

## UN-HABITAT:

### South Africa - Overview of the current Housing Rights situation and related activities

#### 1) Background and normative/institutional framework for the promotion and protection of housing rights: constitution, legislation, policy measures, national jurisprudence, housing rights institutional arrangement (e.g. national housing rights institutions)

##### Constitution:

- The nature of land reform adopted since 1994 is encapsulated in the Constitution, which attempts to find a balance between competing demands. It protects existing property rights and makes provision for the orderly transfer of land rights to the landless majority.
- Thus in the post 1994 era, South Africa has moved away from the complete disrespect for property rights of the majority of South Africans under the apartheid government to a system of strong protection of property rights and clear processes for the acquisition of property rights, and constitutionally valid limitations on the content of property rights.
- The drafters of the Constitution anticipated the need for land reform in order to rectify the imbalances created in the past, but specifically made provision for an orderly land reform programme which is based on a strong support of property rights and the rule of law as well as the protection of the environment.
- The Constitution Act No. 108 of 1996) states that "...Everyone has the right to have adequate housing... the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right", and that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, Section 26(1-3). It further defines an unqualified right to shelter by children (Section 27(1)).
- The Bill of Rights protects existing property rights, providing the basis for land reform, in particular as it relates to past discrimination under apartheid. Beyond this, it states that "...the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"(Section 25(4).
- The Reconstruction and Development Programme (RDP) document and the Government's *White Paper on South African Land Policy* (Department of Land Affairs, 1997) articulated the concept of land reform. The entitlement to land reform is constitutionally guaranteed and is contained in Chapter 2 of the Constitution entitled "Bill of Rights". The Bill of Rights is the principal source of substantive constraints on public power but also places duties on Government to progressively devise and implement, within its available resources, comprehensive and coordinated programmes to realise socio-economic rights.
  - Section 25 (4) emphasises that "the public interest includes the nation's commitment to land reform, and to reforms to bring the equitable access to all South Africa's natural resources"; and that "property is not limited to land".
  - Section 25(5) states that the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
  - Section 25(6) states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- While South Africa has ratified a number of relevant international and regional human rights treaties and has included the right to adequate housing in the Constitution, it has not yet

ratified the International Covenant on Economic, Social and Cultural Rights which is recognized as the most important international agreement in respect of housing rights.

### **Legislation:**

The state has enacted the following legislation to give effect to the Constitution:

- In addition to those inherited from the previous dispensation such as the Provision of Land and Assistance Act, 1994 (Act No. 126 of 1993), Parliament has passed the following: The Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997), the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996), the Transformation of Certain Rural Areas Act, 1998 (Act No. 94 of 1998) and the Communal Land Rights Act, 2004 (Act No. 11 of 2004).

### **Policy:**

The South African Land Reform Programme has the challenging task of redressing the injustices of colonialism and apartheid, which resulted in skewed distribution of land where white South Africans who in 1991 represented about 10 percent of the population owned almost 87 percent of the land (Department of Land Affairs, 1997). In addition, land reform is intended to address extreme conditions of poverty in rural areas where 75 percent of South Africa's poor live (Adams *et al.*, 1999), and to address the specific aspirations of women (Cross & Friedman, 1997). The objectives of the strategy were to promote a more broad-based distribution of land ownership (equity), achieve a more productive use of the land (efficiency), and create more meaningful rural jobs (poverty reduction). The implementation of this strategy was to be achieved in three programme areas: (i) restitution of land to the victims of forced removals; (ii) land tenure reform to promote security of tenure for all; and (iii) redistribution of land to historically disadvantaged, landless people.

- Land restitution forms the second pillar of the land reform programme. It aims to redress the imbalances in land ownership that were created by policies and legislation of forced removals such as the infamous Natives Land Act, 1913 (Act No. 39 of 1913). The nature of restitution is determined by three broad categories of the effects of land dispossession - namely, dispossession leading to landlessness, inadequate compensation for the value of the property, and hardships that cannot be measured in financial or material terms (Department of Land Affairs, 1997). Some communities, such as the Makuleke of the Kruger National Park, gained land rights in protected conservation areas through the restitution process and are developing tourism development strategies.
- Land redistribution was conceived as a means of opening up the productive land for residential and agricultural development. The national government set itself a target of redistributing 30% of the country's commercial agricultural land (about 24 million hectares) (Department of Land Affairs, 1997) over a five-year period (i.e. from 1994 to 1999). The Department of Land Affairs faced a number of daunting additional challenges: How to deal with the widely differing needs and aspirations of people for land, in both urban and rural areas? How to redistribute land in a manner that was both equitable and affordable? How to contribute to employment, poverty reduction, and economic growth? How to address the urgent and immediate situation of landlessness and homelessness?
- This target has been extended since the review of the programme in 2000 to redistribution of 30% of agricultural land by the year 2014 (Department of Land Affairs, 2003a) and encompasses all agricultural land redistributed through all three programmes. As of 31 March 2007, less than 5% of land had been redistributed, although approximately 60,000 households received grants for land acquisition, mainly for shelter (Department of Land Affairs, 2007). The redistribution programme therefore is the main driver of the government's land reform

agenda because it would provide men and women with ownership of land for growth, equity and poverty reduction.

## **2) Promotion and protection of housing rights on the ground: national legislation and voluntary commitments, national housing rights activities, public awareness of housing rights, cooperation with housing rights mechanisms, etc.**

- The **Housing Subsidy Scheme**, introduced in 1995, is one of the most important ways of implementing the Constitutional right of access to adequate housing. People who qualify for a housing subsidy receive a once-off grant from the government for housing purposes.
- The initial focus of the subsidy programme was on the “poor”, defined simply in terms of income as those earning less than R 3,500 per month. Since 1994, housing delivery for low-income households has been one of the key programmes. The backlog of three million houses set the government’s focus on mass delivery at the highest possible rate with an emphasis on the green-field development. Targets of about 300,000 houses per year were set for the ten-year period from 1994.

## **3) Achievements, Best Practices, Challenges and Constraints**

### **3.1. Achievements**

- Since the inception of the Housing Policy and Strategy for South Africa, built on a national consensus in 1994, it has been widely acknowledged that the achievement of the **2,355,913** houses in twelve years is unprecedented both nationally and internationally.
- It is estimated that over 6 million people in both urban and rural areas have benefited from the programme by receiving a fixed asset, security of tenure, basic services such as water and sanitation and basic shelter.

### **3.2. Challenges and Constraints**

- **Overcoming Apartheid Planning:** Over the past decade, housing and service delivery interventions for the poor have continued to perpetuate apartheid urban form. This has resulted in the creation of large dormitory settlements of low-cost mass housing on the urban periphery where the price of land is cheap. These areas are typically far from economic opportunity and have limited and expensive transport access. They also tend to reinforce the segregation of the city along racial and income lines. This is likely to trap people in poverty and pose long-term social costs. Therefore the perpetuation of the apartheid spatial form is seen as a serious outstanding challenge for cities. According to the South African Cities Network’s (SACN) “State of South African Cities” report (2006), “Cities can do much to address the spatial challenges of the ongoing segregation, fragmentation and sprawl by ensuring that broad spatial development frameworks are translated into practical local level plans (among others)”.
- There is a need to improve intergovernmental planning and actions. This is particularly important given the fragmentation of the functions in social services, transport and housing – all essential to the effective operation of cities.
- **Service Delivery Protests:** Whilst millions have been housed, millions gained access to clean water and many successes have been recorded, many researchers claim that rising poverty has caused more people to lose their houses and others have their water or electricity cut off because of unpaid bills. The millions staying in informal settlements are angered by the long wait for service delivery while others see their shacks being demolished for various reasons. Service delivery protests swept across the country leaving dozens injured, roads blockaded with rocks and tires set alight, demanding adequate housing, water and sanitary

facilities. To date countless protests have rocked the settlements with some of them becoming violent. The frustration of service delivery began to boil in mid-2004, when residents of a settlement near the town of Harrismith (Free State) rioted. Since then demonstrations have spread to virtually every corner of the country.

- There are serious issues of role clarification. For example when people demand housing, they go to the municipalities. This is despite the fact that it is not a local government competency to provide housing. This is a provincial competency. Still, the local government is part of the cooperative governance structure while legislation governing them excluded housing as their function.
- **Evictions:** Legislation on evictions has been enacted since 1996 to address the issue of evictions and land invasions. Where land outside of a formally declared township has been occupied with the consent of the owner, the Extension of Security of Tenure Act No. 62 of 1997 (ESTA) applies. The Act prescribes eviction procedures. These procedures include that the relevant court should consider circumstances. In cases of land occupation and eviction, the Prevention of Illegal Eviction (PIE) from Unlawful Occupation of Land Act 19 of 1998 applies. This Act criminalizes un-procedural evictions. The procedure set out for eviction differs according to the length of occupation. Where this has exceeded six months, it must be considered whether alternative land can reasonably be made available by a municipality or other organ of the state or another land owner. Where the land has been occupied for less than six months, an eviction order may only be granted after considering all the relevant circumstances.
- Thousands of people are evicted for various reasons and several legal cases go on in courts throughout the country. The latest incidents include the vicious cycle of the hijacking of inner city buildings in Johannesburg by crime syndicates. A local newspaper's investigation exposed how syndicates scout the area to find derelict overcrowded and even hijack properties, by posing as municipality officials in order to gain access into the buildings. They then draw up fraudulent eviction notices, using fake letterheads of the courts, which seemingly are sold to them by corrupt officials. These buildings are then used for various illegal activities.
- In other instances people are staying in abandoned warehouses located in industrial areas that have been vacated. These warehouses are then partitioned and rented out by aspirant slumlords. Many of the warehouses are without electricity and they have contributed to many fires because people use paraffin stoves to cook.
- The manner in which the housing needs of poor people dealt with in the inner city needs urgent attention. This should not be seen as giving priority attention to people who "jump the queue" at the expense of people who obey the rule of law. Furthermore, this should not imply that only people with access to legal representation get treated fairly than those who have no access.
- **Migratory Patterns:** There is also a need to understand the migration patterns and understand "the migrant's long term plans so as to be able to focus – for example – on rental accommodation (if new urban residents are only in cities for a short time or on education). Targeting informal settlements areas where the majority of new urban residents are often "accommodated on arrival" can provide much needed information. These are people with no formal addresses, far from economic opportunities and lead precarious and impoverished lives. Official population and economic statistics at a municipal level are not updated regularly enough for cities to track changing demographic patterns.

- **Slow progress on land redistribution:** The government has admitted that drastic steps will have to be taken to save its national land reform programme from disaster. This follows widespread protests against the slow pace of land being transferred into black hands and delays in compensating families who were forced off their land during apartheid. Although a range of land reform steps have been taken, much more is needed before the existing distribution pattern and inequalities in access to land are resolved. The redistribution of land under the Redistribution and Restitution programmes has been extremely slow due to the “market-based” approach taken by government and the lack of capacity within key agencies such as the Department of Land Affairs (DLA), Provincial Departments and local municipalities. Farm dwellers, including labor tenants, remain vulnerable to evictions and other abuses of their rights, and more effective means need to be found to provide them with tenure security. In the communal areas of the old “homelands”, debate continues around the direction that tenure reform should take, and the future role of traditional leaders.
- Where people have obtained land under the land reform programme, they have often struggled to make effective use of it, due to poor settlement planning and a lack of appropriate support from the state and private agencies; and the continuing dispossession of black people of land from the apartheid well into the post-apartheid era is a cause for concern. As revealed by the study undertaken by Nkuzi Development Association and the Social Surveys, 940,000 black people were removed from white farms in the first ten years of democracy (between 1994 and 2004) than were evicted in the previous ten years under apartheid. The results of this survey need to be thoroughly reviewed and to draw lessons from the study.
- Less than 5% of the country’s agricultural land has been distributed to black people since 1994 – despite the Government’s promise of a 30% transfer by the year 2014. Only 9,405 people benefited from successful land redistribution last year, less than the number of people estimated to have been evicted from commercial farms during that time.
- Other findings show that the land restitution programme, aimed at people relocated under apartheid, has over 5,279 rural land restitution claims still outstanding – many of them being community claims involving thousands of residents. Another report by the Human Sciences Research Council (HSRC) showed that current agriculture and land reform policy could lead to the loss of 300,000 farm jobs over the next 15 years – this on top of the 400,000 jobs lost since 1985. A World Bank report stated that the 30% land distribution target would cost around R35 billion and warned that a lack of reform would lead to instability. About 83% of agricultural land is held by 40,000 white farmers, the report said.

**4) Key national priorities, initiatives and commitments that the country intends to undertake to overcome above challenges and constraints and to improve the housing rights situation on the ground.**

- **The National Spatial Development Perspective (1999 – 2006):** The National Spatial Development Perspective is one of the most important documents in understanding urban development in South Africa. It originated in 1998 in the Presidency as a tool to guide public infrastructure investment and development spending. This stemmed from a deep concern that post-1994 government expenditure was not helping to eradicate the apartheid space economy. Work on the National Spatial Development Perspective introduced a set of principles based on the concepts of “need/poverty” and “development potential” to describe the national space economy. It argued that the Government’s key social objective of poverty alleviation would best be achieved by focussing economic growth in economically sustainable areas with proven development potential. In areas with little or no potential, the focus, beyond providing the constitutionally mandated minimum services, should be on “people and not places”. This

would involve high levels of development spending on social investments, such as human resource development, labour market intelligence, health and social transfers. It was speculated that this kind of “development spending” would enable young people especially, to gravitate to areas with potential once they had matriculated.

- The explicit spatial nature of these principles led to a mapping of the South African space economy to provide a high-order indication of the location of potential and need in the country.
- In 2002, the National Spatial Development Perspective was updated and was approved by Cabinet in 2003. In 2005 a further update of the National Spatial Development Perspective began, incorporating 2001 Census data as well as the Provincial Growth and Development Strategies and the municipal integrated development plans. The update also included new analysis and mapping techniques providing a more nuanced reading of the South African space economy. This revealed that the metros and secondary cities had:
  - high levels of concentration of economic activity;
  - High levels of population concentration; and
  - Large numbers of people living below the Minimum Living Level.
- The bulk of districts in the country had relatively low levels of economic activity and high levels of people living below the Minimum Living Level.
- The starkness of this picture was further demonstrated by the fact that 77% of the country’s geographic value added product is generated in just 26 localities and nearly 58% in the three metropolitan areas of the Gauteng City Region, Cape Town and the Durban/Pietermaritzburg conurbation. As for poverty/need, the more detailed analysis highlighted the persistent socio-economic divide between urban and rural areas; former black townships and former white suburbs in the cities; and the former Bantustans and former “white” South Africa.
- The updated 2006 National Spatial Development Perspective builds on the picture of the space economy and principles of the 2003 version but is more explicitly tied to Government’s stated objective of achieving and sustaining a 6% economic growth rate. It provides signals on how to address the challenges of the disparities in the space economy with a focus on maintaining and growing the economy in locations where the bulk of national geographic value added is currently generated. This strategy is supported by the belief that through investing in these areas the bulk of those living in poverty in South Africa will also be reached given that the broader areas (60 km radii) in which the 26 nodes are located are home to 77% of all people living below Minimum Living Level in the country (more than 18 million) 84% of the total population, and 95% of the national economy.