SESSION 6

Experiences with the Right to Adequate Housing in South Africa: A Socio-legal Perspective

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Inspired by South Africa's history, its Constitution and international human rights standards, the Legal Resources Centre (LRC) is committed to a fully democratic society based on the principle of substantive equality and to ensure that the principles, rights and responsibilities enshrined in South Africa's Constitution are respected, promoted, protected and fulfilled. The LRC strives to function as an independent, client-based, non-profit public interest law clinic which uses law as an instrument of justice and provides legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender or disability, or by reason of social, economic or historical circumstances. The LRC seeks creative and effective solutions by using a range of strategies, including impact litigation; law reform; participation in partnerships and development processes; education; and networking within South Africa, the African continent and at the international level. [1]

1 http://lrc.org.za/, last accessed 2 August 2019.

The session was moderated by **Guillermo Delgado**, Land, Livelihoods and Housing Programme Coordinator, ILMI, NUST

Introduction: Legal background to the Right to Adequate Housing in South Africa

I am going to start with explaining how the right to adequate housing came to be in South Africa as well as a bit of the historical background, which Namibia shares in part. In this way, we can see what we can possibly learn from each other.

In the multi-party negotiations and CODESA[2] leading up to 1994, and the development of the new Constitution, one of the really prominent issues was the right of access to adequate housing. A lot of time and energy went into making sure that South Africa had a proper clause in the Constitution to ensure that people had at least some form of a right over housing. The result of that was section 26 of the Constitution:

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.*

This is the 'right of access to adequate housing'[3] clause that South Africa employed after 1994. I will speak about all the different factors in terms of giving content to the right of access to adequate housing.

The Grootboom case: Failure to add content to the right to Adequate Housing?

The very first South African case in regard to the right to housing was the Grootboom judgement.[4] The case dealt with a community within the Wallacedene area in Cape Town. This was an informal settlement without access to water or a sewerage system, patchy access to electricity, and generally very poor social circumstances. Ms Grootboom, after whom the case is named, was one of the people living in this community who decided one day that they could no longer endure their living conditions. They packed their belongings and moved onto a piece of land that was privately owned and demarcated for low-profit housing developments. Of course, the private landowner instituted eviction proceedings, but for some reason, [the community] ended up staying on the property for another four months or so before they were finally evicted. They took their belongings and moved onto the Wallacedene sportsgrounds just outside of Wallacedene, because they could not move back to where they had previously lived as other people had taken occupation of the homes they had left behind. So, they erected structures on the Wallacedene sportsgrounds, after which eviction proceedings were instituted against them. The community was represented by the Legal Resources Centre and their argument was primarily based on section 26 of the Constitution. Essentially, they said, "We have got the right to adequate housing, and the housing policies of the City of Cape Town does not allow for emergency housing. We currently do not have any housing. We actually moved from our housing because the circumstances there were not conducive to normal living." The court, for the first time, looked at [the meaning of] the right to adequate housing. The Constitutional Court[5] said in 2001 that –[6]

> *... housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.*

For a person to have access to adequate housing, all of these conditions need to be met: there must be land, there must be services and there must be a dwelling. On a close analysis of this passage the court does not actually give a content to the right of access to adequate housing. Yes, it says that housing must be more than bricks and mortar, and people must have land, it must be serviced, and there must be a dwelling. But it does not say what kind of dwelling [and] it does not speak to what kind of services are to be implemented on that piece of land. And as my talk continues, I want you to keep in mind that, in South Africa, we have missed an opportunity in terms of giving content to the right to adequate housing.

First of all, the court decided to read the right of access to adequate housing within its textual context. The right cannot be read just on its own: it needs to be read with the right to dignity, equality, the rights of children, and all of those related constitutional rights. This is one of the areas where the court missed an opportunity to flesh out section 26. For example, the judgement did not say that, if the right of access to housing entails that a person must have a dignified existence, what that means practically on the ground and [what] housing [should look like] to ensure that it complies with the standard of human dignity.

The court also rejected the idea of a minimum core obligation. This is a legal principle that was developed in foreign jurisdictions, most notably by the Indian Supreme Court. In the context of socio-economic rights, the minimum core obligation means that, for each socio-economic right, the State has an obligation to provide enough resources to at least meet a minimum standard. The minimum standard is specified and is regarded as the core obligation. The applicants in the Grootboom case argued that the court should accept a minimum core obligation for the right of access to housing. For example, every person in South Africa is entitled to a house of 40 m^2; they are entitled at least to one toilet, a tap that runs, and sewerage infrastructure. The Constitutional Court rejected this approach for various reasons, one of them being that they felt they were not in the position to be able to tell the executive or the legislator what exactly the right of access to housing entails, as they did not have details about what the government would be able to provide in these circumstances.

2 The Convention for a Democratic South Africa was a process to oversee the coalition created by organisations opposing apartheid (http://www.sahistory.org.za/article/convention-democratic-south-africa-codesa).

3 Also referred to herein as right to adequate housing.

4 Grootboom and Others v Government of the Republic of South Africa and Others - Constitutional Court Order (CCT38/00) [2000] ZACC 14 (21 September 2000).

5 The highest legal body in South Africa; deals with constitutional matters.

6 Grootboom case (ibid.); available at http://www.saflii.org/za/cases/ZACC/2000/19.html, last accessed 10 August 2019.

They also felt that it could have created an inflexible situation where the right to access to adequate housing could not be differentiated for particular circumstances or communities. By rejecting the minimum core obligation, the court failed to set a standard for the right of access to adequate housing that could be used to hold government to account.

Ironically, in the Grootboom case, they also referred to the ICESCR and the other rights that the Special Rapporteur was referring to in her message,[7] which [make] specific provision for giving content to the right to adequate housing. It says that the right of access to adequate housing will entail, for example, legal security of tenure; affordability; availability of services, material, facilities and infrastructure; habitability; accessibility; location and cultural adequacy. At that point South Africa had not yet ratified the Covenant, which only happened in 2015. So, the court referred to that briefly and said, "We have taken notice of this but are not going to accept it, as we are under no obligation to do so." Given the fact that South Africa has now ratified this Covenant it would be appropriate for our courts to read section 26 against the backdrop of international law.

The court did, however, address certain aspects of the State's obligation. The court distinguishes between a *positive* obligation and a *negative* obligation (see below). The positive obligation derives from sections 26(1) and (2) of the Constitution, which state that the State must act within its available resources [and] take reasonable and other legislative measures for the progressive realisation of the right to adequate housing. This means that the State must prove that it is doing something or starting to do something to realise the right to housing. It cannot just sit back and do nothing. As the right is progressively realisable, the State must demonstrate that it is taking some steps and that there is efficiency in taking these steps. Lastly, whatever steps the State is taking must be within its available resources.

Section 26(3) of the Constitution addresses the *negative* obligation on the State by prohibiting evictions without a court order. The court in *Grootboom* stated that government should be reluctant to proceed against unlawful occupiers of public land in instances where the eviction will lead to homelessness. When we get to the 'Eviction' section (see below), I will show you other measures that have been implemented to mitigate the effects of evictions that could cause homelessness. Essentially, in order to evict someone, there is the need for a court order. Especially were the State is involved and it is public land, you must be very mindful that your actions could [not] lead to a person being deprived of the right of access to adequate housing.
The final measure that the court decided to impose was reasonableness. The court said that they were not going to establish a minimum core obligation, and they were not going to give content to the right; rather, what they were going to do was a 'reasonableness inquiry'. Reasonableness is an administrative law term that asks whether the measures taken by government are reasonably possible of facilitating the realisation of section 26 of the Constitution.[8] If you consider this carefully, the actions taken do not actually have to facilitate the realisation. They do not actually have to have any effect, to be quite honest: they must just be "reasonably possible"[9] of doing so. And the court specifically said that it was not its role to enquire as to whether or not there were better means of achieving the right of access to adequate housing. The question then, rather, is: ***Is what the government has presented to court reasonably possible of facilitating the realisation of section 26 of the Constitution?*** Even in administrative law,[10] reasonableness is a very low standard. It does not require much of government to jump over that hurdle. Essentially, what they have to say is, "We have embarked on this project. We have decided we will provide, for example, low-cost rental housing and this is the decision we have taken. And yes, it is reasonably possible, in the larger scheme of things, that this will achieve some form of realisation of section 26 of the Constitution." ***The court does, however, give a few guidelines in terms of assessing what we deem reasonable***. For example, something will be reasonable if it is comprehensive and coordinated. It must also be capable of facilitating the realisation of the right. It must be reasonable in its conception and implementation; it must be balanced and flexible; and it must have short-, medium- and long-term goals. This last point was specifically inserted because the *Grootboom* case dealt with emergency housing. The measures must address the plight of those in desperate need. In the *Grootboom* judgement, the court found that the housing policy of the City of Cape Town was not reasonable in that it provided no means to address emergency housing. So, for people who were living in squalid conditions [and] who needed immediate access to housing, there was no provision in the policy at all.

The standard of reasonableness, which is essentially the standard we are now using for adequate housing in South Africa, has positives and negatives. The first positive is that it is flexible. It is a good standard to have in instances where you are working with different communities in different contexts because it can be adjusted to a particular context or a particular group of people, e.g. where people are more vulnerable than in other cases. So, it is a flexible mechanism that can take cognisance of people's lived experiences as opposed to a minimum core obligation that sets a uniform standard that is applicable to everyone. However, it does not make provision for people who have very unique particular circumstances or communities who have very specific challenges.

The problem with this standard as a way of realising the right of access to adequate housing is that it actually conflates (1) the justification that the State must provide for the measures they have decided on, and (2) the right to adequate housing, into one inquiry – and the standard is not very high. What it essentially does is it creates a very normative vacuum within which the inquiry about the right to adequate housing takes place because we are not measuring the justification against any benchmark. It also silences the voice of the people, for whom the right to adequate housing might entail something more than just bricks and mortar. The standard does not really give proper content to this particular right.

7 See Foreword.

8 See 4

9 See footnote 6 of this session.

10 A branch of law focusing on the activities of government entities.

Giving meaning to the Right to Adequate Housing

I will now present some of the South African experiences to give content to the right of adequate housing since 1994 and even a bit before that; and then speak to our experiences within our organisation and our other social partners.

If we look at the current social situation in South Africa, we have seen an enormous increase in public protest surrounding access to adequate housing. These protests are often very hostile and violent and can take the form of burning property, including houses. In 2012, the former Public Protector stated that 10% of all the inquiries or complaints lodged with her office dealt with access to adequate housing, problems with government provision [of housing], and problems with mismanagement of the housing system.[11] We have also seen quite an increase in illegal occupations of open areas within cities recently. We have seen the rise of political parties such as the EFF[12] that have definitely got people thinking about their rights and particularly the right of access to adequate housing.

In terms of the positive obligation on the State, there are two projects which I want to discuss. The first one deals with security of tenure. Section 25(6) of the Constitution, which is the property and land reform clause,[13] says that people whose rights to tenure security were insecure as a result of racially discriminatory practices or laws or any form of discrimination within the country, have the right to have their tenure secured. Even before this was implemented, South Africa had enacted legislation in 1991 to the effect that, in demarcated township areas and where the municipality had records of who was living on [a] particular plot, residents were entitled to have their housing right secured by way of a lease, permit or any other form of property right that could get them title over that particular piece of land. After 1994, there was an incredible drive to get titles – to get ownership of property – as opposed to any other right. Ownership was the one thing that people felt could protect them and secure their tenure. So, in many instances, people were given title deeds to properties in township areas and their names were registered as the lawful owners of those properties. This sometimes happened at a minimum fee but varied very much depending on the particular municipality.

The cost of Titles and Literacy on Ownership

We are now seeing, specifically in the Grahamstown area, the sort of consequences of that system that seems to, for the most part, have happened in a haphazard way. We have got a Deeds Registration Office, which I understand Namibia has as well,[14] and ownership only transfers when your name is registered against a property within the Deeds Office. That is a legal process and, unfortunately, in South Africa, there are costs associated with it. That process must happen by way of conveyancers, who are attorneys with special qualification; and if there is money to be made, the attorneys will make it. The costs associated with having a house registered are prohibitive. At the same time, people who have never had access to any housing right often will not even know that they have to go and register the house. For example, in the Grahamstown area, many of the titles that were granted in this way were never registered. The Act did not provide for the costs around it to be waived, and the deed registration system does not allow for low-cost registrations. The costs are very much dependent on the value of your property as well as certain mandatory registration fees. There is currently an organisation emerging in South Africa that wants to do low-cost registrations,[15] and they are being stopped by the lawyers and the conveyancers because, obviously, the conveyancers are anxious [that they will] lose a lot of money. We are in the process of making representations to the Law Society to ask that this organisation be allowed to do the job they are doing because the rules of the Law Society also do not allow NGOs like ours to do conveyancing. The problem is that there are no other options for people, and there has not been enough education around what it means to have a title deed in South Africa. Simply put, people have not gone through the process of attaining home ownership: the process has not been completed as these deeds have not been registered.

The 'Family Home': Beyond Westernised notions of Property

The second point we need to be addressing, also in the Namibian context, is the Western notion of ownership and property rights: one person, one house, one title deed. This does not take into account the lived realities of people living in various family constellations. In the Eastern Cape, people often talk about family homes. These are homes that have been in families for generations and have been passed on from one generation to the next, with or without ownership formally changing in the Deeds Office. The law does not take cognisance of the concept of a family home. You cannot register a house as a family home in the Deeds Registry. So, we often get clients that are being evicted from their homes by relatives, saying, "But it's a family home! I grew up there, I was born there, I've lived there my entire life. This house belongs to us as a family." And then, when you start going back into the history, you will see that at the point of registering the title, if the title was registered, often the uncle or whoever was employed was named on the title deed. In South Africa, there is a complete misconception that the person who is responsible for the rates and taxes for a house is also the owner. Families would say, "This person is employed. He is the one who is caring for our family. So let's have him registered as the owner of the property, because then he will be responsible for the rates and taxes." Of course, it is not the same thing: you can be registered as the person who pays the rates and taxes even though you are not the owner. But 20 years down the line, when this uncle has passed away, the uncle's son, the cousin – always that one cousin – decides that the house belongs to him because he got it from his dad because of intestate succession[16] – and he is right! In terms of South African law, he is then the owner of that property. He can have it transferred to his name and he can evict his entire family from that home. So, it is really important that a mechanism be found to take account of people's perceived housing rights – which do not always align with Western interpretations of individual property ownership. One of the ways which we

11 Corruption Watch. Presentation to the Portfolio Committee on Human Settlements by the Public Protector Adv TN Madonsela. Available at https://www.corruptionwatch.org.za/wp-content/uploads/migrated/PublicprotectorDHS.pdf, last accessed 14 August 2019.

12 The Economic Freedom Fighters (EFF) are a political party in South Africa, launched in 2013 on the platform of radical economic transformation.

13 Section 25(6) reads as follows: "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."

14 Namibia has a Deeds Office operating under the Ministry of Land Reform.

15 Proxy Smart Services (Pty) Ltd.

16 Inheritance modalities when the deceased had no will.

suggested to address this issue was having co-ownership; thus, having more than one person registered as the owner of the property so that one family member does not hold all the rights alone. However, this does not actually address the idea of a family home in perpetuity.

The Gender Dimension

The third point which requires attention is the gender dimension, especially in the context of customary marriages. In South African law, customary marriages are recognised, but only once they have been formally registered – similar to civil marriages. However, most people do not register their customary marriages. Often, the house is registered in the husband's name, and when they get divorced or when their marriage ends up not working, the wife does not have any real rights over the property. The default position in South African law is that the property will be divided equally in cases of divorce unless there is an antenuptial contract that determines otherwise. However, when the marriage is not registered, the wife usually does not get access to her half of the property. The resulting tenure insecurity for women is really something that needs to be addressed in South African law, and I am assuming that in the Namibian context you have a similar legal situation.[17]

17 The law is indeed quite similar to that of South Africa; see: The Namibian. (2017, September 14). Marital Property. The Namibian. Retrieved from https://www.namibian.com.na/index.php?page=archive-read&id=169266

Titles may Lead to Insecurity of Tenure

With regard to title deeds, we have also found in the South African context that, when people have been given title deeds – which, of course, provides opportunities in terms of accessing credit – this has often led to more insecurity of tenure. We have got a big problem with loan sharks specifically targeting social grant beneficiaries, who are the poorest of the poor. This is because our credit market is not as regulated as it should be and, unfortunately, grant beneficiaries inevitably have to access some form of credit. Where people do have titles, they often end up losing their homes through sales in execution[18] because they have taken up mortgage bonds over their houses or they have incurred debts they cannot repay. Thus, for many people, getting titles has not actually secured their tenure forever.

18 In the South African context, sales in execution involve a public auction by a representative of the court; see e.g. "Sale in Execution Properties – Home Loans", available at https://www.fnb.co.za/home-loans/sale-in-execution-properties.html, last accessed 21 February 2018.

The 'Myth' of the Waiting List

Housing waiting lists are also very problematic in South Africa because they go back to before 1994. Government had already compiled waiting lists and, when the 1994 democratic transition happened, there were new waiting lists that were developed at different levels of government. At some point we had a national waiting list system, but only two of the nine Provinces accepted it. The result is that, until now, each Province has their own waiting list. It is all very nice to get onto a waiting list, but nobody knows how the waiting list is managed and how beneficiaries are allocated. In 2013, the Socio-Economic Rights Institute in Johannesburg did a study on how housing was allocated through waiting lists, and they found that nobody knew how it worked.[19] There are too many lists, too many different role players that have a say, and the backlogs are immense.

19 See: SERI/Socio-economic Rights Institute of South Africa. 2013. 'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa. Johannesburg: SERI. Available at http://www.seri-sa.org/images/Jumping_the_Queue_MainReport_Jul13.pdf, last accessed 14 August 2019.

Corruption and Local Government involvement in Housing Delivery

Another major aspect hampering housing provision – which is very well-documented, especially in the case of the RDP – is the issue of corruption and fraud in tender processes. Before 2001, the RDP was run nationally and provincially, mainly by way of private tenders. Around 75% of all RDP houses were built by private developers who had been contracted by the State. Since 2004, many municipalities have been accredited as developers of RDP housing projects. So, a lot of these projects are now run by municipal councils, and often councillors get personally involved. We have a councillor in Grahamstown who is the owner of six RDP houses, all of them registered in his name. While he lives in one of the best houses in town, he rents out his RDP houses. He had another four houses registered in his name, which he sold for R50,000[20] each. Unfortunately, this is not unique. All of the municipalities in the Eastern Cape as well as our partners in Johannesburg and Cape Town – everybody is complaining about the same thing. The system has been corrupted by councillors, and it has been corrupted by the way in which tenders are allocated to specific people. While there is a specific process that needs to be followed in South Africa for allocation of tenders, very often it is the 'tenderpreneurs' that are commissioned. This is slowing down the process of housing delivery. When people are caught, the tender has to be repealed or set aside by the court and then it has to be reallocated. So, we are talking about a two- to three-year delay in a particular project because of one tender process that has not been followed properly.

20 One Rand (R) is equal to one Namibia Dollar (N$).

The Limits of National Capacities to Manage Titles

South Africa has a big problem with the management of title deeds. Very often, people do not receive their title deeds for RDP houses. Research shows that 1.5 million RDP houses have not been registered at the Deeds Office.[21] So, essentially, they do not have any sort of legal right over the property. Then there is a clause in the Social Housing Act that states that, when you have received an RDP house, you are not allowed to resell it within eight years. I can understand the argumentation behind that: it is supposed to secure the tenure. But what we are seeing is that people are selling the houses anyway. People move away, people's circumstances change. Most of us in this room have not stayed in the same place for the last eight years: our lives have changed, we have migrated, we have moved. And the same is true for people living in RDP houses. What we are seeing is that, because people know they are not allowed to sell the house, they do not go through the formal sales process: they just sell the house informally. The problem is that, whereas an RDP house is normally built for about R160,000, people are selling houses for as little as R10,000. If they had been given the opportunity to sell the house earlier, when they wanted to sell it, people would be able to resell the house for R150,000 instead through the formal process and they would know that they could buy another house with the money received from the RDP housing. That resale clause in the Social Housing Act, while it was well intended, has created an informal

21 Gordon, R., Nell, M., & Di Lollo, A. (2011). Investigation into the delays in issuing title deeds to beneficiaries of housing projects funded by the capital subsidy. Retrieved from Urban LandMark website: http://www.urbanlandmark.org.za/downloads/title_deed_delays_report_2011.pdf

market. About 11% of RDP housing in South Africa has been resold in the informal market,[22] which means title deeds have not been transferred and the prices have not been at the level they should have been.

22 (ibid.)

Political Profiteering through Public Housing

Housing programmes allow for abuse of political influence. There is a [so-called] coloured township in East London which has been on the waiting list for RDP housing for more than 16 years. The development was supposed to have started [in] 2004. In all the other townships around [there], RDP housing was constructed, but not within that particular township. When people went to the municipality to ask why they were not building houses, the municipal council told them that the area had voted largely for the Democratic Alliance[23] and that they should not be surprised that they were not receiving housing. However, the right to adequate housing is not for a particular group of people or for a particular political affiliation: it is supposed to be for everyone.

23 The official opposition party in South Africa.

Negative Obligations: Protection against Evictions and the Reality on the Ground

We will now look at eviction law, which represents government's negative obligation. Eviction law in South Africa, based on sections 26(1) and (3) of the Constitution, states that you cannot evict someone without a court order. The court will not grant an eviction order if they feel that it is not just and equitable in the circumstances. The circumstances that are usually taken into account are questions such as: Are there children or elderly living in the house? Is there alternative accommodation? This sets a benchmark for protecting people's right of access to adequate housing if they are already live in housing. However, in terms of legal evictions in South Africa, we are not doing particularly well – even though the legislation has been established. The last study that was conducted in 2005 says that only 1% of all evictions in South Africa went through the legal process.[24] That might have increased in the 12 years since; but, from the number of clients coming into my office on a daily basis, illegal evictions are still happening at an incredible rate.

24 Social Surveys, & Nkuzi Development Association. (n.d.). Summary of Key Findings from the National Evictions Survey. Retrieved from Social Surveys Africa & Nkuzi Development Association website: https://sarpn.org/documents/d0001822/Nkuzi_Eviction_NES_2005.pdf

Alternative Accommodation

The court will not grant an eviction order if they are not sure that that person has access to alternative accommodation. The courts also give proper content to what alternative accommodation means. If a person can go and live with his or her aunt, the court will see that as alternative accommodation. But when you are trying to evict larger communities, for example, in township areas or illegal occupations, it becomes more tricky. The one case that the LRC has dealt with – and I will speak about it in terms of meaningful engagement as well – related to the Joe Slovo informal settlement, situated next to the N2 highway in Cape Town. In 2004, the Breaking New Ground housing policy was introduced,[25] which included the idea [of upgrading] our informal settlements.

25 Breaking New Ground is the title of South Africa's 2004 revision of its housing policy. The revised policy provides a guide for the development of human settlements over a five-year period. See: RSA/Republic of South Africa. 2004. "Breaking New Ground": A comprehensive plan for the development of sustainable human settlements. Department of Human Settlements. Available at http://www.dhs.gov.za/sites/default/files/documents/breaking%20new%20ground%202004_web.pdf, last accessed 10 August 2019.

The first project that emerged was Joe Slovo; and [the] settlement was going to be upgraded with what was called the N2 Gateway Project. The N2 Gateway Project was meant to provide housing for all Joe Slovo residents, but it needed to be constructed in the area where people were already living. So, the proposal was that the residents of Joe Slovo should move to Delft, which is a place nearby, while Joe Slovo was being upgraded. Some people left; but for those that did not want to leave, an application for eviction was submitted to the courts. It was incredibly violent and created a lot of animosity between the State and the residents of this community. Those who stayed essentially did not want to move to Delft because they were moving away from their families [and] from their work, and they did not regard it as proper alternative accommodation. In that instance, the court gave a structural interdict putting an obligation on the State to provide alternative accommodation, and also determined what alternative accommodation must consist of in the circumstances. The court specifically required that every household must receive a house of 40 m^2 with access to electricity, water and refuse removal, and it must be accessible by roads. This case has been dragging on for many years and the people eventually did not move. Now there is an ongoing in-situ upgrading programme in that particular informal settlement. However, in that [specific] case, the court did give content to what alternative accommodation meant.

Joinder of Local Authorities

Another way to achieve access to adequate housing is [via] the joinder of local authorities. In South African law, whether you are evicting someone from private property or public property, you have to join the local authority and, in some instances, the Department of Human Settlements if you are dealing with a very large group of people. You also have to serve notice on the local municipality that an eviction application has been brought. Then, theoretically, the municipality is supposed to file a report with the court as to what kind of alternative accommodation is accessible to the evictees within its particular municipal area.

Getting the municipality to file a report is like trying to pull teeth. This was the issue at stake in the *Blue Moonlight Properties* case.[26] In Johannesburg, people were being evicted from a dilapidated apartment complex by the private landowner. Firstly, the City of Johannesburg rejected the idea that it had to be given notice and then report on alternative accommodation, because the case pertained to a private landowner. The court insisted that, even though it concerned private property, the local authority still [had to] file a report. In this case, it took three court cases to get the City of Johannesburg to file the report – which was still inadequate because the report did not really address the issue of those particular people, and required another report.

But, theoretically, if the municipality is doing its duty, the joinder of the local authority is meant to provide the court with an overview of possibilities for alternative accommodation for evictees within the same area before it can take a decision.

26 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011); available at http://www.saflii.org/za/cases/ZACC/2011/33.html, last accessed 22 February 2018. For an analysis of the case, see: SERI. (2016). From Saratoga Avenue to MBV 2 and Ekuthuleni (Community Practice Notes No. 3). Retrieved from Socio-Economic Rights Institute of South Africa website: http://www.seri-sa.org/images/Saratoga_Practice_notes_FOR_WEB.pdf

Meaningful Engagement

Finally, let us turn to the idea of meaningful engagement. Meaningful engagement is meant to occur before an eviction takes place. This is especially important when the eviction affects a large group of people. In these circumstances, there is an obligation on both parties to sit around the table and to speak about the practical effects of the eviction, instead of coming in with bulldozers and tearing down the entire place. The idea is that the affected community must be involved right from the start. The concept was developed in the *Olivia Road* case[27] in Durban, where people were living in horrible conditions. The court said that, even before the parties came to court, they had to have a process of meaningful engagement. There is a need to bring people on ground level into the conversation about adequate housing instead of [using] a top-down approach where people are evicted without their voices having been heard.

27 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008); available at http://www.saflii.org/za/cases/ZACC/2008/1.html, last accessed 4 March 2018. For an analysis of the case, see: SERI. (2016). From San Jose to MBV 1 (Community Practice Notes No. 1). Retrieved from Socio-Economic Rights Institute of South Africa website: http://www.seri-sa.org/images/San_Jose_Practice_notes_FOR_WEB3.pdf.

Discussion

Guillermo Delgado noted that Rose Molokoane and Sheela Patel had reminded participants in their session that the legal aspect could be a very useful instrument, but that access to the law was farfetched for many. Encouraging a discussion that was varied in approach, he began by mentioning how the right to adequate housing could be used as an inspiration that Namibia ought to strive for, rather than only as a legal term.

A participant from the Legal Assistance Centre (LAC) stated that they received plenty of applicants with eviction problems, where the City Police,[28] in particular, were in violation of the law.

28 The Windhoek City Police Service is an organ of the City of Windhoek, while the Namibian Police Force (Nampol) is a national body established in the Namibian Constitution.

Charl-Thom Bayer of NUST mentioned that, in Namibia, illegal occupations took place mostly on municipal and public land, and that the State was usually the one that did the evicting. He also explained that Namibia did not have provisions such as those in South Africa, where alternative accommodation had to be provided. Nonetheless, he added, the Namibian Constitution included fundamental freedoms and people had the right to be treated in a certain way,[29] and that ought to guide eviction processes. He questioned the idea of not employing the right to adequate housing as a legal avenue.

29 This may refer to the case where the City of Windhoek evicted a mother of four without a court order, but with the assistance of the Affirmative Repositioning movement, she was able to take the City to court. While the case was being reviewed, the family was accommodated at a bed-and-breakfast at the City's cost. See New Era, 3 April 2017. Court asks evicted land group to provide proof. Available at https://www.newera.com.na/2017/04/03/court-asks-evicted-land-group-to-provide-proof/, last accessed 11 August 2019.

Mr Delgado explained that a rights-based approach differed in character from an investment-based approach, for example. While both might be more or less desirable, depending on the party in question, they could also be in conflict with each other. He offered as an example the proposal to reform the legislation on rentals to protect tenants: while many welcomed this as a positive development, those in the financial sector saw it as a negative influence on the property markets. He reminded the audience of the Special Rapporteur's message,[30] in which she stressed that housing was a right, not a commodity.

30 See Foreword.

John Nakuta, law lecturer at the University of Namibia, stressed that there was a difference between the right to adequate housing, that was recognised under international law, and the right to property. He explained that the Namibian Constitution only provided for the right to property, but that the right to adequate housing was incorporated into this right when Namibia signed the ICESCR in the early 1990s. He emphasised that adopting a rights-based approach to fulfil the right to adequate housing was not an option. In illustration, he referred to the problem of affordability, saying it was not possible simply to address that issue at the expense of others, such as security of tenure. He explained that, if one aspect was neglected, then a person could not be said to enjoy the right to adequate housing. He asked the presenter to expand on the fair lending legislation in South Africa, which compelled financial institutions to comply with the right to adequate housing.

Ms Van Schalkwyk stressed that countries were obliged to take international law into account. She also emphasised how other rights that were in the Namibian Constitution could also be used to enforce the right to adequate housing, even if the right was not included in the Constitution as such, e.g. the right to dignity, equality and family life.

Regarding fair lending, Ms Van Schalkwyk mentioned there were social movements trying to get financial institutions to address the plight of the poor. She explained how stringent the procedures were to get a bond to buy a house in South Africa, including having a credit record. She stated that, without these, applicants were regarded as 'high-risk clients', which was a proxy for 'low-income groups'. She noted that her organisation had supported cases protecting people's rights in execution when their properties were being sold to cover debt. As an example, she described a case where a woman's house had been placed in execution for a debt of just a few hundred Rand, and that the court had deemed this a violation of the debtor's right to adequate housing. She also noted how banks were now aware of the issue and took the option of restructuring the debt. She added that, previously in South Africa, one could have a house sold in execution and the execution warrant could be issued by the registrar of the court, i.e. the evictee was not even seen by a judge. In other words, one's house could be sold in execution without the debtor being aware of what was going on, she explained. This ended with a Constitutional Court case, *Gundwana vs Steko Development*,[31] which established that such decisions had to be taken by a court of law.

Hilia Hitula of the Walvis Bay Municipality asked whether there was a specific definition of ownership. She referred to the example of 'family homes', where a house was not perceived as being owned by one individual

31 Gundwana v Steko Development CC and Others (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011); http://www.saflii.org/za/cases/ZACC/2011/14.html, last accessed 14 August 2019. For an analysis of the case, see: Tissington, K. (2011). A Resource Guide to Housing in South Africa 1994-2010. Legislation, Policy, Programmes and Practice. Retrieved from Socio-Economic Rights Institute of South Africa website: http://www.seri-sa.org/images/stories/SERI_Housing_Resource_Guide_Feb11.pdf

but was the property of a wider family network. She believed that this notion was probably not limited to Namibia and South Africa but was arguably applicable to the broader African context. She also questioned the idea that proof of ownership amounted to a piece of paper and stressed how much effort went into obtaining such a document, while what was at stake was a basic human need – regardless of proof of tenure or what form that took.

Ms Van Schalkwyk explained that, in South Africa, particularly under the presidency of Thabo Mbeki, the focus was on a very neoliberal economic approach which favoured the idea of individual titles ('one person, one title') because this gave people access to credit. However, she explained that there was now a shift away from that in South Africa and different forms of tenure beyond 'ownership' such as long-term leases were being supported. She nevertheless noted that the support for individual ownership was still very much alive. She also mentioned the notion of *co-ownership*, where one could have more than one person's name on a title deed; all such named parties remain actively involved when circumstances changed. Ms Van Schalkwyk also suggested that different tenure possibilities may be something more related to education and the ability to understand how public procedures (e.g. land administration) operate than to actual changes in the way that the Deeds Office operated. At the same time, she stressed that, in order to actually have ownership, that notion had to be understood in the same sense that the Deeds Office understood it. While she recognised that placing property in the name of a trust was a more flexible possibility, it was a costly and complex endeavour, and certainly not a tool applicable to the realities of many today. She mentioned that there were also 'family property associations' but emphasised that such legal options entailed yet other complexities.

Ms Hitula noted that while shack dweller groups constituted some form of collective processes, local government authorities were generally reluctant to engage with them. She asked what practical experience on the ground could help these organisations.

Ms Van Schalkwyk admitted having no definitive answer to the question, but she explained how her office had assisted boards of representatives with constitutions that stated who their beneficiaries were. In such cases, the board itself was registered as the owner of the property in question, and this option was acceptable to the Deeds Office.

Mr Bayer noted how these options all came with their own sets of challenges. He noted that the more sophisticated a collective group was, the more expensive and complicated its set-up became. He stressed that being a group automatically implied a greater degree of complexity because of the multiple opinions that shaped how the group functioned. He used the Rehoboth area to illustrate this point. Although the Deeds Office allowed properties in Rehoboth to be registered in the name of all one's dependants, it created a situation where various individuals had a claim to a property, which made decisions regarding that property a burdensome task. He noted that a similar case applied in Namibia's communal areas.

Ms Van Schalkwyk stressed that the Deeds Registry and the Deeds Registration Act,[32] specifically in South Africa as well, needed to start becoming aware of the various modes of tenure taking place on the ground. She mentioned how such Acts stemmed from a very old system and that it was a mistake to think that system would last forever. She felt that recognising and supporting different forms of ownership was something that needed to be addressed in South Africa and perhaps in other parts of the world as well.

32 No. 47 of 1937 (South Africa).

Taro Ashipala from the City of Windhoek asked whether the definition of house was the same in South Africa as it was in Namibia's Local Authority Act.[33] He mentioned cases where, if the City Police found a building that, in their view, did not comply with certain characteristics, then they did not regard it as a house. He also noted how the discussion had not elaborated on the time dimension. In this regard, he asked how long a person had to live in a place to be able to claim the right to adequate housing.

33 The Local Authorities Act, 1992 (No. 23 of 1992) defines the sense of buildings as including "(a) any structure, whether of a v or temporary nature, constructed or used for the housing or accommodation of human beings ...; (b) a wall of at least 1,2 metres in height ... [or] (c) any boundary fence or wall". However, there is no further specification on the nature of such building.

Ms Van Schalkwyk replied that she was not aware of a specific Act in South Africa that defined the notion of house, but that the challenges regarding ambiguity in the right to adequate housing could be illustrated in the *Grootboom* case.[34]

34 See footnote 4 of this session.

Mr Ashipala referred to Namibia's Deeds Office not allowing the registration of properties smaller than 300 m^2. He noted how this provision had created a situation where some people rented for many years. In his view, this was also unfair fair to those who wanted to leave a patrimony for their children. He also noted how the lack of ownership, i.e. not being in possession of a title deed, prevented inhabitants from building a permanent structure on a plot of land. He added that it was not possible to erect a permanent structure on a plot of land that was not fully serviced, and that the process of servicing was left to the local authority to do as and when resources permitted, or they chose to give it priority. The challenge, he concluded, was that inhabitants were unable to improve their living conditions because of ownership limitations.

Mr Nakuta reminded the participants that, when speaking about the right to adequate housing, this involved not only ownership but rentals as well. Furthermore, he stressed that inhabitants of informal settlements were equally entitled to the right to adequate housing and, by extension, security of tenure.

An unidentified female participant mentioned how monitoring and evaluation mechanisms were needed to follow up what had already been tried. She stressed how government projects ended up dying a silent death, which created the idea that there was no accountability.

Ms Van Schalkwyk responded that, in South Africa, it was not so much a lack of mechanisms to address problems of corruption, but rather that follow-ups on such cases were scarce. To illustrate, she referred to the Public Finance Management Act[35] and the legislation regulating public procurement,[36] which set out specific mechanisms for how procurements needed to happen to prevent corruption. These laws prescribed what tender committees needed to be formed within municipalities and outlined specific tender processes, but on a day-to-day basis, these procedures were not always followed. The task was to bring to book or even fire those who took part in such crimes, but this did not always happen. She concluded that half of the work was having the mechanisms in place; as important, however, was following up and holding people accountable.

A participant from the LAC clarified that, under the rules of the Law Society of Namibia, the LAC could not take a matter to court if they saw a problem, whereas the LRC in South Africa could do so. Whereas public interest law in South Africa had the scope to do things on their own, the LAC needed to have clients walk through the door, screen them, and then hand over their case to a litigation lawyer, for example. She stated that the LAC was considering asking the court to expand its standing to allow it to act on behalf of the public.

Mr Bayer brought up the cases of local authorities not adhering to the law or misspending their funds. He suggested that, at some point, notwithstanding the costs, litigation might be the way to go.

Mr Delgado reminded the participants that, in the case of Namibia, local councillors were appointed, not elected (with the exception of regional councillors). Therefore, the mechanism for accountability through elections was not really available. He stated that local governance and accountability were key areas for further work.

Ms Van Schalkwyk provided an example of a case where a court awarded a property to a specific person, but the property transfer was not effected because the beneficiary made a living selling things on the side of the road and could not scrape the money together for the transfer.

An unidentified participant mentioned that, in Namibia, issues of affordability were serious: many houses had been built but stood empty because no one could afford them.[37]

Ms Van Schalkwyk explained that transfer fees in South Africa depended on property values. If the house was not expensive, the transfer fees might be low – but many might still find that unaffordable.
Mr Bayer referred to a study in which he had taken part where transfer costs were established to have been between 7% and 8% of the value of the property. In his view, these rates were comparatively favourable by international standards; however, such costs sometimes amounted to almost 100% of a beneficiary's annual income. Even if covering such costs would take five to ten years, the impact on the beneficiary's livelihood would be significant. He also mentioned cases where some people's monthly rental for a property was higher than what a home loan repayment would be, and suggested some form of regulation to address this.

35 No. 1 of 1999 (South Africa).

36 Government of the Republic of South Africa. (n.d.). General Procurement Guidelines. Retrieved from http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf

37 This may refer to the houses built during the first phase of the MHDP which, at the time of the Forum, were reportedly still unoccupied; see: The Namibian. (2017, June 7). 2 000 houses unoccupied. The Namibian. Retrieved from https://www.namibian.com.na/index.php?page=archive-read&id=165448.