Submission on the
Gauteng Land Invasion Management and Prevention Policy

Socio-Economic Rights Institute of South Africa
(SERI)

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Executive summary

In July 2017, the Gauteng Department of Human Settlements (the Department) published its provincial policy on land invasion management and prevention, and invited interested parties to comment on the policy. The policy aims to develop a coordinated approach in relation to the unlawful occupation of land. SERI has prepared and submitted comments on the draft policy in line with the organisation’s areas of expertise.

SERI recognises and welcomes the spirit of the draft policy, which clearly attempts to address land occupation in a manner that is respectful of the constitutional and human rights of unlawful occupiers and takes stock of the legal framework governing evictions. This is apparent in the principles and positions laid out in the policy. In particular, SERI welcomes the Department’s recognition of the importance of the principles of consultation and meaningful engagement with unlawful occupiers; the Department’s acknowledgement of the legal and moral obligations of local and provincial government to provide land for residential accommodation; and the Department’s commitment to ensuring that a “suite” of housing options is made available “prior to evictions” from unlawfully occupied land. These principles go a long way towards encouraging local governments to develop more proactive strategies to address the unlawful occupation of land.

SERI also welcomes the Department’s recognition that proactive approaches to addressing unlawful land occupation should be considered and, where-ever possible, prioritised over relocation, eviction or demolition.

However, despite the laudable policy principles and positions, SERI’s submission touches on a number of concerns with the policy. In this respect, SERI’s submission:

- briefly clarifies the law in relation to eviction and local government’s constitutional duty to provide alternative accommodation to unlawful occupiers who are rendered homeless as a result of an eviction;
- argues that the policy is an inappropriate response to urbanisation;
- argues that policy encourages evictions;
- questions the lack of clarity about “registration permits” and “site allocations” and the Department’s silence on the appropriateness of Anti-Land Invasion Units; and
- argues that the policy fails to take stock of the various proactive ways in which provincial and local government can address unlawful land occupations, including the targeted use...
of the Emergency Housing Programme (EHP) and the Upgrading of Informal Settlements Programmes (UISP) contained in the National Housing Code of 2009.

SERI concludes the submission by noting that SERI does not support policies which allow the proliferation of informal settlements or unsafe living conditions, and agrees that the reduction in the number and size of informal settlements over time is an appropriate and achievable goal. At the core of SERI’s submission too is a recognition of the agency and dignity of those who the policy casts as “land invaders” and a better understanding of the social circumstances that lead to what the policy dismisses as “land invasions”.

The achievement of the policy’s goals lies primarily in informal settlement upgrading and/or the provision of appropriate alternative housing to people living in shacks, not in aggressive regulation, enforcement of formal building standards and hasty evictions. If the type of enforcement contemplated by the policy is to play any role in addressing informal living conditions, it must be secondary to, and conditional upon, the provision of adequate housing and it must be consistent with the Constitution and PIE Act (as interpreted by South African courts) and important national policies such as the UISP and the EHP. In our submission, at present, the policy does not adequately reflect this reality.
1. Introduction

In July 2017, the Gauteng Department of Human Settlements published its provincial policy on land invasion management and prevention,¹ and invited interested parties to comment on the policy. The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the proposed amendments and makes this submission to the Gauteng Department of Human Settlements (the Department) in accordance with the invitation to submit written comments.

SERI’s submission provides background to the organisation and its work; sets out general comments on SERI’s work dealing with land occupations, evictions, the provision of alternative accommodation, relocations that take stock of human rights standards and informal settlement upgrading, and provides more detailed comments on the policy.

The submission, which is based throughout on the legal requirements of the Constitution and the PIE Act (as interpreted by South African courts), also encourages policy coherence between the policy itself and national housing policies such as the UISP and the EHP.

2. The Socio-Economic Rights Institute (SERI)

SERI is a registered non-profit organisation and public interest law clinic that provides professional, dedicated and expert socio-economic rights assistance to individuals, communities, community-based organisations (CBOs) and social movements in South Africa. SERI conducts applied legal research, litigates in the public interest, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI’s core work relates to the advancement and protection of access to socio-economic rights in socio-economically marginalised (poor) communities.

One of SERI’s primary thematic focus areas is ‘Securing a Home’, which includes protecting and fulfilling the right of access to adequate housing; challenging unlawful evictions; informal settlement upgrading; and defending and promoting access to basic services such as water, sanitation and electricity, particularly in informal settlements.²

² For more on SERI visit the SERI website: https://www.seri-sa.org
Over the last 10 years SERI has been involved in legal, research and advocacy work around evictions, relocations, rental housing, allocation of state-subsidised houses, and informal settlement upgrading. We have published several resource guides, research reports and working papers, including the following:

- ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa (April 2013).

SERI has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and informal settlement upgrading. These include:

- **Abahlali baseMjondolo and 30 Others v eThekwini Municipality and Others (Cato Crest)** Cato Crest informal settlement - illegal eviction - urgent interdict - Durban High Court
- **Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another (Blue Moonlight)** eviction - alternative accommodation - Constitutional Court
- **Dzai and Others v Ekurhuleni Metropolitan Municipality and Others (Makause)** Makause informal settlement - Upgrading of Informal Settlements Programme (UISP) - Ekurhuleni Metropolitan Municipality
- **Fischer and City of Cape Town v Ramahlele and 46 Others (Fischer)** Marikana informal settlement - anti-land invasion unit - Supreme Court of Appeal
- **Lyton Props and Robert Ross v Occupiers of isiQalo and City of Cape Town (isiQalo)** isiQalo informal settlement - eviction application - Western Cape High Court
- **Melani and the Further Residents of Slovo Park Informal Settlement v City of Johannesburg and Others (Slovo Park)** Slovo Park informal settlement - Upgrading of Informal Settlements Programme (UISP) - City of Johannesburg Mzimela and Others v
3. Eviction law and jurisprudence in South Africa

The right of access to adequate housing, enshrined in section 26 of the Constitution, is undoubtedly the most contested and frequently litigated socio-economic right in the South African context. The volume of litigation over the right has meant that the applicable law is frequently re-interpreted and the related rights and underlying principles have been more significantly developed than any other socio-economic right.

This is unsurprising given the apartheid legacy of denying the majority (black) population access to adequate housing, valorising property ownership at the expense of all other forms of property rights and using evictions as a means to systemically relocate black people far away from urban centres and opportunities.

These practices were reinforced by statutes such as the Prevention of Illegal Squatting Act 52 of 1951 (PISA) but were also buttressed by the common law, in terms of which the rei vindicatio gave owners a bare right to evict unlawful occupants regardless of their circumstances and the text of lease contracts was for the most part taken at face value and not underwritten by any notions of fairness or equity.

This section examines the development of eviction law since the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) was passed in 1998.

3.1. The PIE Act

In 1998 the first democratic Parliament replaced PISA with the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The PIE Act gave effect to section 26(3) of the Constitution’s requirement that a court consider all the relevant
circumstances before making an eviction order. It required the eviction of an unlawful occupier to be “just and equitable”, having regard to a range of factors, including the personal circumstances of the occupiers and whether alternative accommodation could be made available by the state.

The PIE Act was intended to protect the millions of South Africans in urban areas who had no common law entitlement to the land that they lived on, at least until housing could be rolled out at scale. In this sense, the PIE Act sought to invert the legal order in relation to evictions: from a legal framework that targeted unlawful occupation and “land invasion”, to one that sought to prevent illegal evictions.

3.2. Development of eviction law

Since 2000, a number of important eviction-related cases have come before the Constitutional Court, including Grootboom, Modderklip, PE Municipality, Olivia Road, Blue Moonlight, Skurweplaas and Mooiplaats.\(^3\)

In the *Port Elizabeth Municipality v Various Occupiers (PE Municipality)* judgment, handed down by the Constitutional Court in 2005, Sachs J reviewed the way in which the apartheid legal order – particularly through PISA – deliberately sought to make evictions as easy as possible. He characterised section 26(3) of the Constitution and the PIE Act as an inversion of apartheid law, requiring unlawful occupiers to be treated with “dignity and respect”,\(^4\) not as “obnoxious social nuisances”\(^5\). He wrote that the Constitution has substantially altered the law relating to evictions by recognising that the “normal ownership rights of possession, use and occupation” are now offset by “a new and equally relevant right not arbitrarily to be deprived of a home”\(^6\).

Section 26(3) of the Constitution, according to Sachs J “evinces special constitutional regard for a person’s place of abode” acknowledging that “a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.”\(^7\) According to Sachs J:

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\(^4\) *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC), para 12 (PE Municipality)*.

\(^5\) *PE Municipality*, para 41.

\(^6\) *PE Municipality*, para 23.

\(^7\) *PE Municipality*, para 17.
It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual. 

According to PE Municipality, while the Constitution and the PIE Act do not provide that under no circumstances should a home be destroyed, a court should be reluctant to conclude that an eviction would be just and equitable unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending access to permanent housing.

Almost ten years after the PE Municipality judgment, despite the state’s commitment to progressively realising the right to housing through its range of state-subsidised housing programmes, many poor households remain unable to access adequate housing, often having to live in difficult conditions in informal settlements, backyard shacks and inner city “slum buildings”, subject to exploitation and the constant risk of eviction.

The constitutional provision promising everyone access to adequate housing and the protections contained in the PIE Act stand in stark contrast to pervasive realities of housing backlogs, evictions and removals. This is one of the main reasons that the right of access to adequate housing has been so regularly invoked in court. The volume of litigation has meant that the law in relation to the right to housing, evictions and alternative accommodation is continuously changing and adapting as the South African courts have incrementally and progressively developed the right.

The development of this right has led to concomitant obligations on local government. The constantly developing legal framework has given rise to a new cluster of relationships in relation to housing and eviction law. These relationships, in turn, are characterised by a series of rights and obligations pertaining to various parties. However, municipalities have been hesitant, unable or unwilling to act on the obligations laid down in case law. More generally, across the country municipalities have failed to devise and implement proactive, programmatic

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8 PE Municipality, para 18.
9 PE Municipality, para 28.
and coherent responses to evictions and the provision of alternative accommodation in instances of eviction within their jurisdictions.

Instead, municipalities have often responded in a largely uncoordinated *ad hoc* manner by providing alternative accommodation only after being ordered (sometimes several times) by courts to do so. In cases where the municipalities have sought to implement a more coordinated response, the strategies have often failed to adequately internalise the substantial protections encapsulated in jurisprudence and human rights law.

Since the Constitutional Court’s judgment in *PE Municipality* and indeed even before it, much judicial energy has focused on developing principles concerning the relevant circumstances that courts should consider, as well as what constitutes a “just and equitable” eviction in order to govern the instances in which courts should or should not order evictions. Through interpreting section 26 and the PIE Act, the courts have developed the law to establish a set of transformative principles that now govern evictions from homes. These include the following: that the state is required to develop a reasonable housing policy; various procedural safeguards; the provision of alternative accommodation by the state to unlawful occupiers who are at risk of being rendered homeless as a result of an eviction; meaningful engagement; that the state cannot bypass the PIE Act; the limitation of private property ownership rights; and what would constitute an eviction in terms of section 26(3) of the Constitution.

The Constitutional Court has also clearly pronounced itself on various occasions on different aspects of so-called land invasions. Its position, which is well reflected in the judgment of van der Westhuizen J in *Zulu*:

“No for a moment do I doubt the seriousness of illegal land invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else to live. This was the motivation for the enactment of PIE and its protective measures which are intended to ensure due process and sufficient consideration of housing needs prior to eviction. As state organs, the respondents have failed in their constitutional obligations by repeatedly evicting (or, as the case may be, sanctioning the eviction of) the Madlala Village residents without an appropriate court order.”

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10 *Zulu and Others v eThekwini Municipality and Others* 2014 (4) SA 590 (CC), para 46 (Zulu).
In SERI’s submission, in general, the policy does not sufficiently consider the seriousness of the “illegal eviction of vulnerable individuals with nowhere else to live”. It therefore risks repeating unconstitutional evictions which violate unlawful occupiers’ rights.

4. Comments

4.1 Preventative policy principle

SERI is encouraged by the policy principle set out in section 8 (e) of the draft policy:

“(e) Making available a “suite” of housing options prior to evictions based upon qualifying criteria: the Department shall identify and discuss different housing options to the affected communities before evictions.”

This is the centerpiece of a preventative and proactive approach. The lack of available housing options, particularly affordable rental accommodation near to economic centres, is a key driver of unlawful occupations. People occupy land because of a lack of alternatives, and identifying and discussing alternative housing options is the most effective preventative strategy.

4.2 Attitude towards “land invaders” and “land invasions”

The policy defines land invasions as “the illegal occupation of land, with the intention of establishing dwellings on it. This also extends to the illegal occupation of property without obtaining consent from the property owner.” As a result, it refers to those people committing such land invasions as “land invaders” throughout. The Constitutional Court has rightly condemned this type of characterisation noting that

“this description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental, and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like “occupiers” might well be more appropriate.”

11 Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others 2012 (4) BCLR 382 (CC), para 3 (Skurweplaas).
In fact, and as a matter of law, the PIE Act refers to those who policy characterizes as “land invaders” as “unlawful occupiers” and occupations the policy describes as “land invasions” as “unlawful occupations”. Although the policy is correct that one of the aims of the PIE Act is to prevent unlawful occupations, it accepts them as a necessary fact of South African life in the historical and present social and economic environment.

In its most recent judgment on housing rights and PIE evictions, the Constitutional Court has therefore emphasised that the PIE Act’s explicit purpose is to protect unlawful occupiers despite the unlawfulness of their occupation. It therefore concluded that inquiry into the justice and equity of an eviction “has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.”

SERI therefore submits that it is inadvisable for the policy to use terminology that the Constitutional Court has condemned as violative of constitutional rights. Moreover, it is submitted that the policy’s approach is effected throughout by this mischaracterisation and therefore “comes close to criminalising the occupiers”.

4.3 The policy’s response to urbanisation

The policy acknowledges that urbanisation is taking place in many of the metropolitan and urban areas in Gauteng and of the need for “urban management”. However, it fails to recognise that informal settlements exist precisely because neither the state nor the market have produced affordable and appropriate housing opportunities sufficient to meet the housing needs of poor South Africans.

It is only through the provision of more, higher quality, and genuinely affordable housing opportunities in appropriate locations – whether in the inner-city or on its periphery – coupled with the necessary reform of planning and urban land regulation that informal settlements will no longer be needed. Simply put, informal settlements will not need to be “monitored” and “eradicated” once there are sufficient housing opportunities available to informal settlement residents.

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12 Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another 2017 (8) BCLR 1015 (CC), para 48 (Erven 87 and 88 Berea).

13 For more on how the market is incapable of resolving the housing crisis in the Johannesburg city centre see, SERI, "Affordable Public Rental Housing Policy Brief" (2016): http://www.seri-sa.org/images/Policy_brief_FINAL.pdf.
In the interim, however, the policy should reflect the reality that informal settlements are, of necessity, meeting at least some of the housing needs of those who reside in them. Policy and legislation should support the efforts of informal settlers to gradually obtain, improve and consolidate access to safe, decent housing and secure tenure. As the Constitutional Court has acknowledged even when people are living in “squalid conditions”, in which “their homes may not amount to adequate housing” they are nevertheless “homes for as long as the residents have no other or adequate housing.”\textsuperscript{14} It is the social importance of these homes – whether lawfully purchased or the result of unlawful occupations – which the policy appears to disregard.

The result is that whereas the policy appears to treat those occupying land unlawfully as criminals to be dealt with, the Constitutional Court requires them to be treated with “care and concern”.\textsuperscript{15} Indeed it goes further suggesting that “the tenacity and ingenuity they have shown in making homes out of discarded material, finding work and sending their children to school, serves as a tribute to their capacity for survival and adaptation”.\textsuperscript{16}

Neither the wide-scale provision of affordable housing opportunities, nor respect for the existing efforts of people at self-provision can be achieved by over-regulating existing informal settlements, or resorting to stringent control measures or forced evictions. What is required, as the Constitutional Court has consistently said, is a clear indication of how Gauteng’s cities and towns are to proactively deal with increasing urbanisation through policies and programmes that extend housing opportunities to a “larger number [and] wider range of people as time progresses”.\textsuperscript{17}

In the absence of these key understandings and approaches, the policy exacerbates the inevitable tension between the need to prevent the unlawful occupation of land and the perpetually increasing number of poor people seeking housing and employment opportunities in urban areas.

4.4 The policy will encourage evictions

\textsuperscript{14} Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others 2010 (2) BCLR 99 (CC), para 101.
\textsuperscript{15} Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46, para 44 (Grootboom).
\textsuperscript{16} PE Municipality, para 41.
\textsuperscript{17} Grootboom, para 45.
As a result of its mistaken understanding of the reasons for unlawful occupations, the policy places significant emphasis on relocations and evictions as possible ways of addressing land occupation in towns and cities in Gauteng. This emphasis is likely to encourage a proliferation of evictions and could contribute to unlawful and arbitrary evictions from informal settlements.

In addition, the policy’s own approach to evictions is problematic in two fundamental ways:
1) The policy fails to understand that all evictions of unlawful occupiers can only be lawful in terms of a court order;
2) Contrary the Constitutional Court’s jurisprudence, the policy regards eviction of unlawful occupiers as mandatory instead of discretionary.

### 4.4.1 Eviction of unlawful occupiers must always be in terms of a court order

Under the heading of “control measures” the policy reads:

> “where a shack or structure has been put up for more than three (3) days, and the action of immediate eviction was not taken, a notice of illegal occupation of land shall be issued, advising the occupant to remove the structure or shack immediately”. (Emphasis added)

This statement implies that in the context of an “immediate eviction” will be lawful without the presentation of a notice of illegal occupation or a court order. Since “immediate eviction” is not a legally recognised term in South African housing law, it can only be assumed that this term applies to evictions of any sort that happen within three days of when a structure has been set up by an unlawful occupier.

This distinction is not made by the Constitution, the PIE Act or any existing South African housing policy. The law clearly requires that all evictions of unlawful occupiers can only take place after a court has considered all the relevant circumstances and determined that an eviction would be “just and equitable”. To the extent that it provides for any form of eviction without a court order to this effect the policy is clearly unconstitutional. In a clear statement of this principle, in *Zulu*, Justice Van der Westhuizen highlighted the importance of PIE’s requirements noting that “its rules and requirements”, including “providing unlawful occupiers a hearing” are “not optional”. He concludes that the “destitute and landless”, who will often become unlawful occupiers out of desperation can no longer be
“considered unworthy of a hearing before they [are] unceremoniously removed from the land where they [have] tried to make their homes.”

### 4.4.2 Discretionary and mandatory eviction

A second issue with the policy’s “control measures” is that it appears to require as mandatory the eviction of unlawful occupiers that have been in occupation for more than 3 days:

“Where a shack or structure has been put up for more than three (3) days, and the action of immediate eviction was not taken, a notice of illegal occupation of land shall be issued, advising the occupant to remove the structure or shack immediately. The Legal Section is to be notified and same must prepare and urgent application to the Court for an eviction order. This action must be accomplished within three (3) months.”

The use of the words “shall” and “must” in the policy suggest that an eviction is ultimately the policy’s sole response to existing unlawful occupations. If an immediate eviction has not taken place (which we have already seen is unlawful) then the policy mandates: 1) the issuing of an eviction notice; and 2) the preparation of an urgent application to court for an eviction order; 3) within in 3 months. There are three serious problems with this approach.

First it is unconstitutional and clearly contrary to the Constitutional Court’s approach to such evictions. In *Abahlali* the Constitutional Court found that a law which required an owner or municipality to proceed with an eviction even if the PIE Act cannot be complied with “would be irrational, in conflict with the Constitution and the PIE Act and invalid.” The same proposition surely applies to policies such as the present one. The present policy does not distinguish between circumstances in which evictions would be able to comply with the PIE Act or not. It merely requires the hasty pursuit of evictions regardless of the circumstances. Second, it does not leave time and space for “meaningful engagement” or the consideration of alternative measures such as the upgrading of the unlawful occupation through the UISP. This in turn also negates the full consideration of the specific, relevant, contextual circumstances which is constitutionally required.

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18 *Zulu*, para 44.
19 *Abahlali*, paras 58 and 111.
The purpose of meaningful engagement, which the policy repeatedly describes as a “two-way process” is for the different parties, including the unlawful occupiers, to come agreement about the best way in which to proceed in order to protect all parties’ rights and interests. Requiring municipalities to pursue eviction processes and proceedings, regardless of the circumstances, not only subverts unlawful occupiers’ rights to participate in negotiations about how their futures will be determined but also prevents municipalities from genuinely engaging in good faith. As the Constitutional Court held in *Olivia Road*:

“It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass.”

Requiring municipalities to pursue evictions regardless of the circumstances and regardless of what the unlawful occupiers say is tantamount to regarding unlawful occupiers “as a disempowered mass” without any stake, say or insight into how best to improve their own housing situations.

Third, the Constitutional Court has already condemned the tendency of some municipalities to seek generalised “duplicate” or “form” eviction orders which are “requested and issued in an almost identical form in multiple cases”. Given its prescriptiveness and in order to save time and costs, a policy which requires hasty and mechanical eviction of unlawful occupiers may well encourage municipal officials to seek “duplicate” or “form” evictions orders. Although the desire to avoid “administrative paralysis” is valid, doing so by ignoring the constitutional and legislative mandate to consider the relevant social circumstances of all unlawful occupiers is inadvisable and most probably unlawful.

### 4.5 Provision of alternative accommodation

In its section on “legal provisions” the policy states that departments and municipalities have a “legal and moral obligation to provide alternative accommodation to residents … who have been so residing for more than six (6) months”. Although this is correct, it implies that

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20 *Zulu*, para 50, n 14.
21 *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC), paras 27-29.
departments and municipalities do not have a legal and moral obligation to provide alternative accommodation to those residents who have been residing in an unlawful occupation for less than six months.\textsuperscript{22}

In \textit{Shulana Court} the Supreme Court of Appeal acknowledged the textual dissimilarities between section 4(6) (which applies to occupiers in occupation for less than 6 months) and 4(7) (which applies to occupiers in occupation for more than 6 months) of the PIE Act.\textsuperscript{23} Although section 4(6) does not explicitly require the consideration of provision of alternative accommodation, the SCA determined that there was nothing in section 4(6) which suggested that a court would be restricted to a consideration of only the circumstances expressly listed in the subsection.\textsuperscript{24} It therefore concluded that a “court may, in appropriate cases, have regard to the availability of the alternative land [or alternative accommodation]” in instances where unlawful occupiers occupied a property for a period less than 6 months.\textsuperscript{25} In fact, the Court deemed this consideration crucial to a comprehensive inquiry into “all the relevant circumstances”. \textsuperscript{26} This decision was confirmed in the Constitutional Court in \textit{Skurweplaas}\textsuperscript{27} and \textit{Mooiplaats},\textsuperscript{28} both of which are cases related to groups of occupiers who had resided on the properties in question for relatively short periods.

The courts have therefore effectively obliterated the distinction between unlawful occupiers who have occupied a property for a duration of more or less than six months, and have established that, where occupiers are evicted from a home, the issue of whether alternative accommodation or land is available or likely to be provided will always be a relevant factor to be considered by a court in eviction proceedings. The policy’s implication to the contrary is therefore unlawful and invalid.

4.6 Lack of clarity about “registration permits” and “site allocations”

One of the “control measures” listed in the policy states that “[n]otice boards are to be put up at entrances of affected township, informing prospective migrants into the area that they must consult the local municipal office to obtain a registration permit and site allocation before relocating.” However, the policy does not explain what this registration permit or site allocation

\textsuperscript{22} Contrast sections 4(6) and 4(7) of the PIE Act.
\textsuperscript{23} \textit{Shulana Court}, para 13.
\textsuperscript{24} \textit{Shulana Court}, para 13.
\textsuperscript{25} \textit{Shulana Court}, para 13.
\textsuperscript{26} \textit{Shulana Court}, para 13.
\textsuperscript{27} \textit{Skurweplaas}.
\textsuperscript{28} \textit{Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others 2012 (2) SA 337 (CC)} (\textit{Mooiplaats}).
is or give any indication what its basis in law is. This may be understood to imply that occupiers have some legal claim to ownership of the land which they are unlawfully occupying.

The policy also appears to be internally contradictory in this regard, stating elsewhere that informal settlement occupiers have “no right[s] to the land and cannot claim ownership of the land on whatever basis including the period of occupation of such land”.

The wording of this control measure is therefore likely to cause a lot of uncertainty. It may reasonably lead unlawful occupiers to believe that these registration permits and site allocation will give them ownership rights. Unless this is the actual intention of the policy, in which case the internal contradictions within the policy should be remedied, forcing people to comply with these provisions is not only disingenuous but is also likely to render people vulnerable to possible eviction. It also raises questions about whether there is an ulterior purpose in requiring “prospective migrants” to present themselves at local municipal offices. Any such ulterior purpose would be unlawful.29

4.7 Anti-Land Invasion Units

The policy is silent on the use of Anti-Land Invasion Units in eviction proceedings. These units are infamous for violently and arbitrarily evicting informal settlement residents. The lawfulness of these units, and the methods which they employ, are constitutionally questionable. The omission from the policy of any expressed guidelines on whether, when and how Anti-Land Invasion Units can be employed is therefore regrettable.

SERI submits that the policy should discourage municipalities from establishing these units or have provided clear guidelines on what their appropriate, lawful roles and limitations would be. This is absolutely essential in ensuring their compliance with the Constitution, the PIE Act and the Constitutional Court’s demand that unlawful occupiers be treated with care and concern.

4.8 Recognition that there is no “waiting list”

In her 2014 budget vote speech the Minister of Human Settlements Lindiwe Sisulu acknowledged that government has no “credible data list against which a municipality can

29 The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others 2009 (6) SA 513 (WCC).
verify the waiting list and make appropriate [housing] allocations". In SERI’s submission the misleading and harmful narrative presented by the policy of “land invasion” and “land invasions” goes hand in hand with the myth of the housing waiting list: “land invaders” are understood to be those who “jump the queue” on this supposed waiting list thus not only violating land owners’ rights but also other poor people who are waiting patiently for housing opportunities.

SERI has for some time maintained that the dominant government discourse around housing delivery as a “housing waiting list system” which constitutes a housing “queue” and which rationally allocates housing on a ‘first come first served’ basis is significantly flawed. In reality there is a “range of highly differentiated, and sometimes contradictory, policies and systems in place” that governs the allocation of housing. Government itself is clear that there are now databases and needs registers in place which operate using a number of different selection criteria to allocate different housing opportunities. However, the dominant discourse remains that there is a waiting list on which people must register, and wait patiently in a “queue” until their turn comes. This explanation is invoked each time there is the occupation of land or contestation over the allocation of housing opportunities. However, as a client of SERI stated recently, “you can’t live in the waiting list...”

The lack of information on housing programmes and opportunities – other than a receipt after registering on a demand database or needs register – is frustrating for people, particularly backyarders who are not living in informal settlements ostensibly targeted by government for upgrading. Indeed, many of the cases of land occupation across the country involve people who have been living in backyard shacks and who are no longer able to stay for a number of reasons, including unlawful evictions.

Both provincial government and municipalities must be encouraged to present honest, upfront and transparent information to the general public – including unlawful occupiers – about how state-subsidised housing opportunities are currently being allocated. The pervasiveness of the discourse of the “waiting list” has led to significant confusion and frustration among communities. Continued lack of information and transparency frustrates intended

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31 Community Law Centre (CLC) and SERI, ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa (April 2013).
32 CLC and SERI, ‘Jumping the Queue’.
33 CLC and SERI, ‘Jumping the Queue’.
beneficiaries, creates the impression of more corruption than there likely is, and leads to protest (as the Minister noted in her speech).34

SERI has called for an investigation into how allocation processes are currently taking place and for greater transparency on these processes in practice. This may well require the provincial government and municipalities abandon the discourse of the “waiting list” and “queue” if necessary, in favour of a more accurate description of how housing opportunities are allocated. SERI therefore submits that the policy should actively encourage municipalities to provide unlawful occupiers and the general public with such information instead of perpetuating unhelpful discourses about waiting lists.

4.9 Lack of consideration of proactive ways of addressing land occupations

The policy over-emphasises evictions and relocations as a means of addressing land occupations, although it includes brief reference to “prevention” through fencing and notifications. Proactive measures to address land occupations should include upgrading informal settlements in co-operation with informal settlement residents in terms of the Upgrading of Informal Settlement Programme (UISP); the use of the Emergency Housing Programme (EHP), and ensuring that there are effective mechanisms to address housing needs. These are national policies that the Department is required to comply with.

This was confirmed in Melani, in which the High Court concluded that “The City had to at least have considered whether the UISP applies to Slovo Park without making a decision to completely ignore in situ upgrade and relocate the residents to Unaville. The City is required and obliged to act within the confines of the Housing Act and the Code, which lay down the framework intended to apply to informal settlements.”35 This is a clear finding that courts will not simply allow municipalities to ignore national policies such as the UISP which tries to regularise unlawful occupation by improving access to services and housing within existing informal settlements.

Despite this, the policy makes no mention of the UISP, the EHP or even the National Housing Code. This is a serious omission for a policy which is constitutionally required to ensure that “alternatives” to eviction are considered and that seeks diminish unlawful land occupation. The impression created is that the aim of the policy is, rather than reducing unlawful land

34 CLC and SERI, ‘Jumping the Queue’.
35 Melani and Others v City of Johannesburg and Others 2016 (5) SA 67 (GJ) (Melani).
occupations, to rather legitimise evictions. Below we discuss the importance of the policy 1) acknowledging the myth of the waiting list; 2) considering the possibility EHP provision; and 3) considering the possibility of in situ upgrading in terms of the UISP.

4.9.1 Emergency Housing Programme (EHP)

The Emergency Housing Programme (EHP) makes provision for municipalities to apply for grants from provincial government to provide emergency housing to those affected by emergencies. As the EHP states, the aim is to enable municipalities to “provide temporary relief to people in urban and rural areas who find themselves in emergencies” through the provision of land, municipal engineering services, relocation assistance and accommodation. The cost of providing certain basic services can also be funded through the programme for a period of three years (provided approval is obtained from the MEC if the municipality is unable to fund these services from its own resources). Evictions, the threat of imminent evictions and “situation[s] of exceptional housing need” are specifically classed in the programme as emergencies.

The programme provides for a broad range of possible emergency housing options, including various types of temporary and permanent housing options. Ultimately it is within the discretion of the municipality to determine whether assistance is required in terms of the programme and decide what approach should be adopted based on the emergency housing need.

The EHP applies to all people who are homeless or are likely to become homeless as a result of an eviction or emergency. The ordinary housing qualifying criteria therefore does not apply in relation to assistance provided in terms of the EHP. This means that assistance can be provided to people or households regardless of their household income, citizenship, whether they have dependents or whether they have previously received assistance through a national housing programme.

38 The services that the EHP could fund are water consumption, sanitation services, refuse removal and high-mast street lighting (where applicable). See DHS, “Emergency Housing Programme”, p. 18.
41 For the full generic housing qualifying criteria, see DHS, “Technical and General Guidelines”, Part A of Part 3, Volume 2 of the National Housing Code (2009), pp. 11-16.
Despite the potential usefulness of the EHP for addressing the temporary housing needs of evictees in rural and urban areas, municipalities and provincial governments seem to be reluctant to use the programme.

The potentially wide application of the EHP and the flexibility it offers means that it is a critical policy instrument that could be employed by municipalities and provincial government to provide temporary alternative accommodation to informal settlement residents who are evicted or are at risk of eviction. SERI submits that the policy’s failure to engage with the EHP at all is therefore seriously weakens its potential impact.

4.9.2 Upgrading of Informal Settlements Programme (UISP)

The Upgrading of Informal Settlement Programme (UISP) provides for municipalities to apply for funding from provincial government to redevelop informal settlements by incrementally providing occupiers with infrastructure, tenure security, and access to basic services in an inclusive and participatory manner.\(^\text{42}\) The programme funds the creation of serviced stands through the installation of both interim and permanent municipal engineering services. Where interim services are provided, they should always constitute “the first phase of the provision of permanent services”. The UISP does not provide assistance for the construction of housing, which should be funded through one of the other national housing programmes in phase 4 of the project upgrading project. Tenure security is a central component of the UISP and can be achieved through “a variety of tenure arrangements [that] are to be defined through a process of engagement between local authorities and residents”.\(^\text{43}\) Moreover, the programme envisages an inclusive and participatory relationship between beneficiary communities and municipalities by expressly providing for the funding of different types of community participation throughout the upgrading process.\(^\text{44}\)

\(^{42}\) Funding in terms of the programme is provided in three phases: Phase 1 includes for land surveying, registration, community participation, development facilitation, dispute resolution, geotechnical investigation, pre-planning for land acquisition and the provision of interim municipal engineering services; and phases 2 and 3 provide funding for detailed town planning, contour surveying, land survey examination, civil engineering and project management. In addition, the programme makes funding available for land rehabilitation and possible relocation. See Tissington, *A Resource Guide for Housing*, p. 86.

\(^{43}\) Occupiers could be granted a range of tenure rights, including rental agreements, the gratuitous loan of the site to occupiers for the purposes of occupation (so-called commodatum) or full ownership (during phase 4). DHS, “Upgrading of Informal Settlement Programme”, pp. 15 and 38.

\(^{44}\) See DHS, “Upgrading or Informal Settlement Programme”, p. 15. See also Clark & Tissington, “Courts and a Site of Struggle”, pp. 386-389; Beja, paras. 53-67; and Melani, para. 34.
The UISP creates a strong preference for *in situ* upgrading and for minimising the disruptive effects of relocation, however, the latter is an option under the programme as a measure of last resort when other alternatives have been exhausted. In the context of informal settlements, this means that all efforts should be made to accommodate the occupiers on the land where they currently reside before considering relocation to alternative land. *In situ* upgrading is particularly tenable when considering that the programme empowers the state to purchase or expropriate land, rehabilitate land that may be unsuitable for conventional low-income housing development and install interim services pending the decision to upgrade an informal settlement. This suggests that occupied land could be purchased or subdivided to develop UISP projects for informal settlement residents.

The UISP applies to beneficiaries who qualify in terms of the generic qualification criteria but, under certain circumstances, may also apply to those who do not qualify under certain circumstances. In cases where prospective beneficiaries do not qualify in terms of the generic qualification criteria, the MEC has a discretionary power to award conditional access to the programme “on a case-by-case basis”. As with the EHP, this means that people could access assistance through the UISP regardless of their household income, citizenship, whether they have dependents or whether they have previously received assistance through a national housing programme.

Implementation of the programme has, however, been lacking. As one commentator wrote, “at all levels of government, and in all parts of the country, there has been a systematic failure to implement the substantive content of [the housing policy] that recommends and makes financial provision for participatory and collective *in situ* upgrades”.

Unfortunately, the policy’s failure to engage with the UISP continues this systematic trend and allows for it to support hasty evictions and disregard the evidence-based UISP which often garners community support because it emphasises *in situ* upgrading – at sites already chosen by occupiers – over evictions and relocations.

5. Conclusion

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45 DHS, “Upgrading of Informal Settlements Programme”, pp. 9 and 32. See also *Melani*, paras. 34-35; and Clark & Tissington, “Courts as a Site of Struggle”, p. 379.


SERI does not support policies which allow the proliferation of informal settlements or of unsafe living conditions. SERI does agree that the reduction in the number and size of informal settlements over time is an appropriate and achievable goal. At the core of SERI’s submission too is a recognition of the agency and dignity of those who the policy casts as “land invaders” and a better understanding of the social circumstances that lead to what the policy dismisses as “land invasions”.

The achievement of the policy’s goals lies primarily in informal settlement upgrading and/or the provision of appropriate alternative housing to people living in shacks, not in aggressive regulation, enforcement of formal building standards and hasty evictions. If the type of enforcement contemplated by the policy is to play any role in addressing informal living conditions, it must be secondary to, and conditional upon, the provision of adequate housing and it must be consistent with the Constitution and PIE Act (as interpreted by South African courts) and important national policies such as the UISP and the EHP. In our submission, at present, the policy does not adequately reflect this reality.