in the area (as casual labourers, domestic workers and gardeners) and could not afford commuting.<sup>134</sup> In the late 1970s, many farmers started selling off farmland to developers for housing developments. Farmworkers lost their jobs and homes, but many joined the informal settlements in order to stay in the area, where there was work in construction and in the new housing developments, and the informal settlements continued to grow. While influx control was abolished in 1986, “orderly urbanization” resulted in the threat of the forced removal of informal settlements to Khayelitsha, using the Prevention of Illegal Squatting Act and other legislation.<sup>135</sup>

In its judgment, the Appellate Division briefly sets out the history of the land. The farm had been owned by the De Villers family for 90 years, and farming operations were still being carried out there in 1987. It appeared that portions of the farm were hillside scrubland and unsuitable for farming. It was there amongst the scrub that the shacks made of wood, corrugated iron and plastic had been built – the Court refers to “large numbers”, but no actual number is recorded.<sup>136</sup> This presumably had no effect on the farming operation. The informal settlement was nonetheless a problem for the owners for many years. After December 1982, the farmer had made several attempts to remove the settlement and to demolish the shacks, without success. The community ignored or resisted all demands to move. The issue became acute in 1987 because of a sudden and large increase in the population of the settlement, which led the farmer to lay charges with the police, but no prosecution followed. The authorities (including the provincial administration and the police) became “gravely concerned”, for reasons including a concern about public health, as there was no water supply or sanitation or any other services. On 9 April 1987 the local authority gave the farmer a warning to remove the shacks in the settlement “on pain of prosecution”.<sup>137</sup>

---

<sup>134</sup> DAG, *Masiphumelele*, 4.

<sup>135</sup> DAG, *Masiphumelele*, 4.

<sup>136</sup> At 709.

<sup>137</sup> At 709-710.

DAG records that earlier, in January 1987, 35 families in the settlement were charged with trespassing and told to move to Khayelitsha. They refused, and stated that they “belonged” in the area, and not in Khayelitsha – they would die rather than move there. Various groups rallied around the community, and a Noordhoek Squatters Support Group was formed, made up of the Surplus People Project, Black Sash, and supportive members of surrounding white communities. This group approached DAG for assistance, which conducted a survey of the community and of land available in the area. An attempt was made to remove the community in April, but this was abandoned after “organisations ensured that the eviction was attended by “the press, embassy officials, and various welfare agencies and organisations”.<sup>138</sup> The Appellate Division judgment describes these events, which were no doubt prompted by the warning from the local authority, as starting with a meeting on the farm on 14 April 1987.<sup>139</sup> The farmer, a member of the police, and representatives of the Regional Services Council attended, telling the community that it had to move, and that sites had been arranged for them in Khayelitsha. The community was told that if they left voluntarily, they would not be criminally charged, but if they refused to leave by 15 April 1987, they would be charged the next day. It appeared that there had been indications that the community would leave voluntarily on 21 April, and transport was arranged for that day. On that day, the community held a religious service, after which most residents stated that they were not prepared to go to Khayelitsha, and only two families left. The slightly differing accounts of the facts of that event by DAG and the Court illustrate the difficulties of determining “what really happened” – the Court would have drawn its account from the affidavits filed and oral evidence given, while DAG probably obtained its accounts from members of the community and organisations involved.

The Appellate Division judgment also sets out what happened to the land after those events, and which prompted the eventual evictions and resultant litigation. In June 1987, the owners of the farm granted an option to purchase the farm to a development syndicate. The option documents recorded the presence of the informal settlement, confirmed that it was there without the permission of the owners, and authorised the

---

<sup>138</sup> DAG, *Masiphumelele*, 4.

<sup>139</sup> At 710.

developers to take steps to remove the settlement. This resulted in “heavy present and future financial commitments” on the part of the developers, and of course the owners were keen to be paid the purchase price. During the following months, meetings were held between representatives of the various state authorities, the police, the owners and the option-holders, after which notices were issued to the community to vacate in August and November, which were ignored. Eventually a plan was devised to remove the community on 2 December 1987. The eviction was to include all the informal settlements on public and private land in the Noordhoek area, some 650 people living in 107 shacks.<sup>140</sup> Both of the court judgments set out the brutal nature of the eviction: at dawn, with helicopters overhead, nearly 200 armed policemen, personnel with loudhailers telling people to dismantle their shacks and pack them onto waiting trucks and threatening arrest and prosecution if they refused, a front-end loader probably to demolish shacks of people who refused to pack up, and roadblocks sealing off the area.<sup>141</sup> The event was described in the media as “the biggest forced removal in the Western Cape in recent years”.<sup>142</sup> Everyone was taken to Khayelitsha, with their building material and belongings, where they found what the Appellate Division described as “two rows of green tents on a flat sandy strip of recently-cleared land, which was windswept and without shade... two water taps and some corrugated iron latrines”.<sup>143</sup>

According to DAG, the community soon set about returning to the land. A committee was elected, and with the help of the Surplus People Project and Sandra Liebenberg from the progressive firm Bernadt, Vukic and Potash, put together the court application. Mr Joseph Ntshwaqela became the first applicant in the litigation, and the case accordingly bears his name. He had been born in the area, and had lived there all his life.<sup>144</sup> The approach taken was the same as that in the *Fredericks* case discussed earlier. The application, brought on 21 December 1987, was for a spoliation order, namely an order restoring the applicants to the land of which they had been dispossessed unlawfully. As explained earlier, this avoided any debate over the legality of their occupation in the first place, and simply enquired into the lawfulness of

---

<sup>140</sup> At 710-711.

<sup>141</sup> At 711-712; Cape High Court at 223-224.

<sup>142</sup> DAG, *Masiphumelele*, 4-5.

<sup>143</sup> At 712.

<sup>144</sup> DAG, *Masiphumelele*, 1.

the dispossession. The Cape High Court handed down judgment on 15 April 1988. The judgment explains that one of the defences of the authorities was that they had not dispossessed the communities of their land, because they had in fact left voluntarily.<sup>145</sup> This was rejected entirely by the Court, which held that “to say that the squatters vacated the land voluntarily is to fly in the face of the evidence. Applicants departed against their will without consenting to do so”.<sup>146</sup> The Appellate Division called that conclusion “unassailable”.<sup>147</sup> According to the Cape High Court, that meant that the action of the authorities constituted “self-help”:

“...applicants were dispossessed against their will and without the authority of any order of this Court... In acting as they did, ... all the respondents took the law into their own hands. They were guilty of what is called self-help. This Court must insist on observance of the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by due process of law. If he is interfered with unlawfully the Court will not condone such interference. It will redress the situation pending the taking of lawful action for ejectment.”<sup>148</sup>

In this, the Court followed the judgment in *Fredericks* handed down a decade earlier. The Court accordingly ordered the authorities and owners to “restore applicants to undisturbed possession of the respective sites occupied by them as at 2 December 1987”.<sup>149</sup> This order was confirmed on appeal 30 November 1989.<sup>150</sup> However, the community had by then in any event returned to Noordhoek, pursuant to the Cape High Court order, and assisted by private vehicles that returned the community and their belongings. It appears that the Regional Services Council had made available vacant land owned by it across from Dassenberg, named “Greenpoint” by the community. Presumably, this land was made available following negotiations between

---

<sup>145</sup> CPD at 221.

<sup>146</sup> At 225.

<sup>147</sup> AD at 714.

<sup>148</sup> CPD at 225.

<sup>149</sup> At 229.

<sup>150</sup> The appeal process can be lengthy, as a record of the proceedings has to be prepared, and heads of argument filed by both sides, after which a date is allocated on a busy court roll. The judgment was reported in 1990.

the developers of the original site, and the Council. DAG records that there was an atmosphere of celebration as the community was rebuilding their homes. One resident was recorded as saying later that “it was very nice there because we could work and it was close to Dassenberg”.<sup>151</sup> By 1989, there were 150 structures constructed out of wood, corrugated iron and plastic at Greenpoint, and further structures at Kommetjie, Ocean View, Fish Hoek and Redhill. The struggle for permanent settlement still lay ahead, and DAG was instrumental in that process. That story ends quite happily in December 1992, but the events of the two intervening years were shaped by the process of transition to democracy which started in early 1990, and the attendant evolution of housing politics and policy. For that reason, that part of the story is taken up in the next chapter.

## **Conclusion**

Against this background, it is clear that the housing and homelessness crisis in South Africa has deep roots in many decades of inept but devastating policies and their implementation. While much of this time can be described as black South Africans spent in “the waiting room of history”, waiting for housing and democracy, there are many stories of resistance to the apartheid state, on the terrain of housing, by individuals and communities aided by a range of actors including community-based, progressive non-governmental and legal aid organisations, as well as lawyers in private practice. As a result, there was constant interaction between communities, courts and the state, which shaped housing policy and politics in different ways. In this way, waiting for housing took on many forms, and this complexity demonstrates the range of experiences of marginalised communities of the process of waiting. The role of the courts in these issues clearly started shifting even before the transition to democracy, demonstrating a measure of autonomy from the apartheid state on the part of courts, and also showing the ways in which shifts in community activities read together with supportive civil society organisations, and the resultant shift in state policy, can develop together with shifts in judicial conduct, in complex multi-directional ways. This is explored again in the next chapter, where focus is on the role of courts during the transition to democracy.

---

<sup>151</sup> DAG, *Masiphumelele*, 6-8.

## **Chapter 2**

### **The state in transition**

The transition from apartheid to democracy in South Africa was officially set in motion in February 1990. This process shaped national and local approaches to housing policy, as well as the role of community participation and activism, civil society participation, and litigation strategies, which by the mid-1990s had become rights-based litigation strategies. The process of transition was in many ways a process of constitution-making, and was largely framed as such by the different political groupings involved. The period of transition also saw the institutional transformation of the state housing sector and the evolution of theories and ideologies in respect of housing and homelessness on the part of state actors and institutions. This chapter accordingly explores the role of the state in the design and implementation of housing and informal settlement policy and in the politics of housing in Cape Town during the period 1990-1996, against the background of the transition to democracy, marked by the first democratic elections in 1994 and the adoption of the final Constitution in 1996. An important part of this period of transition was the mobilisation of communities, and the activities of a range of non-state actors and civil society organisations, including legal aid organisations and progressive lawyers in private practice, which led to litigation on the issues. The waiting for democracy was nearly over, but the waiting for houses continued. However, the waiting now took on a different character in some ways, and for a range of reasons, and this developing process is one of the issues addressed in this chapter.

### **The evolution of state housing policy during the early 1990s**

During 1991 a series of legislative measures removed the remaining legislative instruments of spatial apartheid.<sup>1</sup> The Less Formal Township Development Act came

---

<sup>1</sup> Mainly by means of the Abolition of Racially Based Land Measures Act of 1991, which scrapped the Group Areas Act, the Land Acts, and the Black Communities Development Act. This was accompanied by the adoption of the Upgrading of Land Tenure Rights Act of 1991 and the Less Formal Township Establishment Act of 1991, aimed at accelerating urban land development for poor communities, and the establishment of the IDT which developed a system of housing subsidies eventually adopted by the post-apartheid government (Harrison *et al*, *Planning*, 37).

into effect on 1 September 1991.<sup>2</sup> Almost immediately, in October 1991, the Act was relied on by the Transvaal Provincial Administration (“TPA”) to start the process of developing serviced sites for a group of homeless people who had become known as “the Zevenfontein squatters”. This process culminated in the establishment of a township called Diepsloot, north of Johannesburg. The process is discussed below in the context of the litigation and the interaction with communities that attended it, because although its setting is not in the Cape Town area, it demonstrates the rapid evolution of the late-apartheid state’s approach to urbanisation, housing and informal settlements from 1990 onwards. Furthermore, the final decision in the litigation was made by the Appellate Division, which resulted in judicial precedent and thus authority applicable to the whole country.

A further example of this evolution of state policy is the South African Housing Council De Loor Commission on Housing in South Africa which was established in 1990, and which reported in 1992.<sup>3</sup> Paul Hendler notes that the Commission was greatly influenced by the advocacy of the UF, which “advocated a one-off capital subsidy as the panacea for South Africa’s housing woes”.<sup>4</sup> This was recommended by the Commission, and “subsequently formed part of the transitional arrangements”, whereafter it was incorporated into the post-apartheid national housing policy.<sup>5</sup> The Commission saw its mission as investigating ways of addressing the serious “housing plight” in South Africa.<sup>6</sup> The Commission recommended new policies and institutions on the basis of the principles of non-racialism, community participation, and the involvement of the private sector.<sup>7</sup> It defined a minimum standard for “adequate housing” quite extensively.<sup>8</sup> It did, however, also recommend that “informal housing

---

<sup>2</sup>The full text of the Act is available at <https://www.sagc.org.za/pdf/legislation/Less%20Formal%20Township%20Establishment%20Act%2013%20of%201991.pdf>

<sup>3</sup> Paul Hendler describes it as “a major housing think tank” initiated by the De Klerk government, and which “laid the basis for housing policy going forward” (Paul Hendler, “Houses for the People: The Relevance of NGOs to Housing Delivery” in Planact, *Making Towns and Cities Work*, 222).

<sup>4</sup> Hendler, “Houses for the People”, 222.

<sup>5</sup> Hendler, “Houses for the People”, 222.

<sup>6</sup> In this regard, it recorded that in 1990, there were 1 330 969 informal housing units across the country, including legal, illegal and backyard structures (De Loor, *Housing*, 81). This was later argued by Planact to be an under-count by about 50% (Hendler, “Houses for the People”, 222).

<sup>7</sup> De Loor, *Housing*, 194; 284.

<sup>8</sup> It was defined as being “a formal house providing separate living quarters for parents and children... private ablution facilities and facilities for the preparation of food”, and providing “adequate protection against the elements”, privacy, security of tenure, and “integration into a system of housing which in fact relates to the evolution and development of viable communities (De Loor, *Housing*, 80).

structures” should be “accepted as part of the solution to South Africa’s housing challenge.”<sup>9</sup> The Commission’s focus was on what it argued was the importance of a “strategy which will lead to a more market-orientated housing sector” which “will benefit both the housing sector and the economy at large.”<sup>10</sup> In this regard, it was of the view that investment in adequate housing as defined “must in terms of economic principles contribute to the creation of wealth.”<sup>11</sup> Against this background, the Commission recorded with approval the activities of what it called “central government corporate institutions”.<sup>12</sup> Hendler records that Planact<sup>13</sup> produced a critique of the De Loor Report, which argued that the Report’s proposal on housing delivery “did ‘not address the issue of community participation through focusing on finance and housing delivery enterprises, which are linked to social housing principles rather than having private profitability as their *raison d’etre*.”<sup>14</sup> A further comprehensive critique was provided by the Urbanity and Housing Network at the University of Cape Town.<sup>15</sup> David Dewar

---

<sup>9</sup> De Loor, *Housing*, 365.

<sup>10</sup> De Loor, *Housing*, 94.

<sup>11</sup> For this position, it relied on the “Global Housing Strategies compiled on the initiative of the United Nations”, which “state explicitly that it is no longer sufficient to rely on the public sector to solve the low-income housing sector”, see a partnership with the private sector as essential, and recommend that “all countries should endeavour to develop policies and institutions which are integrated into their capital markets.” (De Loor, *Housing*, 80, 96-97).

<sup>12</sup> De Loor, *Housing*, 163. These included the South African Housing Trust (“SAHT”). The Trust had been established in 1987 as a joint venture between the private sector and the government (De Loor, *Housing*, 163). The Trust aimed to provide mortgage loans to home-owners who required loans of less than R25 000, and during the period 1990-1991 developed and facilitated 9 900 serviced sites, 12 500 houses and 7 200 new home loans totalling R195 million. The DBSA was recorded as having provided loans of R258 million for urban development focused on providing bulk infrastructure during 1990-1991 (and encouraging private sector participation), and the IDT as having provided R750 million during that time for its capital subsidy scheme, based on a grant of R7 500 per person “to acquire a serviced site” (De Loor, *Housing*, 163-168). The Commission further recorded the activities of the UF related to the “development and sale of serviced stands and houses” through a number of “housing utility companies” which provided or assisted with the provision of “end-user finance”, with the aim of facilitating and guaranteeing home loans between R12 500 and R35 000. To this end, it received grants from foreign governments and short-term interest-free loans “from local and international private sector sources” (De Loor, *Housing*, 180-182).

<sup>13</sup> Planact was established in 1985 “by a group of urban development professionals committed to social and political change in South Africa”, and who “wanted to use their professional expertise to support the growing consolidation of local organisations in support of a political change agenda.” Planact focused on providing services to communities in respect of “pragmatic built-environment issues such as housing and services”. See Lauren Royston, “A Short History of Planact and its Work” in Planact, *Making Towns and Cities Work*, 3. Planact will be referred to later in this chapter, but as most of its work focused on the Johannesburg area, a full account is beyond the scope of this thesis.

<sup>14</sup> Hendler, “Houses for the People”, 222.

<sup>15</sup> Dewar recorded that the Network was established late in 1992, and was “driven by a concern to use housing policy to restructure and reconstruct Southern African cities; to create settlements of quality; and to meet more successfully the basic needs of urban communities and households” (David Dewar (ed.) *The De Loor Task Group Report on Housing Policy for South Africa: Some Perspectives* (The Urbanity and Housing Network, University of Cape Town, Working Paper No. 1, September 1992, “Preamble”, 1).

called the Report “an important document” which provided a reference “from which to launch a serious, long overdue, debate on housing policy in South Africa.”<sup>16</sup> Dewar himself made a submission to the Commission during its deliberations, in which he argued that the housing problem is “complex” and therefore “experimentation is the key” and “many forms of initiative must be stimulated”: “The super-imposition of yet another over-simplified approach will fail”.<sup>17</sup> Peter Wilkinson’s critique of the Report focused on the failure to understand and take into account the wide variation in housing needs, and the resultant “standardisation” and “quantification of aggregate housing need as the target of a comprehensive, programmatic ‘solution’ that renders its approach both technocratic and... unstrategic”.<sup>18</sup> Finally, Graham Ramsay applauded the Report for its emphasis on “accepting informal housing as one essential plank in a positive housing strategy... [and] the importance of the consolidation of units over time to acceptable standards, but points out that it shows “a curiously watered-down approach to it”. He emphasised that “the homeless will have to be organised to build for themselves”, and that capacity must be created for them to use their own labour and “spending their own meagre cash resources in ways which are rational to them”. Furthermore, the Report recommended just one method which requires no substantial financial commitment from the prospective home-owner, namely a serviced site made available at no charge with the option to purchase later. This approach “has to be expanded if self-help is to be stimulated and “self-sufficient communities [are to] be propagated”.<sup>19</sup>

---

<sup>16</sup> Dewar, “Preamble”, 1.

<sup>17</sup> David Dewar, “Submission to the De Loor Task Group Inquiry into a New Housing Policy and Strategy” in *The De Loor Task Group*, 1.

<sup>18</sup> Peter Wilkinson, “Housing Need and Housing Policy in South Africa” in *The De Loor Task Group*, 31; 41-42. Similarly, Dewar argued that the Report tended to “individualise the housing problem” while policy should “mobilise collective energies and resources”, and warned that the private sector would be unlikely “to enter investment arenas of excessively high risk”, which required instead greater state involvement and experimentation with innovative forms of lending, including group lending (David Dewar, “Reality or Myth? An Evaluation of the De Loor Task Group’s Proposals on Housing Policy” in *The De Loor Task Group*, 53). Julian Cooke further pointed out that the Report did not adequately deal with migrant hostels, and described the success of the initiative by the Western Cape Hostel Dwellers’ Association (referred to in the previous chapter), which he described as “by far the most advanced community-based initiative dealing with the upgrading of hostels in South Africa” (Julian Cooke, “Migrant Labour Hostels and the De Loor Task Group Report”, in *De Loor Task Group*, 78).

<sup>19</sup> Graham Ramsay, “Informal Housing, Affordability and Building Standards” in *De Loor Task Group*, 85-86.

## Diepsloot

As indicated earlier, during this time the Diepsloot process unfolded.<sup>20</sup> The Zevenfontein squatters<sup>21</sup> occupied farmland in the Zevenfontein area which they had sublet from the lessee of the land, paying rental per household and shack.<sup>22</sup> The settlement appears to date back to the mid-1980s, and had apparently been subject to forced removals and the destruction of shacks during 1991.<sup>23</sup> After their tenancy had been lawfully terminated, they refused to leave. They were evicted following an eviction court order, at the end of September 1991, and they moved on to an adjoining property. The settlement soon grew dramatically.<sup>24</sup> Indeed, as a result of “socio-political changes” that entire area<sup>25</sup> saw rapid urbanisation at that time, with a large number of people migrating to the area “in search of employment opportunities”: “There was a pressing need for land to accommodate these people”.<sup>26</sup> The Administrator of the TPA accordingly assembled a task team “to study and report on the means of ensuring orderly long term urbanisation” in the area.<sup>27</sup> However, by then the Administrator had become concerned about the Zevenfontein squatters, and asked the task team to report additionally and urgently on that situation specifically.<sup>28</sup> The Zevenfontein report included documentation setting out various proposals, thirteen possible sites for low cost housing identified by TPA officials, a detailed evaluation of a smaller number of sites by officials of the TPA (including Diepsloot West, which became known as “the Diepsloot site”), and public objections to those.<sup>29</sup>

---

<sup>20</sup> Unless otherwise indicated, the facts of the process set out here are mainly drawn from the judgment of the Appellate Division in the *Diepsloot* case reported as *Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal* 1994 (3) SA 336 (A).

<sup>21</sup> At that stage comprising forty-five families of approximately six members each.

<sup>22</sup> Stephen Durand, *A social support network in an informal settlement : Zevenfontein* (Master of Arts, University of Johannesburg, 2015), 60.

<https://ujcontent.uj.ac.za/esploro/outputs/graduate/A-social-support-network-in-an/9912561807691>

As recorded earlier, the facts reported in respect of such communities and the attendant litigation by various sources differ, which renders it impossible to establish what “really happened”. The discrepancies in this case are not relevant for present purposes, and this account relies mainly on the version reported by the Appellate Division, unless otherwise indicated.

<sup>23</sup> Durand, *A social support network*, 56-57.

<sup>24</sup> AD judgment at 342.

<sup>25</sup> That area was known at the time as the Pretoria-Witwatersrand-Vereeniging region, or the PWV.

<sup>26</sup> At 342.

<sup>27</sup> At 342-343. The task group included a large number of experts and government officials under the direction of the chief town and regional planner of the TPA, and it consulted widely. The task group reported its general findings to the Administrator on 30 March 1992.

<sup>28</sup> That report was submitted on 2 March 1992, and both reports were considered in an executive committee of the TPA on 5 June 1992.

<sup>29</sup> At 343.

In the event, the Diepsloot site was chosen, relying on the provisions of the Less Formal Township Development Act, and the relevant properties were expropriated by the Administrator on 9 June 1992.<sup>30</sup>

The land-owners and residents of several surrounding areas were up in arms, and a range of threats, protests and marches by those residents were reported in the media.<sup>31</sup> On 26 June 1992, the Diepsloot Residents and Landowners Association brought an urgent application for an interim interdict to prevent the Administrator from proceeding with the settlement pending an action for final relief, namely permanently preventing the establishment of the settlement. The grounds advanced included allegations that the settlement would present a nuisance because of increased air pollution from fires for cooking and heating and increased crime rates and conflict (which would allegedly result *inter alia* from settling two communities with “socio-economic and cultural differences” in close vicinity), and would cause “unlawful interference with the rights of the Diepsloot residents to the enjoyment of their properties” including a negative effect on the value of their properties.<sup>32</sup> The first judge, in the urgent application, on 30 July 1992 granted the interim interdict and referred certain issues to oral evidence.<sup>33</sup> The second judge heard the oral evidence during November and December 1992. He dismissed the application, mainly on the basis that the exercise of the Administrator’s powers under the relevant Act could be seen as inevitably resulting in a degree of impact on the surrounding properties (for example nuisance and diminution of property values) and on the common law rights of the owners, that the Legislature would have foreseen this, and that it was therefore permissible in terms of the Act.<sup>34</sup> The Court also referred to the urgent need for accommodation as a result of unavoidable urbanisation – it recorded that at the time, there were 400 000 indigent families in the PWV area requiring accommodation.<sup>35</sup> Furthermore, that urgent need “can hardly be met if land is allocated in an area far

---

<sup>30</sup> At 343-344. The expropriation was done under the provisions of the Expropriation Act 63 of 1975.

<sup>31</sup> Durand, *A social support network*, 61-68.

<sup>32</sup> At 344-345 and 354.

<sup>33</sup> Such an order is made when there are disputes of fact which cannot be resolved on the basis of the affidavits alone, and the presiding judge would be assisted by the cross-examination of witnesses by counsel on both sides. That judgment is reported as *Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal and Others* 1993 (1) SA 577 (T).

<sup>34</sup> This judgment is reported as *Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal and Others* 1993 (3) SA 49 (T). This reasoning is set out at 62-65 and 68.

<sup>35</sup> At 65.

distant from where such persons find themselves... and the object of the Act would be defeated if the settlement is to be established in an area to which they could not reasonably be expected to move.”<sup>36</sup> That decision was eventually upheld on appeal in all respects, as discussed below.

While the litigation was under way, the Administrator published an official notice (on 8 July 1992), in which he designated the land that made up the Diepsloot site for “less formal settlement”, in terms of the Less Formal Township Development Act. The proposed layout plan for the Diepsloot site provided for 1 324 residential stands, the majority of which averaged 250 square metres; three schools; sixteen community sites; two business sites; and twelve parks. The intention was “to settle approximately 8 000 people on the Diepsloot site, including about half the number of the Zevenfontein squatters”.<sup>37</sup> By that stage, the community included about 750 households or 4 000 people, living on a site of one square kilometre, with four water tanks and 80 toilets provided by the TPA, and no other services.<sup>38</sup> The community had by then also become organised and mobilised, and had elected a committee to represent them in their negotiations with the TPA and outside organisations. Regular public meetings were held to inform the community of progress or setbacks, and there was a strong sense of community.<sup>39</sup> The committee comprised fourteen residents who set up a community hall with poles, tarpaulin and a borrowed generator providing light, and chairs from their shacks, and who met for four hours every night to discuss what to do.<sup>40</sup> Mr Eric Ngeleza of Operation Masakhane for the Homeless, a national organisation which appeared to have been involved with the community, said that the community had “constructive plans for the future”, and wanted to “train their people to build decent homes... but no one wanted to hear their side of the story”.<sup>41</sup>

---

<sup>36</sup> At 63.

<sup>37</sup> AD judgment at 344.

<sup>38</sup> Durand, *A social support network*, 58. According to Anton Harber, *Diepsloot* (Johannesburg: Jonathan Ball Publishers, 2011), 11, the settlement had by then already “rocketed to about 8 000”. The discrepancy is inexplicable, but not important for present purposes.

<sup>39</sup> Durand, *A social support network*, 58.

<sup>40</sup> Harber, *Diepsloot*, 14. Harber’s account focuses on the reality of life in Diepsloot in the late 2000s, but he includes a short account of its history. Here he reports the observations of Peter Wellman, a journalist who spent time with the community before the move to Diepsloot.

<sup>41</sup> Durand, *A social support network*, 65.

The judgment of the Appellate Division records the Court's awareness of the dire situation in which communities such as the Zevenfontein squatters found themselves, and of the urgent need for government to assist. The Court's reasoning was developed against the background of its "judicial cognisance" of "significant developments [that] took place in the Republic in 1991 with regard to the dismantling of the system of apartheid". This was apparent from the fact that parliament had "passed laws repealing a wide range of racially discriminatory legislation dealing, *inter alia*, with the ownership and occupation of land". The Court further noted that 1991 "also saw a rapid increase in urbanisation with resultant squatting in urban areas", and that these "changing circumstances" had resulted in a range of statutes (listed above), including the Less Formal Township Establishment Act, which was the focus of the judgment. The Court held that it is "permissible to view and interpret the relevant provisions of the Act against the background of these developments which are sufficiently well-known for judicial cognisance to be taken of them".<sup>42</sup> As in the second judgment discussed above, the Appellate Division considered the main issue to be whether the Act in effect permitted the infringement of the common-law rights of the surrounding property-owners. If it did, then the decision-maker in terms of the Act had "immunity" in respect of such infringement, and cannot be considered to have acted wrongfully. In the event, it decided that the Administrator did have such immunity in terms of the Act.<sup>43</sup> For this reasoning, it relied almost entirely on authority from 1927.<sup>44</sup> The issue was considered as a question of the construction of the Act, "involving a consideration of the relevant provisions of the Act as well as its purpose".<sup>45</sup> In this regard, the Court held that "the Act was enacted against the background of the repeal of discriminatory legislation, increased urbanisation and the resultant squatter problem": "There was an urgent need to provide for the speedy and orderly settlement of homeless persons".<sup>46</sup> The purpose of the Act was accordingly to provide for "less

---

<sup>42</sup> At 347. Judicial cognisance or judicial notice may be taken of facts that are not canvassed on the papers or in evidence, if those facts are sufficiently well known. See, for example, Marie McGregor, "Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces" in *De Jure* (Vol.8, 2011), 121-123.

<https://www.saflii.org/za/journals/DEJURE/2011/8.html>

<sup>43</sup> Its reasoning in this regard is set out at 345-353, which comprises the majority of the judgment.

<sup>44</sup> At 345-346 and 350. The authority in question is the case of *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163. The judgment in that case was authored by then-Chief Justice Innes, who was and is still one of the most highly regarded jurists in South African law.

<sup>45</sup> At 345. The "purposive interpretation" approach became very important in later Constitutional Court jurisprudence.

<sup>46</sup> At 349.

formal settlements... and for less formal township establishment". The need for those had "arisen in urban areas... [and] the solution had to be found there as well". The legislature must therefore clearly have contemplated that "large numbers of homeless and impoverished persons" would be settled "within urban areas as part of the urbanisation process and the resolution of the squatter problem". This was so, because "the persons in need of settlement were there to stay" and they "would therefore have to be settled, to the extent that this was reasonably practicable, near to where they were, or wanted to be, and near to their work or where employment opportunities existed". In turn, this meant that "settlement of persons next door to - or close to - established residential areas is unavoidable".<sup>47</sup> The legislature must therefore have been aware of, and contemplated that, "the exercise by the Administrator of his powers... with regard to the settlement of homeless persons might result in interference with the common law rights of third parties".<sup>48</sup> The Court concluded from all this that "the reasonably apprehended interference with the rights of the Diepsloot residents as a result of the proposed settlement of the Zevenfontein squatters at the Diepsloot site is authorised by the Act and not wrongful". This resulted in the dismissal of the appeal, as the appellants were not entitled to the interdict which had been sought.<sup>49</sup>

The judgment was handed down in March 1994, but the Zevenfontein squatters had to wait for services to be installed before they could move to Diepsloot. By then, the community had been waiting since the end of September 1991, when they were evicted from the homes that they had been occupying lawfully, until the eviction order. The waiting was mainly caused by the litigation, in which they were in effect represented by the state, with the assistance of the State Attorney, in opposing white land-owners. This was an extraordinary shift in the stance of the state from just a year or so before. However, the waiting continued after the conclusion of the litigation, this time for the state to install services. This changed in early 1995, when the community heard that other homeless people were starting to move onto the Diepsloot site. They decided "to wait no longer", as they "were not going to let anyone occupy [their] land",

---

<sup>47</sup> At 349.

<sup>48</sup> At 349.

<sup>49</sup> At 353.

and on Easter Monday they “packed up [their] shacks and just went to Diepsloot”.<sup>50</sup> Of course, by that time, the waiting for formal democracy had ended, and conceivably had some impact on the conduct of the community in respect of their settlement.

All of this demonstrates a number of points made earlier. Firstly, the waiting on the part of the community was, on the whole, not passive. They actively mobilised, elected representatives who ensured that the community remained informed and involved in the process, and interacted with state and non-state actors. While they appear to have waited patiently for the litigation to be concluded, and then for services to be installed, they engaged in what can be seen as an act of encroachment and resistance when they took the unilateral (and ultimately unchallenged) decision to move to Diepsloot when their interests were threatened. Secondly, the evolution of the approach and policy of the state in respect of urbanisation, homelessness and informal settlements during this time was rapid and dramatic. The obvious reason for this was the fundamental shift from the racist and oppressive apartheid state to the formal start of a transition to democracy, in one sense at least put in motion by the state itself. It is not recorded in any detail quite what the mechanisms of the evolution in housing policy were at that stage, but the dovetailing of the activities of the South African Housing Council, particularly the De Loor Commission (and its emphasis on informal settlements as part of the solution of the housing problem), and the rapid repeal of apartheid-era housing legislation and adoption of new legislation during 1991, may well be significant. Furthermore, this new approach had to some extent been foreshadowed by some of the developments in this policy area during the late 1980s, described in the previous chapter, including the ongoing pressure (that had already started in the late 1970s) brought to bear by capital, which needed stability in the labour market. Thirdly, the activities of non-state actors, like progressive planning professionals and other civil society organisations (several of them were discussed earlier), as well as think tanks (like the UF) and funding organisations (like the IDT, DBSA and SAHT), had an increasingly important impact on both state policy and conduct, and the conduct of communities themselves, assisted by this support and changing policy environment. Finally, the character and outcomes of litigation on these issues had shifted nearly as dramatically as state policy. As discussed earlier,

---

<sup>50</sup> Harber, *Diepsloot*, 15.

this resulted both from the activities of organisations like the Black Sash and LRC and progressive lawyers in private practice, and the increasing receptiveness of judges to arguments aimed at more progressive outcomes, against the background of a greater awareness of the changes in the world outside the courtroom. This demonstrates what Latour calls the “fragile bridge of texts”: the linking of a litigant’s claim on the one hand, to the law, in the form of established authority and legislation, on the other.<sup>51</sup> Studying the facts, and applying the law (in the form of legislation, regulations and the common law or established authority) to those facts, constitutes the act of adjudication, and in that way the facts of a case, together with choices made by judges about which authority to rely on and how to bring it to bear in a particular case, will shape the law. Once this point is reached, the judgment gets reported, where it, in turn, becomes part of case law, or authority, to be applied to future claims.<sup>52</sup> This is the importance of precedent, which is key to the South African legal system. In this way, South African law shifted gradually along with changes in the wider context (after, in some cases, being ahead of its time, as discussed in the previous chapter). *Diepsloot* resulted in the unprecedented setting out by the Appellate Division of the housing crisis, the plight of the homeless, the duty of the state in that regard, and the subordination of the property rights of white land-owners to that duty. These developments further illustrate the importance of the conditions for progressive judgments that bring about social change identified by Rosenberg and mentioned in the previous chapter.<sup>53</sup> This argument will be taken up again in the next chapter.

### **Housing policy and the transition to democracy**

Housing policy continued to develop rapidly during the early 1990s. The National Housing Forum (“NHF”) was established in August 1992, with a mandate to “negotiate a future housing policy and framework”.<sup>54</sup> The NHF had nineteen members, comprising “major political groups”, three parastatal agencies (the DBSA, the IDT and the SAHT), representatives of the financial services, construction and insurance

---

<sup>51</sup> Latour, *The Making of Law*, 83-85, 103.

<sup>52</sup> Latour, *The Making of Law*, 104.

<sup>53</sup> Rosenberg, *The Hollow Hope*, 33-35.

<sup>54</sup> Khan, “Continuities”, 11. Lalloo records that the idea of an NHF originated early in 1991, when multiparty negotiations for a transition to democracy were starting to take shape (Kiran Lalloo, “Arenas of Contested Citizenship: Housing Policy in South Africa” in *Habitat International*, Vol. 23 No. 1 (March 1999), 37-38.

industries, and “two ‘non-governmental’ organisations”, namely the UF and Kagiso Trust.”<sup>55</sup> Another important member of the NHF was the South African National Civic Organisation (“SANCO”) which was launched in March 1992, and coordinated civics in all regions of the country.<sup>56</sup> The MDM was further represented in the NHF by the ANC and the Congress of South African Trade Unions (“COSATU”).<sup>57</sup> Intense negotiation followed in the NHF between 1992 and 1994, and culminated in a National Housing Summit in October 1994, which produced a National Housing Accord signed on 27 October 1994.<sup>58</sup> The Accord emphasised the principles of the RDP and the commitment to building 1 million houses within five years; indicated the importance of public-private partnerships and of “self-help” in the sense of individuals and communities investing resources, skills and labour into the provision of housing; and called for the end of rent- and bond-boycotts, land occupations, and non-payment for services. According to the national Department of Human Settlements, the Accord “set down the beginning of the common vision that forms the essence of South Africa’s National Housing Policy. Most importantly, it comprised an agreement that all of these stakeholders would work together to achieve the vision encapsulated in the Accord”.<sup>59</sup>

---

<sup>55</sup> These two NGOs were considered by some to have “very close links to business and their credibility was seriously questioned in many settlements” (Khan, “Continuities”, 11-12), although the Kagiso Trust was in fact officially identified at least partly with the MDM (Laloo, “Arenas of Contested Citizenship”, 38).

<sup>56</sup> Civics constituted a community-based movement, and were described by one observer as “populist organizations based in the black townships” which played an important role in policy development during this period. Since the late 1970s, civics had been “at the forefront of struggles” in respect of community issues, including housing rental. From February 1990, many civics started engaging in “negotiations with the state at both national and local levels”, championing a “massive programme of housing... using a variety of actors with the broadest possible community participation”, including by means of “the allocation of land to communities through different mechanisms, including land trusts”. (Marc van Ameringen (ed.), *Building a New South Africa: Urban Policy* (Johannesburg: International Development Research Centre, 1995), 13-15).

<sup>57</sup> Laloo, “Arenas of Contested Citizenship”, 38.

<sup>58</sup> Marie Huchzermeyer, “Housing for the poor? Negotiated housing policy in South Africa” in *Habitat International* Vol. 25 Issue 3 (2001), 304.

<https://www.sciencedirect.com/science/article/pii/S0197397500000370>

The Summit involved representatives from a range of interests, including the homeless in the form of the South African Homeless People’s Federation, national and provincial government, the NHF, COSATU, SANCO, civil society organisations, the financial sector, emerging contractors, the established construction industry, building material suppliers, employers, developers and the international community. The text of the Accord (also known as the Botshabelo Accord) which records the participants and their signatures), is available at

[https://www.dhs.gov.za/sites/default/files/documents/BOTSHABELO\\_ACCORD.pdf](https://www.dhs.gov.za/sites/default/files/documents/BOTSHABELO_ACCORD.pdf)

<sup>59</sup> Department Of Human Settlements “History”

<https://www.dhs.gov.za/content/department-human-settlements-history>

All of this happened in the context of the process of political transition which was taking shape, with the development of multi-party negotiations in 1990 and 1991 culminating in the first plenary session of the Convention for a Democratic South Africa in December 1991. This was followed by the Multi-Party Negotiations Process (“MPNP”) which had its first meeting on 1 April 1993.<sup>60</sup> This process was nearly derailed by the assassination of Chris Hani on 10 April 1993. Hani had been “one of the most popular ANC leaders in the country... and the country was plunged into one of its bleakest hours”, which demonstrated (together with threats of a “right-wing secession” backed by half a million white military personnel) the “tenuous and fragile nature of a society in transition”, and created a sense among some participants in the process that “time [was] running out”.<sup>61</sup> These factors challenge what Hein Marais calls a wrong and “trite reaction” on the part of the left that sees in the transition process “the seeds of a betrayal and sell-out”.<sup>62</sup> The MPNP produced the Interim Constitution which was adopted in November 1993. The first democratic elections took place on 27 April 1994, when the Interim Constitution came into force and the agreed five-year Government of National Unity was established.<sup>63</sup>

As indicated above, the NHF process and its aftermath took housing policy into the post-apartheid era, with the Summit and Accord in October 1994. After the 1994 elections, the new ANC-led government’s Department of Housing “worked closely with the NHF which was soon reconstituted as the National Housing Board, ...a permanent structure that included representatives of the government as well as civil society”, and Housing Minister Joe Slovo “announced the government’s intention to launch a national housing subsidy scheme”.<sup>64</sup> The Housing White Paper promulgated in December 1994 formed the basis of housing policy into the late 1990s, “which was

---

<sup>60</sup> Ebrahim, *The Soul of a Nation*, 151.

<sup>61</sup> Ebrahim, *The Soul of a Nation*, 153-154.

<sup>62</sup> Hein Marais, *South Africa: Limits to Change* (Cape Town: University of Cape Town Press, 1998), 94; 260.

<sup>63</sup> Schedule 4 of that Constitution contained a set of negotiated Constitutional Principles which had to be followed by the Constitutional Assembly, an elected body (in effect the entire post-apartheid parliament) tasked with drafting the final Constitution. The final Constitution would have to be certified by the newly established Constitutional Court as compliant with the Principles. For an account of the process and the text of all relevant documents, see Ebrahim, *The Soul of a Nation*.

The text of the two constitutions and their implications for housing policy are discussed briefly below. The “We the people” archive contains the records and documents of the constitution-making process.

<https://archive.wethepeoplesa.org/index.php/informationobject/browse>

<sup>64</sup> Lalloo, “Arenas of Contested Citizenship”, 40-41.

fundamentally similar to that developed by the NHF”.<sup>65</sup> Huchzermeyer notes that by the time the White Paper was adopted, “the fundamental tenets of the housing policy” had been agreed upon “by the dominant stakeholders [and] the housing debate was closed”: The preamble of the White Paper stated that “The time for policy debate is now past the time for delivery has arrived (sic)”.<sup>66</sup> The White Paper conceptualised housing as “a basic human right”, and records that government “is under a duty to take steps and create conditions which will lead to an effective right to housing for all”, but qualified this as something to be done “within the resource and other limitations applicable to it”, points to “scarce and insufficient State housing and other resources”, and emphasises partnership “with private, non-State resources”.<sup>67</sup> Furthermore, the White Paper emphasised the importance of “end user subsidies”, which is described as constituting “one of the cornerstones of the Government’s approach to the housing challenge”, and aimed at obtaining “maximum gearing with private investment, savings and sweat equity”.<sup>68</sup> This meant that from then on, housing policy became centred on the capital subsidy scheme which emphasised “the production of single-family homes in large projects on cheap, peripheral land”. At that stage, the maximum subsidy was “sufficient to purchase only a small serviced site (usually about 300 m<sup>2</sup>) with a rudimentary ‘starter unit’” which would then be “developed and consolidated through further investment by the household”. In this way, the state “is limited to playing a monetarist role only, and is relieved of fulfilling the Housing Accord’s broader objective of establishing socially and economically integrated communities”.<sup>69</sup>

As explained earlier, the provision of housing to poor communities in South Africa had for decades centred around housing waiting lists, which in turn resulted in a complex process and experience of waiting for houses. The period of political transition resulted in rapid and dramatic changes in both the official understanding and the

---

<sup>65</sup> Lalloo, “Arenas of Contested Citizenship”, 40-41. The national Department of Human Settlements described the Housing White Paper as setting out “the framework for the National Housing Policy. All policy, programmes and guidelines which followed, fell within the framework set out in the White Paper”. Furthermore, the Housing Act of 1997 “legislated and extended the provisions set out in the Housing White Paper and gave legal foundation to the implementation of government’s Housing Programme” (Department of Human Settlements “History”).

<sup>66</sup> Huchzermeyer, “Housing for the poor?”, 304. The text of the White Paper is available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/161780.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/161780.pdf)

<sup>67</sup> Housing White Paper paragraph 4.4.2

<sup>68</sup> Housing White Paper paragraph 4.6.5

<sup>69</sup> Lalloo, “Arenas of Contested Citizenship”, 40-41.

practical implementation of this system of waiting, caused by the “radical restructuring of local government from apartheid-era racially based structures to democratic institutions” and the consequent changes in both state institutions and policy.<sup>70</sup> The most fundamental change in the waiting list system was the deracialisation of the lists. For example, during the apartheid era, in Cape Town, coloured people had the “right to be on neighbourhood waiting lists in the segregated group areas” while African families were excluded from any lists.<sup>71</sup> This institutional restructuring and deracialisation meant that in Cape Town, by 1996, when thirty-nine local metropolitan areas had been combined into six municipalities, the many different waiting lists had been consolidated, by combining the lists into “a set of spreadsheets”.<sup>72</sup> Each of the apartheid-era thirty-nine local authority councils had their own lists, “merged from neighbourhoods and managed in different ways”.<sup>73</sup> After the second local government elections in 2001, the City of Cape Town municipality was formed and in June 2006, all six regions combined their datasets. The resulting City of Cape Town database “records the names and personal details of three groups of people: those who have applied for a house and are waiting, applicants who have been assisted by the City with a house, and those applicants whose applications have been cancelled for a range of reasons”.<sup>74</sup> In an affidavit in an ongoing case, the City indicated that the 1996 dataset, termed the Housing Needs Register, was in fact a combination of fifteen different lists. Currently there are more than 300 000 people listed on that Register, and “queue jumping” has become a central issue in the implementation of the City’s housing policy, and is complicated by the approach of the courts. Queue jumping is explained by the City as “allowing... [unlawful] occupiers to leapfrog ahead of the many hundreds of thousands of people on the waiting list”, thousands of whom are ahead of the occupiers on the waiting list and have been waiting “patiently” - their “rights will be sacrificed” if queue jumping is allowed.<sup>75</sup>

---

<sup>70</sup> Oldfield and Greyling, “Waiting”, 1105: “For example, local government has been restructured three times”.

<sup>71</sup> Oldfield and Greyling, “Waiting”, 1106.

<sup>72</sup> Tissington K, Munshi N, Mirugi-Mukundi G and Durojaye E ‘*Jumping the Queue*’, *Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa* (Community Law Centre, University of the Western Cape; Socio-Economic Rights Institute of South Africa, 2013), 43.

<sup>73</sup> Oldfield and Greyling, “Waiting”, 1106.

<sup>74</sup> Tissington et al. *Jumping the Queue*, 43.

<sup>75</sup> The affidavit was deposed to by the City’s Director of Informal Settlements in the Directorate of Human Settlements (Case Numbers 2061/2024 and 14413/2023, paragraphs 1, 14 and 17).

## Courts and the Prevention of Illegal Squatting Act

It is instructive at this stage of the account to take a step back to look at one of the most vexed issues in respect of addressing homelessness, namely the unlawful occupation of land by homeless communities, establishing informal settlements. One of the central pillars of the apartheid state's approach to homelessness was the draconian Prevention of Illegal Squatting Act. The devastating impact of this Act was demonstrated earlier. For this reason, it is difficult to understand why it took the post-apartheid state until 1998 to repeal and replace the Act, with the Prevention of Illegal Eviction from and Illegal Occupation of Land Act ("PIE").<sup>76</sup> PIE provides extensive protections for anyone occupying land or accommodation unlawfully, and it criminalises any eviction without a court order.<sup>77</sup> One possible reason for the delay in promulgating PIE may well be the emphasis, in post-apartheid housing policy, on preventing unlawful occupation of land or "land invasions", which would "hamper efforts to timeously release adequate, suitable land for human settlement in a planned manner, and may result in certain people attempting to jump the housing/subsidy queue".<sup>78</sup> Communities subject to evictions under the previous Act had, however, already during the late-apartheid era, become organised and mobilised and were often assisted by civil society organisations and progressive lawyers, as demonstrated in the previous chapter. From 1990 onwards, this trend intensified, and courts (with some exceptions) became more aware of and receptive to the plight of such communities.

In *Port Nolloth*,<sup>79</sup> the Cape High Court refused an application for ejectment by the municipality concerned, and granted an application interdicting the municipality from demolishing tents that the community had lived in, on a salt pan, initially with the consent of the municipality, which had by then withdrawn its consent. In the first application, the Court held that the municipality was seeking an order "for the mass-

---

<sup>76</sup> The text of the Act is available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a19-98.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a19-98.pdf)

<sup>77</sup> PIE has since become an intensively litigated Act, presumably because any eviction requires a court order, and the competing interests of the communities affected and landowners renders it a fraught area of litigation.

<sup>78</sup> Housing White Paper paragraph 3.3.6. Also see paragraphs 3.1.3 (d) and 3.2.1.

<sup>79</sup> *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C)

deportation of a relatively stable community with some, albeit elementary, infrastructure insofar as public utilities were concerned”, and that the consequences of such an order “were mind-boggling: it contemplated the probability of the forcible removal of a large number of women and children, unwilling to be removed, to no particular locality, but rather to be dumped in the desert immediately beyond the boundaries of Port Nolloth, without shelter or any of the most elementary amenities of life being provided for the deportees”.<sup>80</sup> The municipality had relied on provisions of the Group Areas Act, and the Court held that this had not been appropriately set out in the application, and that the Act did not permit its conduct in any event.<sup>81</sup> In the second application, the Court relied on a creative interpretation of the Prevention of Illegal Squatting Act to hold that the provisions of the Act that ousted the jurisdiction of the Court in respect of the demolition of buildings or structures, did not include tents, which were not buildings or structures and could not be “demolished”. Moreover, the legislature could not have intended that a municipality is permitted to demolish without a court order in the case where the occupation was with the consent of the municipality.<sup>82</sup>

In the *Kayamandi* case,<sup>83</sup> the town committee of Kayamandi (established in terms of the apartheid-era Black Local Authorities Act of 1982) applied for an urgent order to remove and prevent from reoccupying, nine named respondents and 150 people whose names it had not been able to establish, who had started erecting shacks on 20 March 1990 “on land which had been earmarked by the applicant for residential development”. The applicant alleged that the development of the land could not proceed “while the squatters are in occupation of it”, that the people who had applied for houses to be built there were “becoming frustrated at the delay in development” and that “an explosive situation may... arise if the trespassing squatters are not removed”.<sup>84</sup> In response the respondents and their lawyers developed a creative approach whereby they brought a counter-application in which they claimed a review and setting aside of the town committee’s decision to launch the court application.

---

<sup>80</sup> At 98, 100.

<sup>81</sup> At 98, 100.

<sup>82</sup> At 101.

<sup>83</sup> *Kayamandi Town Committee v Mkwaso and Others* 1991 (2) SA 630 (C)

<sup>84</sup> At 632.

The first issue addressed by the Court was the question of making an order against large numbers of unnamed respondents. It rejected the argument that it was impossible to identify the persons residing on each of the stands in question because “there are too many of them and they constantly come and go”, and held that the Court would not countenance that “persons who independently happen to occupy the same property and who may have quite different rights and interests can all be bundled off the property on the authority of a writ addressed to only one of them.”<sup>85</sup> Secondly, in respect of the counter-application, which was of doubtful legal status, the Court held that there was no reason why, “in the interests of equity and convenience, such a procedure ought not to be permitted”.<sup>86</sup> Thirdly, the respondents argued that the town committee had been obliged to consider whether alternative land was available to the community. The Court noted that the Prevention of Illegal Squatting Act did not “explicitly state that the availability of alternative land must be considered before a decision is taken to eject a squatter. However, the tenor of the Act clearly is that the availability of alternative land is to be considered”.<sup>87</sup> This was a novel interpretation of the Act. The Court further noted that it had not been disputed that the town committee had given “no thought to the question of making alternative land available to squatters prior to attempting to remove them, although it had, in the context of relieving severe overcrowding in Kayamandi, given the general question of the acute shortage of land for residential accommodation much thought”. For that reason, namely the failure to consider a relevant factor, the Court held that the committee’s decision to launch the action had to be set aside.<sup>88</sup> In this regard, the Court emphasised that “it is a basic tenet that laws should be administered reasonably and fairly”:

“Reasonable and fair administration of the Act, in my view, involves giving consideration to the machinery created therein for the relocation of displaced squatters. The case for considering relocation is so compelling that I would have thought that, even in the absence of statutory prescriptions, one of the first things which a local authority considering the removal of a large body of

---

<sup>85</sup> At 635.

<sup>86</sup> At 636.

<sup>87</sup> At 636-637.

<sup>88</sup> At 638-639.

squatters would think about is what is to become of them once they have been moved. The move obviously has social implications, not only for the squatters, but for the residents of the surrounding communities. For if the squatters are driven out of one place they will simply go to another. A man cannot live without a roof of some sort over his head”.<sup>89</sup>

This is clearly a judgment crafted against the background of an understanding of the dire circumstances of the community affected, and a determination to use a construction of the Act, and the relevant legal authority, to prevent the uprooting of that community.

In contrast, in *Beyers*,<sup>90</sup> heard on 19 September 1990, the same Court adjudicated an application by land-owners for the eviction of a large community which had over the years settled on privately owned property in Hout Bay, consisting of “undulating sand dunes covered with wattle and bush”. The Court recorded that the community had “organised an informal body known as the Princess Bush Committee which represents a considerable number of them”, and that the LRC was acting on behalf of the community. The owners had applied for the rezoning of the land to enable a housing development there.<sup>91</sup> The Court held that since the community was unlawfully occupying the land (which was “being overrun by people who claim no right to be there”), there was no reason why they should not immediately be evicted. In this regard, the Court refused a request by counsel for the community to grant them a period of six months to vacate the property, despite being referred to several cases where such a temporary suspension of the order for eviction was granted.<sup>92</sup> The Court did at least agree, when referred to the *Kayamandi* case (then still unreported), that the order could not apply to unnamed or “faceless respondents” people not properly cited or served.<sup>93</sup> The judgment is based entirely on the notion that private property rights override any other considerations, and the Court relied in this regard on a 1981 judgment from the Appellate Division which held that a housing crisis is no excuse for

---

<sup>89</sup> At 638. Indeed, the requirement for organs of state to provide or at least attempt to provide alternative accommodation when evicting a community became an important part of PIE.

<sup>90</sup> *Beyers and Others v Mlanjeni and Others* 1991 (2) SA 392 (C)

<sup>91</sup> At 394.

<sup>92</sup> At 394 and 397-398.

<sup>93</sup> At 395.

land invasions or self-help, as that infringes the property rights of the owners and would lead to chaos.<sup>94</sup> Finally, the Court ordered the community to pay the costs of the litigation incurred by the land-owners.<sup>95</sup> This was a particularly callous order, as the litigation costs would have been significant, the community would clearly have no means to pay the costs, and they were in any event now homeless again. In Johannesburg, in the *Kgosana* case,<sup>96</sup> heard on the same day, the Court relied on the same type of reasoning to deny a spoliation application by a community whose shacks on empty private property had been demolished without a prior eviction order. These courts appear not to have been referred to the Appellate Division's decision in the *Ntshwaqela* case discussed in the previous chapter and therefore did not even attempt to distinguish the facts in these cases from those.

Finally, in *Thompson*,<sup>97</sup> the difficulties occasioned by the unlawful occupation of accommodation by a community, where that accommodation, built and owned by the local authority, had been allocated to others, took centre stage. The case was heard and decided in November 1997, before the promulgation of PIE. The evidence was that the Johannesburg City Council had made 233 properties available "to prospective purchasers". The Council had received 729 applications, successful applicants were allocated houses, and agreements of sale were concluded by 29 June 1994. Unsuccessful applicants who nevertheless qualified for the allocation of housing were placed on a waiting list. However, during 1994, the properties were "invaded and occupied".<sup>98</sup> The Council accordingly applied for an order of ejectment of the occupiers. The judgment does not mention the Prevention of Illegal Squatting Act, and it is not clear what the legislative basis for the application was. It appears from the judgment that the occupiers had been represented in negotiations by a local civic, which had made representations to the Council on their behalf.<sup>99</sup> There were conflicting accounts of its role, including a claim by the Council that the civic had not shown up for an important meeting (this was denied by the respondents).<sup>100</sup> The respondents further claimed that the civic had reached an agreement with the Council

---

<sup>94</sup> At 397-398.

<sup>95</sup> At 399.

<sup>96</sup> *Kgosana and Another v Otto* 1991 (2) SA 113 (W)

<sup>97</sup> *Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W)

<sup>98</sup> At 801.

<sup>99</sup> At 802.

<sup>100</sup> At 802.

that a moratorium would be placed on evictions from Council housing. The Court held that if this did happen (which the Court held probably did not), this would be unenforceable: “The local authority has a duty to provide and allocate council housing to those who qualify therefor. This duty cannot lawfully be fettered by a contract such as the one alleged by the respondents.”<sup>101</sup> The Court was referred to the decision in *Kayamandi* as authority for an argument that the Council had been obliged to consider alternative accommodation for the occupiers, which the Court appeared to accept, but although the Court held that the evidence on the issue was incomplete, it appeared that the Council did consider the issue. In the event, the Council identified alternative accommodation for the purchasers of the housing, who had by then been waiting for two years to occupy the houses.<sup>102</sup> Against this background, the Court concluded that it was not unreasonable or unfair to evict the occupiers: “They acted with utter disregard for the rights of others and for the law... I fail to see how the decision to evict the respondents in order to allow the original purchasers (after two years of waiting) to occupy their houses, or to allow others on the waiting list to do so, can be regarded as unreasonable or unfair.”<sup>103</sup> Here, waiting takes on a different character. One assumes that everyone concerned in this dispute had been on waiting lists for housing, or had in any event been waiting for housing, for a considerable period of time. The real underlying issue was the desperate shortage of housing provided in the area, but it is a complex situation in light of the fact that a further wait had then been imposed on those who had been allocated housing, by those who had not. Furthermore, the Court noted that according to undisputed evidence, “the vast majority of the respondents in any event did not qualify for allocation”.<sup>104</sup> This is an early case of what the White Paper on Housing had referred to as queue-jumping, an issue which later became central to many disputes over housing and much litigation, as alluded to above.

Against this background, it is important to note that while civil society organisations were active in the area of informal settlements in the late 1970s and throughout the 1980s, the issue did not dominate civil society activities in the 1990s, other than the

---

<sup>101</sup> At 803.

<sup>102</sup> At 806-807.

<sup>103</sup> At 807.

<sup>104</sup> At 807.

consistent efforts of the Homeless People's Federation/People's Dialogue Alliance.<sup>105</sup> This raises the question of the forces driving the activities of communities during these years. A useful way of conceptualising this is the notion of "social nonmovements" as developed by Asef Bayat, who defines "nonmovements" as "the collective actions of noncollective actors" that "embody shared practices of large numbers of ordinary people whose fragmented but similar activities trigger much social change, even though these practices are rarely guided by an ideology or recognizable leaderships and organizations".<sup>106</sup> Bayat argues that nonmovements "have come to represent the mobilization of millions of the subaltern, chiefly the urban poor" or the "urban dispossessed". This is where the notion of "the 'quiet encroachment of the ordinary'" as used by Oldfield and Greyling originates.<sup>107</sup> This quiet encroachment "encapsulates the discreet and prolonged ways in which the poor struggle to survive and to better their lives by quietly impinging on the propertied and powerful, and on society at large". This includes the "mass movement of rural migrants who, in a quest for a better life chance, embark on a steady and strenuous campaign that involves unlawful acquisition of lands and shelters" and "they inscribe their active presence in the configuration and governance of urban life, asserting their "right to city."<sup>108</sup> In South Africa, in addition to recent rural migrants, the urban poor and dispossessed also include long-standing residents of cities who have found ways and places to settle, in the face of state repression by means of the constant threat of eviction or forced removal. This goes some way to explaining the steady claiming of land by communities who are not led by established civil society organisations and do not constitute a social movement, but who nonetheless bring about social change through their actions. In this, they were since the early 1990s in some cases been assisted by the courts, and some state actors. This is illustrated well by the Dassenberg story. As explained earlier, the community was assisted in important ways by some civil society organisations, particularly DAG, and progressive lawyers, but in many ways the quiet encroachment of the unlawful occupation of private property by the community over

---

<sup>105</sup>Marie Huchzermeyer, Aly Karam, Ian Lamla Stemela, Nkhangweni Siliga and Sierajodean Frazenburg, "Policy, data and civil society: Reflections on South African challenges through an international review" in Huchzermeyer, *Unlawful Occupation*, 30.

<sup>106</sup> Asef Bayat, *Life as Politics: How Ordinary People Change the Middle East* (Stanford: Stanford University Press, 2010), 15-16. Bayat's focus is on such nonmovements in the Middle East, but the concept and analysis can usefully be applied elsewhere.

<sup>107</sup> Oldfield and Greyling, "Waiting", 1101.

<sup>108</sup> Bayat, *Life as Politics*, 15-16.

many years, and the dogged determination to stay, played the most important role. DAG noted that during the late 1980s, between the land-owners and state actors, the community's only option was to "dig their heels in and resist removal as far as they could."<sup>109</sup> After the start of the transition in 1990, and after successful litigation, circumstances changed, and the relevant organs of state "finally acknowledged the need to identify land for development". The community accordingly had to shift from determined resistance to negotiations with the Cape Provincial Authority ("CPA") and other government bodies about development issues, with its primary concern by then being to secure the best development deal.<sup>110</sup> DAG documents the process of negotiations over every aspect of the development, with extensive participation by the community which drove the process together with its partners, from identifying the land (in the face of significant resistance from surrounding private land-owners), to the layout, the services, and the community facilities.<sup>111</sup> When the community felt that it had not been consulted by the government bodies on any issue, they protested forcefully. For example, in March 1991, when contractors arrived on site to install taps and toilets, and the community realised that the House of Assembly had unilaterally decided where to position these services (and that the positioning was in any event unacceptable), the "toilet war" erupted, during which they were destroyed by the community.<sup>112</sup> After two years of negotiations, in December 1992 the community moved on to its new site, which they named Masiphumelele ("let us succeed").<sup>113</sup> Similar stories unfolded in the late 1990s, two of which are described in the research of Oldfield.<sup>114</sup> One of these will be discussed in the next chapter.

It is clear that the political transition resulted in some discontinuities in housing and urban planning policy, but there were also important continuities. Harrison, Todes and Watson trace the development of progressive non-governmental organisations that worked in the areas of planning, housing and urban services, from the early 1980s onwards, all with an emphasis on participatory and community-based urban planning

---

<sup>109</sup> DAG, *Masiphumelele*, 11.

<sup>110</sup> DAG, *Masiphumelele*, 11.

<sup>111</sup> DAG, *Masiphumelele*, 12-30.

<sup>112</sup> DAG, *Masiphumelele*, 16.

<sup>113</sup> DAG, *Masiphumelele*, 8.

<sup>114</sup> Oldfield, "The Centrality".

and housing projects.<sup>115</sup> In parallel, the UF was staffed by several planners and “piloted new approaches to low-cost housing and attempted to steer the state towards more laissez-faire approaches to housing and urban development”.<sup>116</sup> During the 1980s, many individuals in the “progressive urban development movement defined themselves by their opposition to the [UF]”, although through the late 1980s and early 1990s “people and ideas moved between the two, and both groupings were influenced by dominant international urban development discourses associated with the United Nations Centre for Human Settlements and the World Bank”.<sup>117</sup> Huchzermeyer also is of the view that there was an increasing convergence between the views of the two factions during the late 1980s and early 1990s, partly because development and housing finance was channelled through the IDT, which had “semi-institutionalised” the thinking of the UF.<sup>118</sup> The neoliberal approach was said to have become “institutionalised into the [post-apartheid] housing policy” while the approach of the civic movement, which emphasised “grassroots democracy and the decommodification of land”, became marginalised.<sup>119</sup>

This process unfolded against a broader development in the thinking of the post-apartheid state, which can be traced through the shifts in vision from the ANC’s 1994 election manifesto, the RDP.<sup>120</sup> The early versions of the RDP included an emphasis on the meeting of basic needs. The RDP was said to aim at “decent, well-located and affordable shelter for all by the year 2003. In the short-term, the aim is to build one million new low-cost houses in five years”.<sup>121</sup> By the time the RDP had been turned into a White Paper and gazetted,<sup>122</sup> those paragraphs on housing targets and goals had disappeared. The differences between the earlier versions of the RDP and the White Paper “were indicative of a trend in ideology and policy that was to become far

---

<sup>115</sup> Including the Built Environment Support Group at the University of Natal, DAG in Cape Town, and Planact in Johannesburg (Harrison *et al*, *Planning*, 44-51).

<sup>116</sup> Harrison *et al*, *Planning*, 40. Also see Huchzermeyer, *Unlawful Occupation*, 2, 22; Von Schnitzler, *Democracy’s Infrastructure*, 61-63.

<sup>117</sup> Harrison *et al*, *Planning*, 51.

<sup>118</sup> Huchzermeyer, *Unlawful Occupation*, 119.

<sup>119</sup> Huchzermeyer, *Unlawful Occupation*, 117, 124.

<sup>120</sup> ANC, *The Reconstruction and Development Programme*, 1994, para 2.5

<sup>121</sup> ANC, *A basic guide*, para 1 “Meeting Basic Needs”

<sup>122</sup> Republic of South Africa, *White Paper on Reconstruction and Development*, Government Gazette No. 16085, Vol.353, Cape Town, 24 November 1994.

<https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>

more obvious in subsequent years”.<sup>123</sup> Of course, this shift in ideology and policy became apparent in 1996, when the RDP was replaced by the Growth, Employment and Redistribution Policy (GEAR). While the neo-liberal bent of GEAR was apparent, the state “clearly retained a concern with poverty alleviation, redistribution and participatory governance but was also concerned with pacifying global markets and ensuring competitiveness in an unstable global economy”.<sup>124</sup> This resonates with the argument of Jeremy Seekings and Nicoli Nattrass that both the ANC and DA local governments in Cape Town during the period 1996 to 2002 “embraced a mix of ‘neoliberal’ and ‘non-neoliberal’ elements in both their discourse and, especially, their practice”.<sup>125</sup> In the event, there were in fact dramatic improvements in infrastructure and service delivery in Cape Town after 1994. For example, the proportion of African households living in formal housing rose from 3% in 1996 to 44% in 2001.<sup>126</sup> Nonetheless, with regard to housing policy and informal settlement intervention, the post-apartheid state appeared to have run into a number of fundamental difficulties including ideological factions in the ruling party, significant lack of capacity at local government level, “stagnation in the thinking on informal settlement intervention”, and the decline in “collective community-based strategies [that] have tended to cooperate with the official framework”.<sup>127</sup> A further fundamental issue is the many deficiencies of the housing programmes developed by the post-apartheid state: houses are of poor design and quality, expensive to maintain, spatially marginalised, and environmentally unsound.<sup>128</sup>

Despite what was described by some commentators as an official drift towards neoliberal policy, the Constitution which, like GEAR, was adopted in 1996, included a range of justiciable socio-economic rights. They were not included in the Constitution as “minority protection rights”, but as rights that were “expected both to legitimise the Constitution in the eyes of black South Africans and to provide programmatic guidance to the political branches on how to overcome the social and economic legacy of

---

<sup>123</sup> Harrison *et al*, *Planning*, 58.

<sup>124</sup> Harrison *et al*, *Planning*, 62-63.

<sup>125</sup> Jeremy Seekings and Nicoli Nattrass, *Poverty, Politics and Policy in South Africa* (Johannesburg: Jacana Media, 2015) 184.

<sup>126</sup> Seekings and Nattrass, *Poverty*, 184.

<sup>127</sup> Harrison *et al*, *Planning*, 70; Huchzermeyer, *Unlawful Occupation*, 230-233.

<sup>128</sup> Firoos Kahn and Petal Thring (eds.) *Housing Policy and Practice in Post-Apartheid South Africa* (Sandown: Heinemann, 2003) 18.

apartheid”.<sup>129</sup> Indeed, the ANC had argued during the constitutional negotiations that the inclusion of socio-economic rights was essential “to counterbalance the ideological effect of civil and political rights, which... should not be allowed to brand the Constitution as a neo-liberal economic charter”.<sup>130</sup> The Interim Constitution was clearly concerned with the most egregious apartheid-era abuses of human rights, for example detention without trial and unfair labour practices, and made extensive provision for measures aimed at redressing apartheid-era discrimination, but did not include any provisions for socio-economic rights.<sup>131</sup> The process of drafting the final Constitution was a more democratic process, as it was steered by the elected Constitutional Assembly, led by the ANC as majority party. The process also placed great emphasis on transparency and public participation, and to that end it invited submissions, held workshops all over the country, ran an extensive media campaign to inform, educate and encourage participation, and opened all sessions of the Assembly to the public.<sup>132</sup> The provision of socio-economic rights was seen as very important. Theme Committee 4 on the Draft Bill of Rights was charged with formulating these rights. Early on, it noted that most of the parties in the Assembly supported the “inclusion of housing rights/right to shelter”, and further that a common position of the parties was that the rights should be drafted in such a way as to “not place an obligation on the state which cannot be fulfilled in terms of its resources and capacity”.<sup>133</sup> In the event, the Constitution included a right to housing formulated as follows:

---

<sup>129</sup> Roux, *The Politics of Principle*, 265.

<sup>130</sup> Roux, *The Politics of Principle*, 265-266.

<sup>131</sup> It did, however, contain guarantees of the rights to equality (including the right to restitution in the case of apartheid-era dispossession of land), and to human dignity (which was later to become important in litigation in respect of homelessness). A clear sign in that constitution of the negotiated compromises of the early transition was the protection of rights in property (See sections 3, 8, 10 and 28). The text of the Interim Constitution is available at <https://www.justice.gov.za/legislation/acts/1993-200.pdf>

Tembeka Ncgukaitobi has noted that, contrary to popular belief, his research on technical committee negotiations in the MPNP shows that it was the ANC’s formulation of this right that was included in the text (remark at a seminar in 2023 [date to be confirmed]). Property rights were again included in the final Constitution.

<sup>132</sup> Ebrahim, *The Soul of a Nation*, 179-180. A 1996 external evaluation of the process was positive: “it [was] such a powerful campaign that so successfully sought to reach out to the nation at large” (David Everatt et al “A New Constitution for a New South Africa: Evaluating the Constitutional Assembly” (Community Agency for Social Enquiry, October 1996), 139).

<sup>133</sup> Constitutional Committee Sub-Committee “Draft Bill of Rights”, Vol 1 “Explanatory Memoranda”, 154.

## “Housing

26. (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.”

The concept of the “progressive realisation” of the right became a major area of contestation in litigation. This will be discussed in the next chapter.

## **Conclusion**

This account demonstrates the ways in which the political transition shaped encounters between state and citizens in the area of housing politics, and the role that litigation played in that process. A central theme is the quiet encroachments by poor communities pursued with often strategic agency, and with the assistance of civil society organisations and progressive lawyers. Against that background, housing and homelessness policy rapidly evolved during this period, and with the adoption of the final Constitution, the stage was set for a new era of rights-based litigation strategies on this terrain. The work of the Constitutional Court quickly became central to the ways in which the state, civil society and communities negotiated the pursuit of housing, and the ways in which waiting was approached by communities.

## Chapter 3

### Community agency and rights-based strategies for social change

The adoption of the final Constitution in 1996, and the inclusion of the right to access to adequate housing, ushered in a new approach to litigation in the area of homelessness and housing policy. The conduct of the state in this regard could now be measured against a constitutional imperative. This had an impact on the strategic choices available in respect of community mobilisation, civil society activism, and state conduct. This chapter focuses on the ways in which housing politics were shaped by these developments, particularly the impact of rights-based strategies on that process, and the respective roles of communities, civil society organisations, progressive lawyers, courts, and state actors in the post-apartheid era. This approach to the pursuit of housing for vulnerable communities is to some extent controversial, as instead of pursuing change in the political arena, it relies on different mechanisms to shape the exercise of power and transform power relations, on the terrain of the Constitution and the court system. The results of this approach in South Africa have been mixed, and have given rise to extensive debate. However, this chapter also shows how waiting communities, which can be characterised as social nonmovements,<sup>1</sup> deploying strategic (albeit constrained and provisional) agency by engaging in quiet encroachments,<sup>2</sup> interact with the state and make demands as inhabitants of political society.<sup>3</sup> In this way, they engage in housing politics in order to challenge the waiting imposed on them and, in some cases, achieve success. The argument here is that while they may not always be seen as citizens pursuing legal claims on the terrain of the Constitution, they are nonetheless assisted in some ways by the text of the Constitution as constructed and applied by the courts.

The next sections trace the debates over the ways in which socio-economic rights have been constructed by the Constitutional Court, described in the context of the constraints on courts with regard to state policy and the precarious position of courts in a new democratic dispensation. The remainder of the chapter then focuses on the ways in which the Constitution has facilitated the mobilisation of socio-economic rights

---

<sup>1</sup> Bayat, *Life as Politics*, 15-16.

<sup>2</sup> Oldfield and Greyling, "Waiting", 1102, 1110.

<sup>3</sup> Chatterjee, *Lineages*, 13-14.

and socio-economic rights discourse, both on the terrain of the legal system and in the social and political arena, and how communities have drawn on strategic agency to engage in these processes in various ways to challenge the waiting imposed on them by state housing policy.

## **Constitutionalism, the Constitutional Court and socio-economic transformation**

The adoption of a democratic constitutional system based on a supreme and justiciable constitution was a fundamental part of the negotiated transition to democracy in South Africa. Democratic constitutionalism can be described as an institutional framework for the distribution of political power characterised by a supreme constitution that limits the exercise of power by the state in a range of ways.<sup>4</sup> This approach emphasises the fact that constitutionalism does not only place constraints on the exercise of state power, but also enables “the functioning of the state and the channelling of political authority through law”.<sup>5</sup> The introduction of socio-economic rights into the Bill of Rights is a good example of this function of a constitution.<sup>6</sup> The notion of a justiciable constitution and the inclusion of socio-economic rights in the final Constitution was supported by all the major political parties that participated in the Constitutional Assembly, which also agreed that these rights should not place an obligation on the state which it cannot meet in the context of limited resources and capacity.<sup>7</sup> In particular, the ANC was of the view that the inclusion of these rights in the Constitution would “reflect South Africa’s ‘vision and aspirations for the future’.

---

<sup>4</sup> A discussion of the extensive international debates in different disciplines on a range of issues regarding constitutionalism, including its historical origin, meaning, details, and implementation is beyond the scope of this thesis. For an excellent discussion by eminent scholars, see Jon Elster and Rune Slagstad (eds.) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988). For a discussion in the South African context, see Klug, *Constituting Democracy*. Dan Mafora identifies the “most important features” that define South African constitutionalism as multiparty democracy, the rule of law and constitutional supremacy, the Bill of Rights, separation of powers, and judicial review of legislation and executive conduct (Dan Mafora, *Capture in the Court* (Cape Town: Tafelberg, 2023), 44).

<sup>5</sup> Mafora, *Capture in the Court*, 43.

<sup>6</sup> Socio-economic rights have a long philosophical and political history. An account is beyond the scope of this thesis. See, in this regard, the UN Office of the High Commissioner for Human Rights.

<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>

Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*

<https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap33.pdf>

Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont: Juta, 2010).

<sup>7</sup> Constitutional Committee Sub-Committee “Draft Bill of Rights”, Vol 1 “Explanatory Memoranda”, 154. Also see Roux, *The Politics of Principle*, 265-273.

While recognising that these rights posed certain ‘difficulties in enforcement’, the ANC argued that these difficulties could be overcome, and that the important point was to put the state under a positive duty to ‘redress the imbalances of the past’.<sup>8</sup> The interpretation and enforcement of the Constitution and the Bill of Rights, including the socio-economic rights, was entrusted to the newly formed Constitutional Court, that was given the power to strike down any “law or conduct” that was found to be inconsistent with the Constitution.<sup>9</sup> This gave the Constitutional Court “a politically awkward and morally contested mandate” to evaluate the conduct of an elected government.<sup>10</sup>

In light of the housing crisis inherited by the post-apartheid state, the right to access to housing provided by section 26 of the Constitution became an important focus of litigation.<sup>11</sup> For the same reason, that right, which can be described as “symbolic of democracy”, in many ways shaped the post-apartheid state’s approach to the provision of housing.<sup>12</sup> The fundamental symbolism of the right to housing in post-apartheid South Africa is poignantly illustrated by Mr Lucky Gwaza, a leader of the *Grootboom* community, who upon the successful conclusion of the community’s litigation, exclaimed: “This is freedom, this is the new South Africa”.<sup>13</sup> However, while there were a few stunning successes by social movements and activists, or individuals supported by organisations like the LRC, the interpretation and enforcement of socio-economic rights by the state and the courts, particularly the Constitutional Court, quickly became controversial and contested. Early on, several commentators were of the view that the Constitutional Court’s socio-economic rights jurisprudence was too cautious and that it was “reluctant to interfere in the affairs of the executive arm of government” when “called upon by the poor”.<sup>14</sup>

---

<sup>8</sup> Roux, *The Politics of Principle*, 270-271.

<sup>9</sup> Section 2 read with section 167 of the Constitution.

<sup>10</sup> Roux, *The Politics of Principle*, 270.

<sup>11</sup> Kate Tissington points out that the right to housing is “the most adjudicated socio-economic right before the Constitutional Court” (*A Resource Guide to Housing in South Africa 1994-2010*, Socio-Economic Rights Institute of South Africa, February 2011, 9).

<sup>12</sup> Oldfield and Greyling, “Waiting”, 1100.

<sup>13</sup> Interview with Mr Gwaza, 2000. The circumstances of this research are explained below.

<sup>14</sup> Huchzermeyer, “Housing rights in South Africa”, 80.

## Democracy, administrative law and the Constitutional Court

The Constitutional Court has developed a nuanced approach to the tension inherent in administrative law, namely to empower officials and give them space to do their work, while at the same time controlling that power, protecting rights and promoting accountability.<sup>15</sup> The Court has explained that the decisions of organs of state must be treated “with the appropriate respect” and that courts must recognise “the proper role of the executive within the Constitution”, and not attribute to themselves “superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field”.<sup>16</sup> This is particularly the case where it is a question of budget allocation. The Court has also held that “the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain”, because it has the “public responsibility” for that function. The “collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order”.<sup>17</sup> This does not mean however that a court will “rubber-stamp an unreasonable decision”.<sup>18</sup> This approach is essential to ensure the coherence, predictability and stability of administrative law. Activist courts that do not show a measure of respect for the decisions of organs of state risk the very standing of the courts themselves. It is important to provide a check on state power. But if courts “become too troublesome to the government, it will either ignore them or find a way of getting round their decision”.<sup>19</sup> This danger has been well understood in

---

<sup>15</sup> Hoexter and Penfold, *Administrative Law*, 178. On this tension with regard to the role of the Council, see Latour, *The Making of Law*, 14; 28.

<sup>16</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 48.

<sup>17</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) paras 67-68.

<sup>18</sup> *Bato Star Fishing* para 48.

<sup>19</sup> Latour, *The Making of Law*, 28. A notorious example of this danger is the Hungarian Constitutional Court. Established as part of the transition from communism in 1989-1990, the powerful Court had been the constitutional guardian and primary check on the government for more than twenty years. Following Hungary's April 2010 general elections, where Viktor Orbán and his Fidesz party won an overwhelming majority of the seats in parliament, the government launched an attack on constitutionalism and the Constitutional Court by means of changing the appointment of judges and the jurisdiction of the Court (Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, “Hungary's Illiberal Turn: Disabling the Constitution”, *Journal of Democracy*, Vol. 23 No. 3 (July 2012), 139-140, <https://doi.org/10.1353/jod.2012.0054>).

Also see Mafora, *Capture in the Court*, 109-110.

the South African context. A central theme of Roux's book on "the politics of principle" is the way in which the Constitutional Court negotiated what he calls the "law/politics tension" in order to avoid political attack.<sup>20</sup> He argues that, in 1995, when the Court began its work, "South Africa's new constitutional institutions were fragile, and the Court was consequently required to do all it could to maintain the public's faith in the objectivity of its decision-making practices. Confronted by the danger of the Court's being seen to be, on the one hand, an extension of the ANC's political power and, on the other, an institution for the protection of minority-group privilege, the judges wisely chose to present their decisions as legally compelled".<sup>21</sup>

The Constitutional Court's approach to state policy is complicated by the "law/politics tension" described earlier. The Court has identified, encouraged and protected government attempts at redistribution, and has also held the state to account for failures to comply with its constitutional duty to protect and serve poor and vulnerable communities, as in the *Grootboom* case discussed below. The remainder of the chapter explores the ways in which the Constitution has enabled the mobilisation of a range of strategies, of which litigation is just one example. In particular, the argument is that waiting communities have developed strategic agency, sometimes drawing on supportive civil society organisations, and relying either explicitly or implicitly on the constitutional right to access to housing, to challenge state policy and to demand an end to their waiting for housing in a number of different ways. While these strategies take many forms, they can be called "rights-based", as they draw in different ways on the right to housing to pursue their demands.

### **Rights-based strategies and the pursuit of housing by waiting communities**

Disappointment in the lack of dramatic social change produced by rights-based litigation strategies in the post-apartheid era is often the result of unrealistic expectations of what courts are able to do, given the serious constraints they face. Gerald Rosenberg describes the view that informs these expectations as "a naïve and romantic belief in the triumph of rights over politics". There is no substitute for

---

<sup>20</sup> See, for example, Roux, *The Politics of Principle*, 10-11, but that argument is threaded through the book.

<sup>21</sup> Roux, *The Politics of Principle*, 387-388.

mobilising citizens to participate more effectively in the political process.<sup>22</sup> It is clear that litigating socio-economic rights in the South African courts does not guarantee significant social change, but the mobilisation of socio-economic rights or at least of socio-economic rights discourse, to a limited extent on the terrain of the legal system, and more effectively in the social and political arena, can and has produced political and social change. The empowering possibilities of rights discourse, and the importance of mobilised communities have been demonstrated in the politics of housing in South Africa. An important example of these processes is the litigation in the *Grootboom* case,<sup>23</sup> together with its background and aftermath, but the constitutional imperative of providing access to adequate housing was also mobilised by communities in ways other than litigation in the post-apartheid era. This section accordingly focuses on three different processes that relied to some extent on this constitutional obligation or duty, including litigation.

These different strategies are important because of the limitations of rights-based litigation, which has important disadvantages and may pose dangers in political and strategic terms. Stuart Scheingold refers to “the myth of rights” to criticise “the direct linking of litigation, rights, and remedies with social change”.<sup>24</sup> Even if a marginalised group wins a case, the victory is often limited to the parties to the litigation and does not have broader impact, and courts in any event have limited means to ensure the implementation of their orders. This is particularly complex when there is “political hostility” – courts depend on political support to have any impact on the transformation of power relations.<sup>25</sup> Furthermore, translating a community’s claims into legal claims risks disempowering the community and diluting their political and strategic agency. Gerald Rosenberg refers to this effect as a “fly-paper court” which causes social activists to succumb to “the lure of litigation” and in this way draws limited resources and talent away from more effective strategies to focus on largely ineffective symbolic victories.<sup>26</sup>

---

<sup>22</sup> Rosenberg, *The Hollow Hope*, 343.

<sup>23</sup> See the references in Chapter 1, footnote 57.

<sup>24</sup> Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (New Haven and London: Yale University Press, 1974), 5.

<sup>25</sup> Rosenberg, *The Hollow Hope*, 336.

<sup>26</sup> Rosenberg, *The Hollow Hope*, 339-341.

Of course, as explored in earlier chapters, litigation also can result in success – during the 1980s in South Africa, for example, the Appellate Division took unprecedented decisions that had a significant impact on influx control. The factors that make such successes possible are explored by Rosenberg, who argues that “when political, social and economic conditions have become supportive of change, courts can effectively produce significant social reform”.<sup>27</sup> These conditions are met firstly when the litigation strategy is gradual, and litigators can find “strong precedents on which to base their claims”; secondly when there is political or elite support for reform, as judges do not want to “step far from the political mainstream”; thirdly when there is political or popular support (or at least low levels of opposition) for the implementation of court decisions: “the appearance of violating a court order is not one legislators usually relish”.<sup>28</sup> The court cases discussed in this and earlier chapters demonstrate that when political power relations or popular opinion shifted, courts were emboldened to make more reform-minded decisions.<sup>29</sup> Furthermore, as Rosenberg predicts, when there is some political support, judges are willing to assist in protecting state action from being undermined by conservative interests.<sup>30</sup>

Such litigation success remains limited, however, for the reasons set out above. Against that background, it is important to view right-based strategies in a broader perspective, not limited to litigation. Law must be seen as a terrain of continuous contestation over power, as legal order is “pluralistic rather than monolithic”.<sup>31</sup> Martha Minow similarly argues that “[rights] pronounced by courts become possessions of the dispossessed... Legal language, like a song, can be hummed by someone who did not write it and changed by those for whom it was not intended.”<sup>32</sup> This resonates with the work of Das, which shows how, in the case of commissions of enquiry (which can be considered a species of law), the “very fact of the possibility that the commission might fault the state becomes a public resource for struggle and for shaming the government in power by publicizing its results in national and international fora”:

---

<sup>27</sup> Rosenberg, *The Hollow Hope*, 31.

<sup>28</sup> Rosenberg, *The Hollow Hope*, 31-32. See the earlier discussion of the *Rikhotso* case.

<sup>29</sup> Especially when parties were represented by respected civil society organisations like the LRC, and when courts could find ways to rely on established authority or precedent, like the common law *mandament van spolie* and an Innes CJ judgment from 1927, as discussed earlier.

<sup>30</sup> For example the *Diepsloot* and *Walker* cases.

<sup>31</sup> Michael McCann, *Rights at Work* (Chicago: University of Chicago Press, 1994), 4, 8, 283.

<sup>32</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990), 310.

“justice is not a matter of all or nothing”.<sup>33</sup> Charles Epp argues that in addition to litigation, rights provide a combination of “bargaining tools and symbolic resources” to a wide range of previously “right-less” individuals and communities.<sup>34</sup> In post-apartheid South Africa, the right to access to adequate housing provided such “bargaining tools and symbolic resources”, shaping the understanding of rights by communities in different ways. This chapter concludes with a discussion of three ways in which the constitutional obligation or duty to provide access to housing was mobilised by communities to challenge, transform or end their waiting for housing.

Firstly, significant shifts in housing policy in the late 1990s and early 2000s were the result of political, social movement and civil society pressure on government. This can be conceptualised as political mobilisation and participation on the terrain of the Constitution. This was reflected in a growing trend during the late 1990s to emphasise the link between “satisfying basic needs and impacting on poverty”, and between “the delivery of housing and poverty alleviation”.<sup>35</sup> One consequence was the “move towards a more state-centred housing delivery programme”, and a concomitant shift away from the “public-private partnerships approach”. The other was the introduction of “norms and standards” in 1999, which “placed increasing focus on improving the quality of the top-structure or house”.<sup>36</sup> In parallel with this evolution, another process was developing which “emphasised increased *beneficiary* involvement in housing” and which resulted in the introduction of the People’s Housing Process (“PHP”) in 1998.<sup>37</sup> The PHP evolved mainly through the work of the South African Homeless People’s Federation<sup>38</sup> which is “an organised movement of savings groups in local communities

---

<sup>33</sup> Das, *Life and Words*, 182.

<sup>34</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: Chicago University Press, 1998), 9.

<sup>35</sup> Sarah Charlton and Caroline Kihato, “Reaching the Poor? An analysis of the influences on the evolution of South Africa’s housing programme” in *Democracy and Delivery: Urban Policy in South Africa* edited by Udes Pillay, Richard Tomlinson and Jacques du Toit (Cape Town: Human Sciences Research Council, 2006), 253.

<sup>36</sup> Charlton and Kihato, “Reaching the Poor?”, 263, 266.

<sup>37</sup> Charlton and Kihato, “Reaching the Poor?”, 265 (emphasis in the original). The PHP is “a form of housing delivery that depends heavily on community initiative and involvement by the beneficiaries of the government’s housing subsidy”, and is described in the National Housing Code as meant to “support specifically the poorest of the poor families who usually only have access to housing subsidies and who wish to enhance their subsidies by building or organising the building of their homes themselves” (Rebecca Himlin, “NGOs and the People’s Housing Process” in Planact, *Making Towns and Cities Work*, 240).

<sup>38</sup> The Federation had participated in the National Housing Summit in October 1994, which produced a National Housing Accord signed on 27 October 1994.

that had been set up to facilitate self-help housing”.<sup>39</sup> These processes can be seen as housing policy evolving to resonate with the constitutional imperative. At the same time, there have been changes in the approach to the type of housing provided in order to better support and provide for poor communities, in the context of a general acknowledgement that “the state cannot deliver housing on the scale required at a sustainable rate or within the means of low-income and poor households”.<sup>40</sup> Especially against the background of the criticism of the ubiquitous RDP housing,<sup>41</sup> researchers and activists have started arguing that accepting and upgrading informal settlements has become an imperative. Kate Tissington argues as follows:

“the preoccupation with ‘formalising’ those living in informal housing... has failed to consider the numerous benefits of aspects of informality for poor individuals and households and the various unintended consequences of ‘formality’ (often involving relocation to underdeveloped dormitory estates or transit areas) that make people *worse off* in real terms, particularly in relation to access to livelihoods and job opportunities. This is demonstrated by the high percentage of people who sell or relocate from their RDP houses back to informal settlements to be closer to employment”.<sup>42</sup>

Residents of informal settlements often resist relocation to “formal subsidised housing” *inter alia* because of the “disruption to economic and social networks that the relocation entails”, including “networks of support, reciprocity and exchange of information and resources”.<sup>43</sup>

---

<sup>39</sup> Himlin notes that the Urban Sector Network, of which Planact was a member, developed an expansive definition of the PHP as an “ongoing development process where people willingly come together to decide how best to use the natural, financial and social resources available to them for the delivery of better integrated human settlement” (Himlin, “NGOs and the People’s Housing Process”, 241).

<sup>40</sup> Tissington, *A Resource Guide*, 9.

<sup>41</sup> Tissington, *A Resource Guide*, 61-62. These include poor quality and poor location, and a failure to contribute to poverty alleviation. Indeed, many RDP houses and settlements “have become residential dormitories, and many beneficiaries choose to trade their houses and move back to informal settlements or other informal housing to be closer to work”.

<sup>42</sup> Tissington, *A Resource Guide*, 8, emphasis in the original.

<sup>43</sup> Nellie Agingu and Marie Huchzermeyer, “Planact’s Response to the Phenomenon of Informal Settlements” in Planact, *Making Towns and Cities Work*, 257. This indicates the lack of usefulness of Patrick Bond’s somewhat vulgarly formulated criticism of an acceptance of informality as “blacks like shacks” (Bond, *Cities of Gold*). As Julian Baskin notes, “[t]he field is fat with the ‘high and mighty’ but very thin with those who are actually willing to do the hard work of delivery... Advice without burning your fingers can hardly be taken seriously” (“Conflict and the Role of NGOs” in Planact, *Making Towns and Cities Work*, 233).

All of these developments in ideas and policy culminated in the new housing policy entitled “Breaking New Ground” (“BNG”) in 2004, which is said to have been the result of “political pressure” on the national Department of Housing to “generate a new document that engaged with socio-economic issues around human settlements”.<sup>44</sup> The BNG resulted in the Upgrading of Informal Settlement Programme (“UISP”) which is described in the BNG as promoting a “‘paradigm shift’ in responses to informal settlements ‘from one of conflict or neglect to one of integration and cooperation’”.<sup>45</sup> Finally, the Emergency Housing Programme (“EHP”) was developed “to provide for temporary relief to people in urban and rural areas who found themselves in emergencies”, as a direct result of the *Grootboom* judgment.<sup>46</sup> Tissington notes that this programme has not delivered as expected, for a range of reasons, including a lack of funding and “no clear guidelines on what constitutes an emergency”.<sup>47</sup> However, for present purposes, these policy developments do demonstrate the potential for lobbying for progress, on the terrain of the Constitution, in the political arena.

The second process that can be viewed through this lens is one where communities that had been waiting for houses mobilised as nonmovements to encroach “on the propertied and powerful, and on society at large”, and to “embark on a steady and strenuous campaign that involves unlawful acquisition of lands and shelters”.<sup>48</sup> This process can also be seen as a form of invoking the constitutional obligation or duty on the state to provide access to adequate housing. It is an intervention that involves “frustrated informal settlement and backyard shack dwellers proactively occupying land and erecting shacks”, making the “statement that the poor do (and should) have a place in the city and that state housing policy and implementation are failing those in desperate need”.<sup>49</sup> This is illustrated by the work of Oldfield, who investigated two post-apartheid case studies of communities that had been waiting for housing, but eventually secured housing “ ‘delivered’ by the state” but did so by means of a

---

<sup>44</sup> Charlton and Kihato, “Reaching the Poor?”, 256. The BNG “frames housing delivery more explicitly as a catalyst for achieving a set of broad socio-economic goals” and in that way moving from a supply-centred model to a demand-driven model focused on the needs of those on the ground (Tissington, *A Resource Guide*, 66). The BNG is generally considered progressive, but many flaws have been identified and there are shortcomings in implementation (see pp 66-70).

<sup>45</sup> Agingu and Huchzermeyer, “Planact’s Response”, 257.

<sup>46</sup> Tissington, *A Resource Guide*, 94.

<sup>47</sup> Tissington, *A Resource Guide*, 96.

<sup>48</sup> Bayat, *Life as Politics*, 15-16.

<sup>49</sup> Tissington, *A Resource Guide*, 93.

community struggle, and not state initiative.<sup>50</sup> One of these community struggles ended up in court, and that case is described briefly here in order to illustrate the potential of ordinary (if not quiet) encroachment by a nonmovement in the struggle for housing, and a particular approach to waiting, or perhaps even a refusal to wait any longer. The case is *The Provincial Housing Development Board Western Cape v The Occupiers of the Erven in Delft South Cape Town*, which is an unreported judgment unfortunately nowhere available.<sup>51</sup> Delft South was a new housing development at the boundary between Khayelitsha (a township formerly classified African) and an area former classified Coloured, and in this way it marked a “significant new space” in the Cape Town metropolitan area. Housing in Delft South had been provided through the Integrated Service Land Project, and was the largest housing development in the Cape Town metropolitan area, with over 4000 houses built in Delft South alone.<sup>52</sup> The beneficiaries of the project were selected both from specific informal settlements in the City of Cape Town’s former African group areas, and from the then-City of Tygerberg’s racially integrated waiting list.<sup>53</sup> The issue here was therefore “not about housing provision, but rather about the politics and process of housing allocation”.<sup>54</sup>

The procedure for obtaining a house in the project was allocation by the relevant housing office, through the waiting lists. However, in 1998, 1 800 families “hijacked the housing delivery process in Delft South by forcibly invading homes”. This group, which was known as “the door kickers”, “rejected the waiting lists and the system of housing allocation by claiming and then invading homes”.<sup>55</sup> This strategy followed a period during which individuals enquired at the Delft South housing office “day-after-

---

<sup>50</sup> Oldfield, “The Centrality”, 859.

<sup>51</sup> The only legal reference which I could track down is in another, later eviction case, namely *City of Cape Town v Persons who are presently unlawfully occupying erf 1800, Capricorn: Vrygrond Development and Another* 2003 (6) SA 140 (C) at 9. The story is told by Oldfield, and the facts of the case set out here are drawn from her account. Unfortunately, Oldfield’s references to the litigation are unhelpful, because she uses the incorrect citation of the parties and characterisation of the legal dispute, but that is not so important for present purposes, and the character of the litigation is capable of being inferred to some extent from the brief mention of the case in *Vrygrond* cited above.

<sup>52</sup> The project was initiated in 1994 as a national and provincial government-sponsored Presidential Lead Project (Oldfield, “The Centrality”, 865).

<sup>53</sup> This waiting list included mainly Coloured residents “because of the chronological construction of the list”. These residents had been on waiting lists longer than African residents because the former were allowed to reside in the city, while the latter were excluded until the abolition of influx control. Beneficiaries therefore came from different parts of the city, and the project resulted in “cross-racial housing allocation” (Oldfield, “The Centrality”, 865-866).

<sup>54</sup> Oldfield, “The Centrality”, 865.

<sup>55</sup> Oldfield, “The Centrality”, 866.

day about their position on the waiting list”, to no avail. A core group met outside that housing office and moved onto the project site where the housing was still being completed. More people joined “when they heard through informal channels about the possibility of claiming a house in the area”.<sup>56</sup> In order to retain possession of an invaded house, the resident had to watch it all day, “sleeping in it and protecting it each night while it was built”. The group also had to develop organisational capacity “to defend possession of the house against the legal recipient”, which was done by the purchase of a new lock and a whistle by each of the families. Once the house had been fully built, the “door kickers” kicked in the door and replaced the locks. When the legal recipients arrived with their keys to claim their allocated houses, they were locked out by the family inside, the whistle would be blown, and the rest of the group would arrive to assist the family to defend their home.<sup>57</sup> Some legal recipients would be intimidated by the large crowd of door kickers, but others did put up a fight, resulting in mass confrontations and running gun battles, supported by police action.<sup>58</sup> In order to address the chaos, the Provincial Housing Development Board of the Western Cape brought an eviction application in terms of PIE. It appears from the mention of the case in *Vrygrond* that the Board had also brought a spoliation application, presumably arguing that the door kickers had spoliated the new houses (i.e. deprived the Board of possession of the houses). Oldfield argues that in response to the litigation, the door kicker families displayed “extensive capacity to work together and to link to external resources. They took their cause to Legal Aid offices — in Mitchells Plain, an area ten kilometres from Delft South — where they successfully sought free legal advice and representation”.<sup>59</sup> It appears that the eviction application was unsuccessful, and the door kickers were “granted legal status as owners of the homes they had vigorously invaded and defended”, because they “had proof that the housing waiting list had been violated through illegal housing sales” (presumably by state officials) and could demonstrate “comparable need to the families originally designated to receive title deeds”.<sup>60</sup>

---

<sup>56</sup> Oldfield, “The Centrality”, 866.

<sup>57</sup> Oldfield, “The Centrality”, 867.

<sup>58</sup> Oldfield, “The Centrality”, 867.

<sup>59</sup> Oldfield, “The Centrality”, 867.

<sup>60</sup> Oldfield, “The Centrality”, 867.

This account indicates that this group employed a form of strategic agency to make claims on the state, again as members of political society. The group also can be seen as a nonmovement of a large number of ordinary people who refused to wait any longer, and whose activities brought about a measure of social change, by means of “collective actions of non-collective actors”, without being guided by an ideology or firm leadership or external organisations.<sup>61</sup> Oldfield notes that the group had many differences in language and residence (in both former African and Coloured townships) but managed to organise this encroachment, and reports one resident as saying: “Our slogan was the only thing that empowered us. We didn’t get our power from a particular organization. We didn’t want organizations involved because we know what we were doing was corrupt and wrong”.<sup>62</sup> Again, the group’s approach to waiting was arguably shaped by the dramatic shifts in political power and state policy during that time, including the mass provision of housing in the area, and they were in the event assisted by a court system which had also shifted its approach during that time, as discussed earlier.<sup>63</sup>

Finally, the third rights-based strategy explored here is to explicitly invoke the right to access to adequate housing in litigation. Of course, litigation is often the last stage in a complex process of quiet encroachments by non-movements followed by strategic community mobilisation, assisted by civil society organisations and progressive lawyers. All of this appears from the *Grootboom* case.<sup>64</sup> The *Grootboom* judgment has been analysed in great detail over the years since its delivery by the Court, including the development of the Court’s socio-economic rights jurisprudence and the consequences of the judgment for both future litigation and the formulation and implementation of housing policy. The word “Grootboom” has in many ways become shorthand for the courts’ approach to socio-economic rights as well as in the housing

---

<sup>61</sup> Bayat, *Life as Politics*, 15-16.

<sup>62</sup> Oldfield, “The Centrality”, 866, 868.

<sup>63</sup> Oldfield notes that the legal recipients of the houses had eventually been allocated housing elsewhere in Delft South (pp 867-868).

<sup>64</sup> The facts of the case set out here are drawn from the judgments of the High Court and the Court, affidavits filed in the courts (copies of some of which I have in my possession, having obtained them from the Court during 2000, but several are also available at <https://collections.concourt.org.za/handle/20.500.12144/2107?show=full>), and from unpublished research notes which I compiled in 2000, during interviews conducted with lawyers (attorney Julian Apollos, and advocates Ismail Jamie and Geoff Budlender) and a community leader (Mr Lucky Gwaza), and personal observations on site in Wallacedene and during the hearings in the Court.

rights and policy community. The judgment is still considered seminal by legal scholars, and is the foundation for all socio-economic rights litigation and jurisprudence since.<sup>65</sup> However, there has been very little analysis of the background to the litigation, as well as the practical, real-life and complex aftermath.<sup>66</sup> Generally, the only attention paid to the aftermath was to record in the media the tragic end to the story of Irene Grootboom, the community member who was cited as the first applicant and accordingly gave her name to the case. In this way, the case has become emblematic of the ongoing housing and homelessness crisis, and the failure of the state to address it. In 2008, Irene Grootboom was reported to have died “homeless and penniless” in her forties, after her name had become “known around the world for enforcing the state’s obligation to respect socio-economic rights, especially of the homeless”.<sup>67</sup> Importantly, there has been (to my knowledge) no detailed analysis of the ways in which the *Grootboom* litigation can be seen as the ways in which the formulation and implementation of housing policy is shaped by the interaction between state, communities and courts. Instead, the judgment itself has been analysed exhaustively, and has formed the basis of any discussion of the Constitutional Court’s socio-economic rights jurisprudence or its approach to dealing with the poor in their struggle with the state, as well as studied for its impact on housing policy and politics.<sup>68</sup>

The *Grootboom* case concerned a group of 390 adults and 510 children from Wallacedene<sup>69</sup> who had lived in an informal settlement called “Mooitrap”,<sup>70</sup> so called

---

<sup>65</sup> See, for example, Roux, *The Politics of Principle*, 286-292.

<sup>66</sup> The one exception is Gilbert Marcus and Steven Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (The Atlantic Philanthropies, 2008) which was produced as a research report on public interest litigation in South Africa more generally, but has an excellent section on *Grootboom*. There is also an account of the community and the litigation in Chapter 7 in M. Langford, B. Cousins, J. Dugard and T. Madlingozi, *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge: Cambridge University Press, 2014), pp. 187-225, based on the judgment, the Marcus and Budlender report, as well as two interviews with members of the community, and media reports.

<sup>67</sup> Pearlie Joubert, “Grootboom dies homeless and penniless” in *Mail & Guardian* (8 August 2008).

<sup>68</sup> See, for example, the chapter on “Social Rights” in Roux, *The Politics of Principle* (and the sources cited there); Murray Wesson, “Grootboom and beyond : reassessing the socio-economic jurisprudence of the South African Constitutional Court” in the *South African journal on human rights*, 2004-01, Vol.20 (2), p.284-308; Albie Sachs, “The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case in *Current legal problems*, 2003, Vol.56 (1), p.579-60; Sandra Liebenberg, “The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa”, in *South African journal on human rights*, 2001-01, Vol.17 (2), p.232-257; Liebenberg, *Socio-Economic Rights*

<sup>69</sup> Wallacedene is an informal settlement on the north-eastern outskirts of Cape Town, near the suburb of Kraaifontein, at that time under the jurisdiction of the Oostenberg Municipality.

<sup>70</sup> An Afrikaans word meaning “tread carefully”.

because when it rained, many of the shacks were knee-deep in water. Those conditions had become intolerable, and the group had moved to a nearby piece of dry land, which they called “New Rust”. The land was privately owned, and had been earmarked for low-cost housing.<sup>71</sup> The owners obtained a court order for their eviction from the Kuils River Magistrate’s court during December 1998, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (“PIE”). In terms of the court order, the group had to vacate the land by 15 May 1999.<sup>72</sup> After they failed to vacate the land as ordered, they were evicted from this land, and had their shack materials burnt and possessions destroyed.<sup>73</sup> This rendered them homeless, because their spaces in Mooitrap had in the interim been occupied by others. They squatted on the sportsfield next to the community centre in Wallacedene.<sup>74</sup> The first involvement of lawyers in this matter provides an interesting insight into the mechanics of this kind of litigation. During the initial eviction application, the magistrate called a local attorney that he knew (Mr Julian Apollos), with a small local practice, to ask him to represent the community. This is unusual in these kinds of proceedings, and can be argued to show, once again, the shift in the approach of the court system in the post-apartheid era. Gilbert Marcus and Steven Budlender also emphasise the role of local politics in the case: the community marched on the offices of the municipality to demand that their plight must be addressed, which resulted in the municipality asking a “prominent ANC provincial politician to assist”, and which in turn gave rise to the community’s decision to take legal action.<sup>75</sup>

On 31 May 1999, represented by Mr Apollos, the community launched an urgent application in the Cape High Court to force government to provide them with housing in terms of section 26 of the Constitution, alternatively to provide the children of the community with shelter, in terms of the children’s rights in section 28 of the

---

<sup>71</sup> *Grootboom* paras 4 and 7-8.

<sup>72</sup> High Court pp 1-2. At *Grootboom* para 10, the Court notes that the PIE eviction order had never been challenged, and must accordingly be accepted to have been valid.

<sup>73</sup> The Constitutional Court was later to deplore the fact that the eviction had been done “prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents’ homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings”. (para 10)

<sup>74</sup> High Court pp 1-2.

<sup>75</sup> Marcus and Budlender, *A Strategic Evaluation*, 51-52.

Constitution.<sup>76</sup> The application was heard on 3 June 1999, and after a visit to the site, the judge granted a temporary order for shelter to be provided in the community centre for all the children in the community, and one parent for each child requiring supervision.<sup>77</sup> After further argument in the High Court, full judgment was handed down on 17 December 1999, and the government respondents were ordered in terms of section 28 of the Constitution to provide the children in the community with shelter, together with their parents, until such time as the parents are able to shelter their own children.<sup>78</sup> The government respondents launched an urgent application for leave to appeal to the Constitutional Court, on the grounds that the High Court order would have “grave consequences” for housing policy and budgets nationally and in the municipal area concerned, in light of the housing backlog and extent of homelessness across the country. In particular, the fear was that the High Court judgment would set a precedent encouraging land invasions and claims for shelter which the government would not be able to meet with its available resources.<sup>79</sup> By that time, a range of civil society organisations and progressive lawyers had become involved. The South African Human Rights Commission and the Community Law Centre were admitted as *amici curiae*, represented by the LRC. The LRC briefed senior counsel Geoff Budlender, a seasoned human rights lawyer and one of the founders of the LRC (but by then in private practice).<sup>80</sup> The appeal was heard by the Court on 11 May 2000. On that day, the government respondents indicated to the Court that they had made an offer to the community of basic materials and services to alleviate the dire circumstances. However, on 5 September 2000, the community brought an urgent application directly to the Court to enforce that undertaking by the government respondents, who had not provided the materials and services as had been undertaken to the Court, despite entreaties by the community’s attorney.<sup>81</sup> That application was set down for 21 September 2000. On that day the Court, after

---

<sup>76</sup> Notice of motion and founding affidavit (deposed to by Mrs Irene Grootboom) in the High Court proceedings.

<sup>77</sup> High Court pp 2-3.

<sup>78</sup> High Court pp 26-27.

<sup>79</sup> Founding affidavit in the application for leave to appeal deposed to by the Director-General of the national Department of Housing.

<sup>80</sup> Justice Albie Sachs was later to say that the LRC intervention “swung the debate dramatically” (Marcus and Budlender *A Strategic Evaluation*, 59).

<sup>81</sup> Founding affidavit in the urgent application, deposed to by the community’s attorney, Mr Julian Apollos.

communication with the parties, “crafted an order putting the municipality on terms to provide certain rudimentary services”.<sup>82</sup>

The Court handed down judgment on 4 October 2000. The judgment set out what the Court considered the cause of the community’s circumstances, namely the history of influx control and apartheid-era failures to provide adequate housing and services in the Cape Town area.<sup>83</sup> The Court also set out the “acute” housing crisis in the Cape Metropolitan area, and described the housing situation “desperate”, which was “compounded by rampant unemployment and poverty”: a quarter of the households in Wallacedene had no income at all, and more than two-thirds earned less than R500-00 per month during 1997. In addition, “many of the families living in Wallacedene are living in intolerable conditions. In some cases, their shacks are permanently flooded during the winter rains, others are severely overcrowded and some are perilously close to busy roads”.<sup>84</sup> Nevertheless, the Court was acutely aware of the dangers of encouraging land invasions,<sup>85</sup> of the extensive legislation and policy formulation and implementation in respect of housing that had been developed (“Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery”),<sup>86</sup> and of the budgetary constraints of government.<sup>87</sup> The Court was urged to give content to the right to housing by identifying and enforcing a “minimum core content” of the right, but refused to do so. Instead, it developed a notion of evaluating whether the state had taken reasonable steps to give effect to the socio-economic right in question.<sup>88</sup> In the event, it held that the housing programme in effect in the Cape Metropolitan Area at the time of the launch of the application fell short of the reasonable steps required to give effect to the right to housing guaranteed by section 26 of the Constitution, in that it did not contain

---

<sup>82</sup> *Grootboom* para 5.

<sup>83</sup> *Grootboom* para 6.

<sup>84</sup> About 206 000 housing units were required, up to 25 000 housing units in the Oostenberg municipality itself. “Shack counts” indicated that 28 300 shacks were counted in the Cape Metro in January 1993, while the number had grown to 59 854 in 1996 and to 72 140 by 1998. This meant that shacks in the area had increased by 111 percent during the period 1993 to 1996 and by 21 percent from then until 1998. In the Oostenberg area, 2121 shacks were counted in 1993, 5701 (an increase of 168 percent) in 1996 and 7546 (an increase of 32 percent) in 1998 (*Grootboom* paras 57-59).

<sup>85</sup> *Grootboom* paras 2 and 92.

<sup>86</sup> *Grootboom* paras 47-53.

<sup>87</sup> *Grootboom* paras 46.

<sup>88</sup> *Grootboom* para 33.

measures to “provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.<sup>89</sup>

As noted earlier, the criticisms of the Court’s judgment in *Grootboom* and other judgments on socio-economic rights often proceed from unwarranted and unrealistic expectations of what courts are able to accomplish. For example, Huchzermeyer argues that the judgment of the Court in *Grootboom* is “liberal, rather than radical” in that it “does not call for reform of the system of access to urban land, or intervention in the urban land market”, and furthermore “has taken four years to impact on housing policy and informal settlements” as it was only in 2004 that the national Department of Housing developed an appropriate policy mechanism.<sup>90</sup> Roux also notes the extensive criticism of the Court’s refusal to identify and enforce a minimum core content of the right to housing.<sup>91</sup> However, Roux argues that the Court’s decision must be evaluated “with some appreciation for the political context in which the Court found itself”: the ANC had been in power for only five years, and national housing policy, “while not without flaws, represented a massive undertaking, the seriousness and overall sophistication of which had to be acknowledged. The adoption of the minimum core approach would have forced a fundamental reorientation of this programme, bringing the Court into direct conflict with the political branches, at a time when it was still vulnerable to political attack”.<sup>92</sup> In the circumstances, the Court was justified “choosing a standard of review that required at least some resources to be diverted to meet urgent shelter needs, while leaving the scale and timing of any such adjustment to the democratic process.”<sup>93</sup> In the event, the judgment “had a major impact on housing policy in South Africa. Most municipalities put in place a ‘Grootboom allocation’ in their budgets to address the needs of those in desperate need”<sup>94</sup> and the EHP was eventually developed, as discussed above.

---

<sup>89</sup> *Grootboom* paras 63-69, 99. The Court noted that by the time the matter was heard, the Cape Metropolitan Municipality had in fact developed a programme that would qualify as such reasonable steps to assist people in crisis situations, namely the Accelerated Managed Land Settlement Programme.

<sup>90</sup> Huchzermeyer, *Unlawful Occupation*, 4.

<sup>91</sup> Roux, *The Politics of Principle*, 286.

<sup>92</sup> Roux, *The Politics of Principle*, 292.

<sup>93</sup> Roux, *The Politics of Principle*, 292.

<sup>94</sup> <https://www.escri-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc/>

This case demonstrates a number of the advantages and disadvantages of rights-based litigation for social change. Firstly, the litigation resulted in concrete relief for a vulnerable and marginalised community in a desperate situation. On 12 October 2000, each individual on the list of names that had been annexed to the papers in the litigation, received the following: 14 steel roof sheets, 1 external door, 1 window frame, 1 steel hasp and staple (door lock), 2 door hinges, 1 packet of roof fasteners.<sup>95</sup> However, this also provoked tension and conflict within the community, as some recipients were accused of not having been part of the original New Rust group or an applicant in the case, some recipients accused of selling their building materials when the community had decided that building materials obtained through the litigation must be used and may not be sold, and leaders of other communities in the Wallacedene area have confronted the Mooitrap community about “doing things alone” and not including the wider community in the litigation.<sup>96</sup> Furthermore, within a relatively short period of time, the conditions in the community had deteriorated again: most of the toilets had stopped working, many taps were leaking or not working, streetlights were not working, many shack dwellers had lost their shack materials through fire, and the community had the perception that the municipality would no longer assist them, in retaliation for the litigation.<sup>97</sup> This demonstrates the more fundamental point, namely the role of community agency and mobilisation in the pursuit of housing and services, instead of relying entirely on litigation. A week after hearing argument in the *Grootboom* case, then-Chief Justice Chaskalson, in the third Bram Fischer lecture delivered in Johannesburg, said that South Africans were capable of realising the vision contained in the Constitution, “but in danger of not doing so”: “We seem to have temporarily lost our way”. The problem was that “the energy, the commitment and the sense of community that were harnessed in the struggle for freedom” was now lacking.<sup>98</sup> It is clear that he did not consider the Court as the primary actor in that process, and the Court’s jurisprudence in the area of socio-economic rights has accordingly been developed to emphasise the role of the state in the delivery of infrastructure and services.

---

<sup>95</sup> As listed on a typed “Confirmation of Receipt of Goods” prepared by attorney Mr Julian Apollos and dated 12 October 2000. I accompanied Mr Apollos to the sportsfield in Wallacedene on 12 October 2000 to assist with the distribution of the materials, and to observe the process.

<sup>96</sup> Interview with Mr Lucky Gwaza, a community leader, October 2000.

<sup>97</sup> Interview with Mr Gwaza, 2002.

<sup>98</sup> Jeremy Gordin, “We have lost our way – Chaskalson” in *The Sunday Independent*, 21 May 2000.

## **Conclusion**

This account demonstrates the different ways in which the provision of housing to vulnerable communities can be pursued on the terrain of the Constitution in several different ways, relying on the constitutional imperative established by the right to access to adequate housing, which facilitates a number of strategic choices by communities, civil society organisations, lawyers, courts and state actors. In particular, the case studies presented show how waiting communities can draw on strategic agency to participate in housing politics and challenge, transform or end their waiting for housing. While the right to access to adequate housing does not necessarily transform waiting communities into citizens pursuing legal claims on the terrain of the Constitution, even as inhabitants of political society they are assisted in some ways by the text of the Constitution, including in some cases as constructed and applied by the courts.

## Conclusion

The housing crisis in South Africa has over time resulted in the experience of waiting for housing on the part of marginalised communities. Housing policy and politics have historically constituted a site where state power is both imposed and contested. Relying on court judgments, reports on case studies in the area of housing policy and implementation, the housing crisis and related litigation, produced by non-governmental organisations, and various other primary sources, from 1949 to 2000, the research shows that waiting communities are able to engage in a number of quiet encroachments as well as the mobilisation of strategic community agency, and while state power remains ever-present, and courts have an uneven record of challenging that power, in this way communities have the capacity to contest the condition of waiting and improve their access to housing.

The housing crisis is rooted in inept but destructive apartheid-era urbanisation policies, including influx control. While much of that period can be described as black South Africans languishing in “the waiting room of history”, waiting for housing and democracy, there are many instances of resistance to the apartheid state, on the terrain of housing, by individuals and communities often supported by community-based, progressive non-governmental and legal aid organisations, as well as lawyers in private practice. As a result, there was constant interaction between communities, courts and the state, which shaped housing policy and politics in different ways. In this way, waiting for housing took many forms, and communities had a range of experiences of the process of waiting. The role of the courts in these issues clearly started shifting already before the transition to democracy, which shows a measure of autonomy from the apartheid state on the part of courts, and also shows the ways in which shifts in community activities read together with supportive civil society organisations, and the resultant shift in state policy, can develop together with shifts in judicial conduct, in complex multi-directional ways.

The interaction between the state, communities and courts took on a different character during the late-apartheid and early post-apartheid period. It is clear that the experience of waiting, first for democracy and then for housing, can be seen as both a passive experience of the power of the state, and as a terrain where state power is

resisted, contested and negotiated. This lens enables an understanding of the interaction between the state, courts, and community and civil society activism and mobilisation in the shaping of housing policy and its implementation, particularly the impact of the political transition and the resultant constitutional right to housing, which allowed the use of various rights-based strategies, on those processes.

Once a constitutional right to access to housing had been established, a range of strategies were developed that enabled communities to mobilised the constitutional obligation or duty to provide access to housing to challenge, transform or end their waiting for housing. This included political, social movement and civil society pressure on government which can be conceptualised as political mobilisation and participation on the terrain of the Constitution and which resulted in significant shifts in housing policy in the late 1990s and early 2000s. Secondly, communities that had been waiting for houses mobilised as nonmovements to encroach “on the propertied and powerful, and on society at large” and in this way further their access to housing by invoking the constitutional obligation or duty on the state to provide access to adequate housing. Finally, communities also explicitly invoked the right to access to adequate housing in litigation, often assisted by civil society organisations and progressive lawyers.

Overall, the research demonstrates the impact of quiet encroachments by marginalised communities, or non-social movements, pursued with often strategic agency, and with the assistance of civil society organisations and progressive lawyers. In particular, the research shows the importance of the ways in which community mobilisation in engagement with the state and with courts, both of which responded in repressive but also progressive ways, shapes housing politics and challenge, transform or end the waiting for housing on the part of some marginalised communities in South Africa.

## Bibliography

### 1. Primary Sources

#### Websites

African National Congress. *The Reconstruction and Development Programme*. 1994  
[https://www.sahistory.org.za/sites/default/files/the\\_reconstruction\\_and\\_development\\_programm\\_1994.pdf](https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf)

African National Congress. *A basic guide to the Reconstruction and Development Programme*. 1 May 1994  
<https://www.anc1912.org.za/policy-documents-1994-a-basic-guide-to-the-reconstruction-and-development-programme/>

Black Sash. *Newsletter: Crossroads* (1976).  
[https://disa.ukzn.ac.za/sites/default/files/pdf\\_files/BSAug76.0036.4843.018.006.Aug1976.12.pdf](https://disa.ukzn.ac.za/sites/default/files/pdf_files/BSAug76.0036.4843.018.006.Aug1976.12.pdf)

Black Sash. *Overview*.  
<https://www.blacksash.org.za/overview/>

Development Action Group “Who we are”  
<https://www.dag.org.za/who-we-are/history/>

International Network for Social Economic and Cultural Rights (ESCR-Net) *Case Law: Grootboom*  
<https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc/>

Legal Resources Centre. *Who we are*.  
<https://lrc.org.za/who-we-are/>

Office of the Chief Justice. *Court online*.

<https://www.judiciary.org.za/index.php/court-online/about-court-online>

### **Archival materials: oral histories and documents**

Columbia University, "Oral History Interview with Arthur Chaskalson (1999).

[https://www.columbia.edu/cu/lweb/digital/collections/oral\\_hist/carnegie/pdfs/arthur-chaskalson.pdf](https://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/arthur-chaskalson.pdf)

Constitutional Assembly. Constitutional Committee Sub-Committee "Draft Bill of Rights", Vol 1 "Explanatory Memoranda".

Constitutional Court. *Grootboom case documents*

<https://collections.concourt.org.za/handle/20.500.12144/2107?show=full>)

Department of Human Settlements *The Botshabelo Accord*

[https://www.dhs.gov.za/sites/default/files/documents/BOTSHABELO\\_ACCORD.pdf](https://www.dhs.gov.za/sites/default/files/documents/BOTSHABELO_ACCORD.pdf)

Department Of Human Settlements "History"

<https://www.dhs.gov.za/content/department-human-settlements-history>

Department of Human Settlements. *Housing White Paper*.

[https://www.gov.za/sites/default/files/gcis\\_document/201409/161780.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/161780.pdf)

Legal Resources Centre. LRC Oral History Project: Interview with Arthur Chaskalson. Johannesburg: Historical Papers, William Cullen Library, University of the Witwatersrand (2012) Item ZA HPRA AG3298-25

[http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-](http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/d/e/deea5515832268a3bc31c16bd5a18a7f9114b3dff10d77ed636eb4a1a288e6ea/AG3298-1-025-text.pdf)

[witwatersrand/d/e/deea5515832268a3bc31c16bd5a18a7f9114b3dff10d77ed636eb4a1a288e6ea/AG3298-1-025-text.pdf](http://historicalpapers-atom.wits.ac.za/uploads/r/historical-papers-research-archive-library-university-of-witwatersrand/d/e/deea5515832268a3bc31c16bd5a18a7f9114b3dff10d77ed636eb4a1a288e6ea/AG3298-1-025-text.pdf)

Republic of South Africa *The Less Formal Township Development Act*

<https://www.sagc.org.za/pdf/legislation/Less%20Formal%20Township%20Establishment%20Act%20113%20of%201991.pdf>

Republic of South Africa. Interim Constitution 1993

<https://www.justice.gov.za/legislation/acts/1993-200.pdf>

Republic of South Africa. *White Paper on Reconstruction and Development.*

Government Gazette No. 16085, Vol.353, Cape Town, 24 November 1994.

<https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>

Republic of South Africa: Final Constitution 1996

<https://www.justice.gov.za/constitution/pdf.html>

Republic of South Africa. Prevention of Illegal Eviction from and Illegal Occupation of Land Act 1998.

[https://www.gov.za/sites/default/files/gcis\\_document/201409/a19-98.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a19-98.pdf)

SA History. *Crossroads.*

<http://www.sahistory.org.za/place/crossroads-township>

SA Truth and Reconciliation Commission. *Crossroads.*

<https://sabctrc.saha.org.za/glossary/witdoeke.htm?tab=report>

Southern African Legacy Project, "Profile of Karrie Weinstock".

<https://www.ojasalp.org/profile/karrie-weinstock/>

We the People "Constitution-making process"

<https://archive.wethepeoplesa.org/index.php/informationobject/browse>

## **Reports, submissions, evaluations and case studies**

City of Cape Town. *A Memorandum to the Commission of Inquiry into Township Establishment and Related Matters* (July 1982).

De Loor, J.H. *Housing in South Africa : proposals on a policy and strategy*. South African Housing Advisory Council Task Group on National Housing Policy and Strategy. Pretoria: Government Printer, 1992.

Development Action Group. *Masiphumelele: A Case Study of the Role of the Development Action Group in the Informal Community in Noordhoek*. Cape Town: Development Action Group, June 1996.

<https://www.dag.org.za/wp-content/uploads/2023/10/masiphumelele-noordhoek-case-study.pdf>

Dewar, David (ed.) *The De Loor Task Group Report on Housing Policy for South Africa: Some Perspectives* (The Urbanity and Housing Network, University of Cape Town, Working Paper No. 1, September 1992)

Ellis, George, Delia Hendrie, Alide Kooy, and Johann Maree. *The Squatter Problem in the Western Cape: Some Causes and Remedies*. Johannesburg: South African Institute of Race Relations, April 1977.

David Everatt et al "A New Constitution for a New South Africa: Evaluating the Constitutional Assembly". Community Agency for Social Enquiry, October 1996.

Foundation for Contemporary Research. *Masithembane Housing Association: Case Study Commissioned by the People's Housing Partnership Trust: Department of Housing*. Cape Town: Foundation for Contemporary Research, 2000.

<https://www.dag.org.za/wp-content/uploads/2023/10/fcr-masithembane-case-study-2000.pdf>

Granelli, Roger and Ronald Levitan. *Urban Black Housing: A Review of Existing Conditions in the Cape Peninsula with Some Guidelines for Change*. Cape Town: Urban Problems Research Unit, University of Cape Town, 1977.

Nash, Margaret. *Home? An Introduction to the Housing Crisis in Cape Town*. Cape Town: Board of Social Responsibility Anglican Diocese of Cape Town and The Cape Flats Committee for Interim Accommodation, 1976.

The Cape Co-ordinating Council of Social Welfare Organizations. *Report of the Proceedings at a Symposium on Social Aspects of Housing*. Report Series No. 7. Cape Town, August 1945.

UN Office of the High Commissioner for Human Rights.

<https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>

Urban Problems Research Unit, University of Cape Town. *Western Cape Hostels Housing Upgrade Programme*. Working Paper No. 36 (Occasional Paper No. 23). University of Cape Town, May 1987.

Watson, Vanessa. *Western Cape Hostels Housing Upgrade Programme: A Background*. Working Paper No. 50 (Occasional Paper No. 37). Urban Problems Research Unit, University of Cape Town, November 1993.

Watson, Vanessa. *Western Cape Hostels Housing Upgrade Programme: An Evaluation of the First Phase (Pilot) Project*. Report to Umzamo Development Project. Urban Problems Research Unit, University of Cape Town, August 1994.

### **Media articles**

Gordin, Jeremy. "We have lost our way – Chaskalson". In *The Sunday Independent*, 21 May 2000.

Joubert, Pearlie. "Grootboom dies homeless and penniless" in *Mail & Guardian* (8 August 2008).

Kgosana, Rorisang. "Pretoria high court's 'filing' system a mountain of unruly paper mayhem" *The Citizen*, 26 February 2019.

<https://www.citizen.co.za/news/south-africa/courts/pretoria-high-courts-filing-system-a-mountain-of-unruly-paper-mayhem/>

## Case Law

*Administrator of Cape of Good Hope and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A)

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

*Beyers and Others v Mlanjeni and Others* 1991 (2) SA 392 (C)

*City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)

*City of Cape Town v Persons who are presently unlawfully occupying erf 1800, Capricorn: Vrygrond Development and Another* 2003 (6) SA 140 (C)

*City of Johannesburg and Others v Mazibuko and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2009 (3) SA 592 (SCA)

*Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal and Others* 1993 (1) SA 577 (T)

*Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal and Others* 1993 (3) SA 49 (T)

*Diepsloot Residents and Landowners Association and Others v Administrator, Transvaal* 1994 (3) SA 336 (A)

*Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C)

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

*Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C)

*Hleka v Johannesburg City Council* 1949 (1) SA 842 (A)

*Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163

*Kayamandi Town Committee v Mkwaso and Others* 1991 (2) SA 630 (C)

*Kgosana and Another v Otto* 1991 (2) SA 113 (W)

*Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A)

*Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 (W)

*Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)* 2010 (4) SA 1 (CC)

*Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC)

*National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)

*Ntshwaqela and Others v Chairman, Western Cape Regional Services Council and Others* 1988 (3) SA 218 (CPD)

*Oos-Randse Administrasieraade n 'n ander v Rikhoto* 1983 (3) SA 595 (A)

*Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C)

*R v Gorekwang* 1961 (3) SA 407 (A)

*R v Zulu* 1959 (1) SA 263 (A)

*Southern Metropolitan Substructure v Thompson and Others* 1997 (2) SA 799 (W)

*S v Govender* 1986 (3) SA 969 (T)

*S v Peter* 1976 (2) SA 513 (C)

*S v Tofile* 1963 (1) SA 387 (T)

## 2. Secondary Sources

Abel, Richard L. *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*. New York: Routledge, 1995.

Agingu, Nellie and Marie Huchzermeyer. "Planact's Response to the Phenomenon of Informal Settlements". In Planact. *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Bánkuti, Miklós, Gábor Halmai and Kim Lane Scheppele. "Hungary's Illiberal Turn: Disabling the Constitution". In *Journal of Democracy*, Vol. 23 No. 3 (July 2012): 138-146, doi.org/10.1353/jod.2012.0054,  
[https://muse.jhu.edu/article/480981/pdf?casa\\_token=tugccFnlfC8AAAAA:OeSYVbigHS8BGOBJ2WPYxgvK\\_4zfkzrqERQQVSJHaSNsSxtOhskFg-cD7J0goMbsRzb0vk7Bn9Q](https://muse.jhu.edu/article/480981/pdf?casa_token=tugccFnlfC8AAAAA:OeSYVbigHS8BGOBJ2WPYxgvK_4zfkzrqERQQVSJHaSNsSxtOhskFg-cD7J0goMbsRzb0vk7Bn9Q)

Baskin, Julian. "Conflict and the Role of NGOs". In Planact. *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Bayat, Asef. *Life as Politics: How Ordinary People Change the Middle East*. Stanford: Stanford University Press, 2010.

Benson, Koni. "Crossroads continues: histories of women mobilizing against forced removals and for housing in Cape Town South Africa, 1975-2005". PhD Thesis. University of Minnesota, 2009.

Benson, Koni. "A 'Political War of Words and Bullets': Defining and Defying Sides of Struggle for Housing in Crossroads, South Africa". *Journal of Southern African Studies*, Vol. 41 No.2 (2015): 367–387.

<https://doi.org/10.1080/03057070.2015.1013358>

Bond, Patrick. *Cities of Gold, Townships of Coal*. New Jersey: Africa World Press Inc, 2000.

Bond, Patrick. "Are those Planact fingerprints?". In Planact, *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Bourdieu, Pierre. *Pascalian Meditations*. Stanford: Stanford University Press, 2000.

Bundy, Colin. "Land, Law and Power: Forced Removals in Historical Context". In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan, 3-12. Cape Town: Oxford University Press, 1990.

Chakrabarty, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton: Princetown University Press, 2000.

Chanock, Martin. *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*. Cambridge: Cambridge University Press, 2001.

Charlton, Sarah and Caroline Kihato. "Reaching the Poor? An analysis of the influences on the evolution of South Africa's housing programme". In *Democracy and Delivery: Urban Policy in South Africa* edited by Udesch Pillay, Richard Tomlinson and Jacques du Toit. Cape Town: Human Sciences Research Council, 2006.

Chatterjee, Partha. *Lineages of Political Society: Studies in Postcolonial Democracy*. New York: Columbia University Press, 2011.

Cloete, Fanie. "Greying and Free Settlement" in *Apartheid City in Transition* edited by Mark Swilling, Richard Humphreys and Khehla Shubane. Cape Town: Oxford University Press, 1991.

Cohen, Jean L. and Andrew Arato, *Civil Society and Political Theory*. Cambridge: MIT Press, 1992.

Corder, Hugh (ed.). *Democracy and the Judiciary*. Cape Town: IDASA, 1989.

Das, Veena. *Life and Words*. Berkely: California University Press, 2007.

Dodson, Alan. "The Group Areas Act", in *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan, 137-161. Cape Town: Oxford University Press, 1990.

Durand, Stephen. *A social support network in an informal settlement : Zevenfontein* (Master of Arts, University of Johannesburg, 2015), 60.

<https://ujcontent.uj.ac.za/esploro/outputs/graduate/A-social-support-network-in-an/9912561807691>

Ebrahim, Hassen. *The Soul of a Nation: Constitution-Making in South Africa*. Cape Town: Oxford University Press, 1998.

Ellman, Stephen. "A Bittersweet Heritage: Learning from the Making of South African Legal Culture". In *Law in Context: A Socio-Legal Journal*, Vol. 28 No. 2 (2010): 76-94. [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1868&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1868&context=fac_articles_chapters)

Elster, Jon and Rune Slagstad (eds.) *Constitutionalism and Democracy*. Cambridge: Cambridge University Press, 1988.

Epp, Charles R. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: Chicago University Press, 1998.

Forsyth, C.F. *In Danger for their Talents*. Cape Town: Juta & Co, 1985.

Fuller, Lon L. *The Morality of Law*. New Haven, Connecticut: Yale University Press, 1964.

Gardner, John. *Politicians and Apartheid: Trailing in the People's Wake*. Pretoria: Human Sciences Research Council, 1997.

Harber, Anton. *Diepsloot*. Johannesburg: Jonathan Ball Publishers, 2011.

Harrison, Philip, Alison Todes and Vanessa Watson. *Planning and Transformation: Learning from the Post-Apartheid Experience*. London: Routledge, 2008.

Hart, H.L.A. *The Concept of Law*. Oxford, Oxford University Press, 1961.

Hendler, Paul. "Houses for the People: The Relevance of NGOs to Housing Delivery" In Planact. *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Himlin, Rebecca. "NGOs and the People's Housing Process". In Planact. *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Hindson, Doug. "Orderly Urbanisation and Influx Control: from Territorial Apartheid to Regional Spatial Ordering in South Africa". In *Regional Restructuring Under Apartheid: Urban and Regional Policies in Contemporary South Africa*, edited by Richard Tomlinson and Mark Addleson, 74-105. Johannesburg: Ravan Press, 1987.

Hoexter, Cora and Glenn Penfold. *Administrative Law in South Africa* (3<sup>rd</sup> ed). Cape Town: Juta & Company, 2021.

Huchzermeyer, Marie. "Housing for the poor? Negotiated housing policy in South Africa". In *Habitat International* Vol. 25 NO. 3 (2001): 303-331.

<https://www.sciencedirect.com/science/article/pii/S0197397500000370>

Huchzermeyer, Marie. "Housing rights in South Africa: Invasions, evictions, the media, and the courts in the cases of Grootboom, Alexandra, and Bredell". In *Urban Forum*. Vol. 14 (2003): 80–107, <https://doi.org/10.1007/s12132-003-0004-y>

Huchzermeyer, Marie. *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil*. Trenton, New Jersey: Africa World Press, 2004.

Huchzermeyer, Marie and Aly Karam (eds.). *Informal Settlements: A Perpetual Challenge?* Cape Town: UCT Press, 2006.

Jackson, Steven J., Paul N. Edwards, Geoffrey C. Bowker, and Cory P. Knobel, "Understanding Infrastructure: History, Heuristics, and Cyberinfrastructure Policy", in *First Monday*, Vol. 12 No. 6 (2007).

<https://doi.org/10.5210/fm.v12i6.1904>

<https://firstmonday.org/ojs/index.php/fm/article/view/1904>

Jeffrey, Craig. "Timepass: Youth, class, and time among unemployed young men in India" in *American Ethnologist*, Vol. 37 No. 3 (August 2010): 465-481.

<https://anthrosource-onlinelibrary-wiley-om.ezproxy.uct.ac.za/doi/pdf/10.1111/j.1548-1425.2010.01266>.

Khan, Firoz. "Continuities, Ambiguities and Contradictions". In *Housing Policy and Practice in Post-Apartheid South Africa* edited by Firoz Khan and Petal Thring. Johannesburg: Heinemann, 2003.

Kahn, Firoz and Petal Thring (eds.). *Housing Policy and Practice in Post-Apartheid South Africa*. Sandown: Heinemann, 2003.

Kennedy Duncan. *A Critique of Adjudication*. Cambridge: Harvard University Press, 1998.

Keightly, Raylene. "The Trespass Act". In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan, 180-193. Cape Town: Oxford University Press, 1990

Kirtsoglou, Elisabeth and Bob Simpson (eds.) *The Time of Anthropology: Studies of Contemporary Chronopolitics*. London: Routledge, 2020.

Klug, Heinz. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press (2000).

Laloo, Kiran. "Arenas of contested citizenship: housing policy in South Africa" in *Habitat International*, Vol. 23 No. 1 (1999): 35-47.

<https://www.sciencedirect.com/science/article/pii/S0197397598000344#aep-section-id7>

Langford, Malcolm, Ben Cousins, Jacky Dugard and Tshepo Madlingozi. *Socio-Economic Rights in South Africa: Symbols or Substance?* Cambridge: Cambridge University Press, 2014.

Latour, Bruno. *The Making of Law: An Ethnography of the Conseil d'Etat*. Cambridge: Polity Press, 2010.

Liebenberg, Sandra. "[The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa](#)". In *South African Journal on Human Rights*, Vol.17 No.2 (2000): 232-257.

Liebenberg, Sandra. *Socio-Economic Rights: Adjudication under a Transformative Constitution*. Cape Town: Juta, 2010.

Liebenberg, Sandra. *The Interpretation of Socio-Economic Rights*. 2018.

<https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap33.pdf>

Lodge, Tom. "Reform, Recession and Resistance" in Tom Lodge and Bill Nasson (eds.) *All, Here and Now: Black Politics in South Africa in the 1980s*. Ford Foundation, 1991.

Mafora, Dan. *Capture in the Court*. Cape Town: Tafelberg, 2023.

Malcolm, Janet. *The Journalist and the Murderer*. New York: Vintage Books, 1990.

Mamdani, Mahmood. "Social Movements and Constitutionalism: The African Context". In *Constitutionalism and Democracy: Transitions in the Contemporary World*, edited by Douglas Greenberg et al, 172-185. New York, Oxford: Oxford University Press, 1993.

Marais, Hein. *South Africa: Limits to Change*. Cape Town: University of Cape Town Press, 1998.

Marcus, Gilbert and Steven Budlender. *A Strategic Evaluation of Public Interest Litigation in South Africa*. The Atlantic Philanthropies, 2008.

Mayekiso, Mzwanele. *Township Politics: Civic Struggles for a new South Africa*. New York: Monthly Review Press, 1996.

Mbali, Mandisa. *South African AIDS Activism and Global Health Politics*. Houndmills and New York: Palgrave Macmillan, 2013.

McCann, Michael. *Rights at Work*. Chicago: University of Chicago Press, 1994.

Marie McGregor, "Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces". In *De Jure* Vol.8 (2011).

<https://www.saflii.org/za/journals/DEJURE/2011/8.html>

Minow, Martha. *Making All the Difference: Inclusion, Exclusion and American Law*. Ithaca: Cornell University Press, 1990.

Mitchell, Timothy. "Introduction: Life of Infrastructure". In *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 34 No. 3 (2014).

doi 10.1215/1089201x-2826013

<https://muse.jhu.edu/article/566144/pdf>

Morris, Pauline. *A History of Black Housing in South Africa*. South Africa Foundation, 1982.

Mufson, Steven. "Introduction: The Roots of Insurrection", in Tom Lodge and Bill Nasson (eds.) *All, Here and Now: Black Politics in South Africa in the 1980s*. Ford Foundation, 1991.

Muller, Gustav. "The Legal-Historical Context of Urban Forced Evictions in South Africa". In *Fundamina* Vol. 19 No. 2. Pretoria: UNISA Press, 2013.

<https://journals.co.za/doi/pdf/10.10520/EJC149298>

Murray, Christina and Catherine O'Regan (eds.). *No Place to Rest: Forced Removals and the Law in South Africa*. Cape Town: Oxford University Press, 1990.

Ngcukaitobi, Tembeka. *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism*. Cape Town: Penguin Random House, 2018.

Oldfield, Sophie. "The Centrality of Community Capacity in State Low-income Housing Provision in Cape Town, South Africa". In *International Journal of Urban and Regional Research*. Vol. 24 No. 4 (December 2000): 858-872, <https://doi.org/10.1111/1468-2427.00283>

Oldfield, Sophie and Patricia Zweig. "The Contested Politics of Housing Allocation in Ikapa, Cape Town, 1981-1994". In *Journal of Southern African Studies*, Vol. 26 No. 1 (March 2010): 133-150, <https://www.jstor.org/stable/40600236>

Oldfield, Sophie and Saskia Greyling. "Waiting for the state: a politics of housing in South Africa". In *Environment and Planning*, Vol. 47 No. 5 (May 2015):1100-1112, DOI:10.1177/0308518X15592309

O'Regan, Catherine. "The Prevention of Illegal Squatting Act". In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan, 162-179. Cape Town: Oxford University Press, 1990.

Pakleppa, Yoni. *Tempered Tempos: The Politics of Waiting for Public Services in Contemporary Cape Town.* . MA Thesis. Cape Town: Faculty of Humanities, African Studies, 2019.

<http://hdl.handle.net/11427/31027>

Penn, Nigel. *Rogues, Rebels and Runaways.* Cape Town: David Philip Publishers, 1999.

Penn, Nigel. *The Forgotten Frontier.* Cape Town: Double Storey Books, 2005.

Pillay, Suren. "The Prerogative of Civilized Peoples: Apartheid, Law, and Politics". *Comparative Studies of South Asia, Africa and the Middle East*, Vol. 34, No. 2 (2014): 294-313.

<https://muse.jhu.edu/pub/4/article/554575/pdf>

Planact. *Making Towns and Cities Work for People: Planact in South Africa: 1985-2005*". Johannesburg: Planact, 2009.

Posel, Deborah. *The Making of Apartheid 1948-1961.* Oxford: Clarendon Press, 1991.

Robinson, Jennifer. "The geopolitics of South African cities: States, citizens, territory". In *Political Geography*, Vol. 16 No. 5 (June 1997), 365-386,  
[https://doi.org/10.1016/S0962-6298\(96\)00019-4](https://doi.org/10.1016/S0962-6298(96)00019-4)

Rosenberg, Gerald N. *The Hollow Hope.* Chicago: Chicago University Press, 1991.

Roux, Theunis. *The Politics of Principle: The First South Africa Constitutional Court, 1995-2005.* Cambridge: Cambridge University Press, 2013.

Sachs, Albie. "[The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case](#)". In *Current Legal Problems*. Vol.56 No. 1 (2003): 579-600.

Scheingold, Stuart. *The Politics of Rights: Lawyers, Public Policy and Social Change*. New Haven and London: Yale University Press, 1974.

Seekings, Jeremy. *The UDF: A History of the United Democratic Front*. Cape Town: David Philip, 2000.

Seekings, Jeremy and Nicoli Nattrass. *Poverty, Politics and Policy in South Africa*. Johannesburg: Jacana Media, 2015.

Soni, Dhiru V. "The Apartheid State and Black Housing Struggles". In *The Apartheid City and Beyond* edited by David M. Smith. Johannesburg: Routledge, 1992.

Sutcliffe, Michael, Alison Todes and Norah Walker. "Managing the Cities, An Examination of State Urbanization Policies since 1986". In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan, 86-106. Cape Town: Oxford University Press, 1990.

Thurman, Sarah. *An Evaluation of the Impact of the National Housing Policy in the Western Cape*. Cape Town: Development Action Group, 1999.

<https://www.dag.org.za/wp-content/uploads/2023/10/impact-of-the-housing-policy-wcape.pdf>

Tissington, Kate. *A Resource Guide to Housing in South Africa 1994-2010*. Johannesburg: Socio-Economic Rights Institute of South Africa, February 2011.

Tissington Kate, Naadira Munshi, Gladys Mirugi-Mukundi and Ebenezer Durojaye. *'Jumping the Queue', Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa*. Cape Town and Johannesburg: Community Law Centre and the Socio-Economic Rights Centre, 2013.

<https://www.seri-sa.org/index.php/more-news/174-research-report-jumping-the-queue-waiting-lists-and-other-myths-perceptions-and-practice-around-housing-demand-and-allocation-in-south-africa-3-july-2013>

Tomlinson, Richard and Mark Addleson (eds.) *Regional Restructuring Under Apartheid: Urban and Regional Policies in Contemporary South Africa*. Johannesburg: Ravan Press, 1987.

Van Ameringen, Marc (ed.). *Building a New South Africa: Urban Policy*. Johannesburg: International Development Research Centre, 1995.

Van Kessel, Inneke. "*Beyond our wildest dreams*" *The United Democratic Front and the Transformation of South Africa*. Charlottesville: University Press of Virginia, 2000.

Vismann, Cornelia. *Files: Law and Media Technology*. Stanford: Stanford University Press, 2008.

Von Schnitzler, Antina. *Democracy's Infrastructure: Techno-Politics and Protest after Apartheid*. Princeton: Princeton University Press, 2016.

Wesson, Murray. "[Grootboom and beyond: reassessing the socio-economic jurisprudence of the South African Constitutional Court](#)" in the *South African Journal on Human Rights*. Vol.20 No. 2 (2004): 284-308.

Wilkinson, Peter. "Straddling Realities: The Urban Foundation and Social Change in Contemporary South Africa". University of the Witwatersrand African Studies Institute, Seminar Paper No. 117, May 1982.

<https://wiredspace.wits.ac.za/server/api/core/bitstreams/050667c4-8b18-4cd5-8908-5a6b89b9e4af/content>