Submission to the Lwandle Ministerial Enquiry

Socio-Economic Rights Institute of South Africa (SERI)

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1. Introduction

On 24 January 2014 the Western Cape High Court handed down an order in South African National Roads Agency Limited (SANRAL) v The Persons Intending to Occupy Erf 32524 Nomzamo, Strand. On 2 and 3 June 2014 over 800 residents of the Lwandle community in Cape Town were violently evicted from their homes. In response to the outcry over the eviction, which took place in freezing weather with no alternative accommodation provided, the Minister of Human Settlements convened an inquiry aimed at investigating the circumstances under which the evictions took place.

This submission by SERI to the Lwandle Ministerial Enquiry provides background to the organisation and its work, briefly summarises eviction law and jurisprudence in South Africa, and examines three cases where the constitutional and legislative protections for unlawful occupiers were circumvented: Zulu, Fischer and Lwandle.

The submission also looks at proactive ways that the state can address land occupation, discussing the rather unhelpful discourse of the “housing waiting list” and two of government’s key housing programmes: the Emergency Housing Programme (EHP) and the Upgrading of Informal Settlements Programme (UISP). Finally, the submission provides some concluding remarks and recommendations.

2. About SERI

SERI is a registered non-profit organisation and public interest law clinic that provides socio-economic rights assistance to individuals, communities 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.

SERI’s thematic focus areas are urban housing; access to basic services and informal settlement upgrading; informal trade; and participation, protest and political space. SERI is involved in legal, research and advocacy work around evictions, rental housing, allocation of state-subsidised houses, and informal settlement upgrading. Over the past five years 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).


Engaging meaningfully with government in the realisation of socio-economic rights in South Africa: A focus on the right to housing (March 2010).

SERI is also involved in a number 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

- *Pheko and Others v Ekurhuleni Metropolitan Municipality (Pheko)* Bapsfontein informal settlement - illegal eviction - Constitutional Court

- *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others (Schubart Park)* Schubart Park - difference between 'evacuation' and 'eviction' of occupiers - Constitutional Court

- *Zulu and 389 Others v eThekwini Municipality and Others (Zulu)* constitutional validity of court order - Constitutional Court
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 sheer volume of litigation over the right has meant that the applicable law is constantly being 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.¹

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 occupiers 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.\(^2\)

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”,\(^3\) not as “obnoxious social nuisances”.\(^4\) 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”.\(^5\)

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.”\(^6\) According to Sachs J:

> 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.\(^7\)

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.\(^8\)

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 some form of 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.

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\(^2\) For a detailed analysis of the development of key South African housing and eviction court cases, see Clark Evictions and Alternative Accommodation (2013) pp. 6-21.

\(^3\) Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC) para 12 (PE Municipality).

\(^4\) PE Municipality para 41.


\(^6\) PE Municipality para 17.

\(^7\) PE Municipality para 18.

\(^8\) PE Municipality para 28.
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 sheer 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 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 what are 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: reasonable housing policy; procedural requirements; provision of alternative accommodation by the state; meaningful engagement; state cannot bypass PIE; limits on private property ownership rights; and what would constitute an eviction in terms of section 26(3) of the Constitution.

Recently, however, there have been a number of attempts by municipalities and other organs of state to circumvent or bypass the PIE Act and the principles laid out in the evictions jurisprudence of the courts. This is done through the issuing of rule *nisii* to interdict unnamed and unknown people from occupying land.

The following section discusses this practice in more detail, in relation to the *Zulu* and *Fischer* cases, as well as the *Lwandle* eviction.

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9 A rule *nisii* is an interim order granted by a court, often in the absence of the person against whom the relief is being sought, calling upon the person to give reasons on or before a specified date why a final order should not be granted. Rule *nisii* are often used in urgent applications e.g. interdicts.
4. Attempts to Circumvent the PIE Act

It is very clear from the Constitutional Court’s jurisprudence that it strongly disapproves of strategies used to undermine the eviction frameworks set out in the Constitution and the PIE Act. Even in cases where the PIE Act does not or might not apply – for example, Olivia Road, Abahlali, Pheko and Schubart Park – the Court has found that the dignified framework that has been established must be respected. The constitutional principles of meaningful engagement, due notice, dignity and alternative accommodation (where an eviction would lead to homelessness) still apply even in cases where the PIE Act does not.

Recently, a number of cases challenging the de facto eviction of unlawful occupiers through the use of urgent interdicts against unnamed potential “invaders” have come before the courts. A 2004 High Court case provides some authority on the lawfulness of interdicts preventing the unlawful occupation of land. In City of Cape Town v Yawa and Others (Yawa), handed down by Budlender AJ in 2004, it was made clear that an interdict restraining “the persons intending to unlawfully occupy Erf 18332, Khayelitsha” from erecting and/or occupying any structure for the purpose of unlawfully occupying on the property was fundamentally problematic, and it was therefore dismissed.\(^{10}\)

According to Budlender AJ, one of the “fundamental” problems with this type of interdict is that it attempts to bind a group of unidentified people who the applicant (in this case the City of Cape Town) “does not know and cannot say who they are or where they are.”\(^{11}\) Although this does not necessarily invalidate an eviction order or an interdict (provided that there is as ascertainable group), it may impact on the nature of the act that the court is performing. Referring to a judgment in which the Cape High Court held that one of the essential tests for determining whether a particular act is to be classed as a judicial act is whether there is a *lis inter partes* (applies between parties),\(^{12}\) Budlender AJ quotes the following:

> [A] failure to identify defendants or respondents would seem to be destructive of the notion that a Court’s order operates only inter partes... An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a Court order at all.\(^{13}\)

Furthermore, according to Budlender AJ, this type of interdict is “tautologous” as it is by definition *unlawful* to occupy property without the consent of the owner or without some legal

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\(^{10}\) The Yawa case involved a dual order sought by the City of Cape Town against two groups of people. The first was an eviction order sought in terms of the PIE Act against a number of unlawful occupiers (this was not necessary to be decided in the case). The second order requested by the City was an interdict restraining an unnamed group of people “intending to unlawfully occupy the erf”. City of Cape Town v Yawa and Others [2004] 2 All SA 281 (C) (29 January 2004) (Yawa): http://www.saflii.org/za/cases/ZAWCHC/2004/5.pdf.

\(^{11}\) Yawa para 5.

\(^{12}\) Kayamandi Town Committee v Mkhwaso and Others 1991 (2) SA 630 (C)

\(^{13}\) Kayamandi para 634.
right to occupy. According to Budlender AJ, “I do not see the purpose in asking a court to declare that people who by definition are described as acting unlawfully, may not act unlawfully. If they are not acting unlawfully, then they do not fall within the range of the respondents at all. They do not even have to oppose the application. If they are acting unlawfully then that is the end of the matter.”

This section examines three recent cases that have come before the courts since Yawa - the Zulu, Fischer and Lwandle cases - in order to draw out what the courts are saying on the issue of interim interdicts preventing land occupation, as well as on some of the practical considerations that need to be made in cases of land occupation where people have established homes.

4.1. Zulu and 389 Others v eThekwini Municipality and Others (Zulu)

The Zulu and 389 Others v eThekwini Municipality and Others (Zulu) case involves the occupiers of Madlala Village in Durban, located near Lamontville Township (represented by the Legal Resources Centre). The case deals with the constitutional validity of a rule nisi (interim interdict) obtained by the KwaZulu-Natal MEC for Human Settlements and Public Works on 28 March 2013 from Koen J in the Durban High Court. This order permitted and obliged eThekwini Metropolitan Municipality to “prevent any persons from invading and/or occupying and/or undertaking the construction of any structures” on specified land within the municipality’s area of jurisdiction and to “remove any materials placed by any persons upon” that land. Madlala Village is located on land identified in the order.

4.1.1. High Court order

In April 2013 the MEC and the municipality approached the Durban High Court for confirmation of the order. The Madlala Village residents applied for leave to intervene, arguing that they had “direct and substantial interest” in the proceedings and that the order effectively authorised their eviction without complying with the PIE Act. The order had been used to justify numerous demolitions at Madlala Village by the municipality’s Land Invasion Unit. Judge Kruger dismissed their application, finding that the PIE Act was not applicable.

The Madlala Village occupiers were then forced to approach the Constitutional Court, after the High Court judge and the SCA refused to grant them leave to appeal.

4.1.2. Constitutional Court judgment

The case was heard in the Constitutional Court on 12 February 2014. Abahlali baseMjondolo (represented by SERI) was admitted as amicus curiae. Abahlali has thousands of members with an interest in any case dealing with the validity of the MEC’s order. In September 2013

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14 Yawa para 22.
15 Ibid.
the order had been used to justify the demolition of numerous structures at the Cato Crest informal settlement. SERI represents the Cato Crest occupiers.16

On 6 June 2014 the Constitutional Court handed down judgment in Zulu case. The municipality had argued that the order could not and was not used to evict people, even though the municipality had relied on it to evict the appellants 25 times. The majority judgment found that that “there can be no doubt that the interim order authorised the taking of steps which could have the effect of evicting from the Lamontville property persons who were already living on the property or had completed building their homes on the property”. The Court found the municipality’s submission to be “unacceptable”, particularly in light of evidence put before it that the municipality demolished a number of structures on the Lamontville property just one day after the hearing before the Court. The Court granted the occupiers leave to intervene in the proceedings; however did not set the interim order aside or express an opinion on the order. Instead it referred the case back to the Durban High Court for determination.

However in a minority judgment, van der Westhuizen J (Froneman J concurring) agreed with the majority judgment and went further to provide an opinion on the interim order, finding that it was invalid because it was granted in breach of the Constitution. According to van der Westhuizen, “it is unacceptable for court orders to sidestep the protections in PIE”,17 which is exactly what the municipality did when it executed the interim order against the occupiers.

He found that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village residents’ rights (as well as those of unnamed others) under the PIE Act and section 26(3) of the Constitution. According to him:

*Eviction is governed by the provisions of PIE, which aim to ensure that the most vulnerable among us are protected. Its rules and requirements are not optional. The interim order authorises evictions – and has been used as authority for at least three evictions – without providing the unlawful occupiers a hearing and ensuring that they were protected to the extent required by law. An order of this nature deprives unlawful occupiers of rights enshrined in the Constitution and recalls a time when the destitute and landless were considered unworthy of a hearing before they were unceremoniously removed from the land where they had tried to make their homes.*

*At the very least, an eviction order could not lawfully have been issued without judicial determination that it was just and equitable to do so, considering all relevant circumstances and having allowed affected persons, especially the most vulnerable, to present evidence of their circumstances in a hearing. The order was issued without consideration of those persons whom it would impact, in obvious contravention of PIE and in direct violation of underlying constitutional rights. I would find that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village residents’ rights.*

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(as well as those of unnamed others) under PIE and section 26(3) of the Constitution.¹⁸

On the issue of so-called “illegal land invasions”:

Not 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.¹⁹

According to van der Westhuizen J, it is important to establish legal certainty on orders like the interim order obtained by the KZN MEC as the order “was not an isolated or unique incident – it seems that other courts have issued similar orders, at least one of which has been found to be constitutionally problematic.”²⁰ The case van der Westhuizen J refers to as an example is the Fischer case, in which SERI is currently involved and which is detailed in the following section of this submission. According to the Judge, the Fischer case:

further indicates the existence of other persons in the same position as the litigants before this Court, and the resultant need for this Court to state unequivocally that land-invasion-control orders like the one issued by Koen J, to the extent that they authorise evictions and carte blanche demolition of structures, are unconstitutional. More problematic is that the order requested by the MEC is a form order – in other words, it has been requested and issued in an almost identical form in multiple cases.²¹

While not directly binding, the minority judgment by van der Westhuizen in the Zulu case is considered to be persuasive authority and a lower court would have to have very good reasons for departing from it.

4.1.3. Update on Zulu case

The Zulu (Madlala Village) and Abahlali (Cato Crest) cases will be heard together in the Durban High Court in May 2015. This is when the finalisation of the interdict is due to occur. However the interveners (residents of both settlements) will be arguing to have the interdict discharged.

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¹⁸ Zulu paras 44 and 45.
¹⁹ Zulu paras 44-46.
²⁰ Zulu para 50.
²¹ Zulu footnote 14. This would include the interdict granted to SANRAL in the Lwandle case.
4.2. Fischer and City of Cape Town v Ramahlele and Others  
(Fischer)

Between April and August 2013 occupiers of the Marikana informal settlement in Philippi had their shacks violently demolished by the City of Cape Town’s Anti-Land Invasion Unit. In August 2013 the City gave the owner of the property, Mrs. Fischer, notice in terms of section 6 of PIE Act to evict the unlawful occupiers who had moved onto her property. On 7 and 8 January 2014 the City commenced with a demolition operation at the settlement.

On 10 January, the City and Mrs. Fischer launched an urgent interdict application in the Western Cape High Court to prevent any further occupation of the property. On the same day a rule nisi was issued by Binns-Ward J, which interdicted and restrained the respondents – referred to in proceedings as “persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150, Philippi” – from the following:

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Section 6 of the PIE Act:

6. Eviction at instance of organ of state

(1) An organ of state may institute proceedings for eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if –

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section ‘public interest’ includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to:

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days’ written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.

(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
2.1...  

2.1.1 Entering of being upon Erf 150 (remaining extent), Philippi (hereinafter referred to as “the property”) for purposes of unlawfully occupying or invading the property.

2.1.2 Erecting, completing and/or occupying any structure on the property.

2.1.3 Intimidation, harassing, assaulting or in any way interfering with the first applicant.

2.1.4 Inciting or encouraging other persons to settle on the property or to erect structures on the property for the purposes of unlawfully occupying or invading the property or erecting any structures on the property.

2.1.5 Occupying any vacant structures on the property.

2.2 Authorising the Applicants, duly assisted by the Sheriff and insofar as needs be, by the members of the SANDF and the SAPS to give effect to the provisions of this Order by:

2.2.1 forthwith removing any person found to be in breach of this Order;

2.2.2 demolishing any structure erected on the property since the grant of this Order;

2.2.3 removing any possessions found at or near such structures, including any building materials, which possession and/or building materials shall be kept in safe custody for three months by the Second Applicant until released to the lawful owner thereof and to take all reasonable steps in order to give effect to this order.

According to paragraph 3 of the order, paragraphs 2.1 and 2.2 operate as an interim order with immediate effect, however the provisions of paragraphs 2.1.1 and 2.1.2 do not apply to occupation of the property by persons who are already primarily resident thereon at the time the order is made.

4.2.1. Effect of the rule nisi

The effect of the Fischer interdict is threefold. Firstly, no one may enter or occupy the land in question. Secondly, if anyone enters the land, the Sheriff (together with SAPS and/or members of the SANDF) can remove them and demolish any vacant structure; however, if the person who entered the land has established primary residence there, they cannot be automatically removed (even though they’re still technically interdicted from being there). Third, if someone takes occupation of the land after the interdict is granted and establishes a home on the land, the legal position would be that another court order is required to evict them.

However, there are obvious practical problems in determining if a home has been established for the purposes of section 26(3) of the Constitution and, in the Fischer case, the interdict has been abused by Anti-Land Invasion Unit officers who have demolished shacks after deciding that they are not homes, based on a brief visual inspection.
4.2.2. Counter-application in the High Court

On 14 January 2014, 42 listed occupiers of the Marikana settlement launched a counter-application in the Western Cape High Court, arguing for the discharge of the rule nisi. The City argued that the structures that were demolished were not homes and, because they were not homes, the City was not bound to observe the provisions of the PIE Act. Evidence provided by the City was in the form of affidavits put to the court by members of the City’s Anti-Land Invasion Unit.

Gamble J acknowledged that there were disputed facts which the parties would want to have resolved by the hearing of oral evidence. However he still requested the parties to address him on two issues of legality in relation to the City’s conduct during the demolition operation:

- First, since the incursion had taken place on private land, in what capacity did the City purport to act; and
- Secondly, on what basis did the City claim that its conduct was lawful in the context of the provisions of section 26(3) of the Constitution and the PIE Act.

High Court judgment

On 14 March 2014 judgment was handed down by the High Court. In terms of the first question, Gamble J found that the City expressly did not rely on the PIE Act and “proceeded to demolish structures without any prior approach to Court. It adopted this more expeditious and expedient course of action because, as the affidavits cited above show, it claimed that PIE only applied to persons who occupied land in ‘homes’, and that the structures of the occupiers in this case had not been on the land for sufficient period of time for them to be termed ‘homes’.” However he accepted the City’s argument that it had the authority to act in terms of the Constitution and the Housing Act, as well as in terms of the Constitutional Court’s judgment in Modderklip. Importantly, he noted that the issue of whether a municipality can take pre-emptive steps of its own volition, as taken by the City in the Fischer case, was not something the case at hand could decide “since it was clear that the City stepped in only after Ms. Fischer had asked for help to deal with a problem with which she manifestly could not cope. This case is therefore limited to that situation.”

In terms of the second question posed to the parties, the City had argued that all structures in which people or signs of human habitation were found, were regarded as “homes” and not demolished, while structures that were vacant (in the sense that there were no people found therein, or that there were no signs of human habitation therein such as furniture or personal effects) were demolished, since the City did not regard such structures as “homes”. Gamble J found the City’s approach to be “fundamentally flawed”. According to him, the City’s approach was not so much to question whether the temporary structures were “homes”, but rather to take a decision based on which structures were occupied at the time of

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23 Fischer and Another v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re: Ramathelele and Others v Fisher and Another 2014 (3) SA 291 (WCC) para 47 (Fischer): http://www.saflii.org/za/cases/ZAWCHC/2014/32.html#_ftn4.
24 Fischer para 62.
25 Fischer para 74.
demolition. This decision was basically left to a field officer in the Anti-Land Invasion Unit and, according to the judgment, “the City’s operation seems to have been somewhat haphazard in that the evidence suggests both confusion and a degree of arbitrariness in the selection of targeted structures. This is no doubt because the City’s officials did not ask themselves the correct question viz are these unlawful occupiers?”

Because of arguments made by the City, the judgment dealt with the concept of “home” in some detail. According to Gamble J there should be a wide, rather than a restrictive, contextual interpretation to the word “home”, stating that “people with limited, if any, resources, such as the occupiers in this case, have managed to scrape together enough money to buy the basic materials (wood, iron and plastic sheeting) to erect the most basic of structures in which they wish to live peacefully would undoubtedly call those structures ‘home’. He argued that in the Fischer matter it is not so much the period of occupation of the property which renders PIE applicable, but the intention behind it, and that the occupiers were deprived by the City of the procedural right to be heard under the PIE Act before their structures were destroyed.

He found therefore that the City of Cape Town’s conduct in terms of the interim order was unconstitutional, implying that the order itself was invalid, and ordering the City to rebuild the shacks at the settlement.

4.2.3. SCA appeal

The owner and the City subsequently appealed the judgment of Gamble J to the Supreme Court of Appeal (SCA). In these proceedings the occupiers were represented by the Legal resources Centre (LRC) and SERI represented Abahlali baseMjondolo, who was admitted as amicus curiae in the proceedings.

The amicus’ submissions were on the scope and meaning of the concept of “home” for the purposes of section 26(3) of the Constitution, and the appropriate interpretative approach to be adopted to section 26(3) on the facts of the Fischer case. According to the amicus submission, “The primary determinant of whether a shack is a ‘home’ must surely be what else is available to the person who constructed it. If the person who constructed the shack was homeless before, and would be homeless if it was demolished, it requires little imagination to conclude that the shack itself – however modest or ill-furnished – is his or her home.” The submission also looked at whether it is consistent with the principle of legality and the separation of powers for a functionary of the state (e.g. police officers or Anti-Land Invasion Unit officers) to be assigned discretion to decode whether and when an informal structure is occupied as a “home”, and, if it is, what principles ought to govern the conduct of that functionary in deciding whether to dismantle and remove and unlawfully erected structure.

26 Fischer para 74.
27 Fischer para 77.
28 Fischer para 91.
29 Fischer para 97.
The case was heard on 27 May 2014. Unfortunately the SCA decided not to deal with the constitutionality of the City’s order and conduct during the demolitions, and remitted the case back to the High Court for the hearing of oral evidence. On 6 June 2014 the SCA handed down its judgment, explaining the reasons for its order. It argued that the lower court should have heard the evidence tendered by the parties and determined “the true facts.”

4.2.4. Intervention application

In August 2014 SERI launched an urgent intervention application in the Fischer case, on behalf of over 223 people (67 households) who occupied the Marikana informal settlement in Philippi on or before 30 June 2014.

This intervention application is to ensure that the City of Cape Town does not confirm the interim order issued by the Western Cape High Court in January 2014. In the proceedings, SERI argued that there is considerable scope for disagreement and confusion as to the meaning of the order, expressing fears that, despite the City’s assurances, it will use the interdict to circumvent the protections of the Constitution and the PIE Act to illegally evict the families living at the Marikana informal settlement. SERI argued that there is a danger in permitting an order as ambiguous as the Fischer one to stand, because in effect it leaves a crucial question which the statute has assigned to the judiciary for determination by the police, namely whether a person is an unlawful occupier deserving of ejection from property.

The case was heard on 1 September 2014 in the Western Cape High Court. Saldanha J granted the intervention and extended the rule nisi to 26 November 2014. He ruled that the Sheriff must erect a notice board at the entry point of the settlement with a copy of this order and must every three weeks read out the order by loudhailer (in English, Afrikaans and isiXhosa). The Judge also ordered that the owner and the City must file a supplementary affidavit by 21 October 2014 to explain how they would render assistance to the applicants in executing the relief sought by them in paragraph 2.2 of the notice of motion, namely that the respondents are interdicted from “erecting, completing and/or occupying any structures there or extending their current structures save except those respondents currently occupying the property at the date of the granting of this order are not interdicted from occupying the property”.

4.3. SANRAL v Persons Intending to Occupy Erf 32524 Nomzamo, Strand (Lwandle)

The analysis of the Zulu and Fischer cases is useful in order to understand the case law emerging on land occupations and the circumventing of the PIE Act. Important to note is that the court order granted to SANRAL in the Lwandle case is strikingly similar to the order granted in the Fischer case.

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This section is concerned with understanding what happened before, during and after the Lwandle evictions in June 2014. It seems clear - from legal documents, media coverage of the eviction and evidence emerging from the Lwandle Ministerial Enquiry – that there were failures on the part of all parties involved.

4.3.1. Issuing of section 6 notice in terms of the PIE Act

An important aspect of this case is the fact that on 22 January 2014 the City issued a notice to SANRAL in terms of section 6 of the PIE Act. Section 6 gives an organ of state permission, under certain circumstances, to institute eviction proceedings against unlawful occupiers living on privately owned land. If the organ of state issues a notice to the owner in terms of section 6(4) of the Act, the owner has fourteen days to respond, failing which a court may, at the request of the organ of state, order the owner to pay the costs of the eviction proceedings. While the City acted lawfully when it issued the section 6(4) notice to SANRAL, its acquiescence when SANRAL acted illegally and instituted other proceedings is cause for concern.

In terms of the section 6 notice issued by the City, either SANRAL should have brought an eviction application in terms of the notice, or, if SANRAL did nothing, the City should have instituted eviction proceedings against the unlawful occupiers, joining SANRAL. Before this however, the City, as a public authority, should have meaningfully engaged with unlawful occupiers, as set out in the Grootboom, Olivia Road and Joe Slovo judgments.

4.3.2. Lack of meaningful engagement

According to the Constitutional Court in Joe Slovo: "individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns". If meaningful engagement occurs before an eviction, it can prevent people from having to go to court. This involves the government and communities having a meaningful conversation about the situation e.g. the possibility of in situ upgrading or, alternatively, relocation to an alternative site nearby. It saves time and money in the long term and is the ideal situation. Government meeting with communities simply to persuade them to accept a decision that it has already been made, and that it says is in their interest, is not meaningful engagement. Meaningful engagement is not about people merely rubber-stamping government policies or decisions.

Yacoob J in Grootboom helpfully sets out what is expected of a municipality in situations like the Lwandle occupation:

The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I

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32 See footnote 22 above.
33 See Lilian Chenwi and Kate Tissington (2010) “Engaging meaningfully with government in the realisation of socio-economic rights in South Africa: A focus on the right to housing” Community Law Centre (CLC) and SERI.
34 Joe Slovo para 238.
would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.\textsuperscript{36}

To simply issue a threatening notice is a dereliction of the municipality’s constitutional obligations. The City did not object when SANRAL went to court to get an urgent interdict against the occupiers, rather than engage in terms of the PIE Act. In fact it appears that the City was happy to avoid eviction proceedings in terms of the PIE Act, which would necessitate talking to the individual occupiers and ascertaining where people would go if they were evicted from the land. According to the Sheriff who executed the order, several meetings were held with key role players to prepare for both evictions. These included the SAPS, Lwandle police, public order policing (POP) officers, Cape Town Metro Police officers, officials from traffic services, the City’s Anti-Land Invasion Unit and SANRAL. According to him the dates for both evictions were decided based on the availability of police.\textsuperscript{37} The City was clearly actively involved in the implementation of the interim interdict.

4.3.3. Effect of the rule \textit{nisi}

The urgent interdict obtained by SANRAL on 24 January (and extended four times by the High Court) that was used to evict the occupiers of Nomzamo settlement in February and June 2014 is in effect a self-executing eviction order (able to be executed repeatedly by the owner) granted before occupation even occurred and without considering the actual occupiers’ circumstances or need for alternative accommodation.

It has been reported that the Sheriff told the Lwandle inquiry that he understood the court order to be more of an “on-going” interdict. According to him, “I was instructed three times by our attorney to go back and remove the people. It was the first time I took on a task of this magnitude and at the time, my main priority was to execute the interdict to the best of my ability. I didn’t foresee that it would have such a big impact”. The fact that the Sheriff, the City’s Anti-Land Invasion Unit, the SAPS and other law enforcement agencies chose to execute the order during an extremely cold spell highlights the lack of regard for the personal circumstances of the occupiers.

The effect of the interdict obtained by SANRAL is much the same as the effect of the interdict obtained in the \textit{Fischer} case, as critiqued by Gamble J in his judgment. It says that that no one may enter or occupy the land in question. If someone does enter the land they can be removed, except if they were already on the land when the interdict was granted. If someone is on the land for any purpose \textit{after} the interdict is granted, they can be removed automatically without notice.

\textsuperscript{36} Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 CC para 87 (Grootboom).

\textsuperscript{37} Barbara Maregele “SANRAL says City of Cape Town was involved in the eviction of displaced Nomzamo residents” \textit{GroundUp} (23 July 2014): http://www.groundup.org.za/article/sanmarl-says-city-cape-town-was-involved-eviction-displaced-nomzamo-residents_2032.
Lack of notice

A fundamental problem with this approach is the lack of notice given to occupiers as well as the lack of a court decision whether not an eviction is just and equitable. The SANRAL interdict states that service of the order consists of the Sheriff serving a copy of the order on those occupying the property "by reading aloud the contents of this order by the loudhailer in isiXhosa, English and Afrikaans at the property" and "by erecting 8 notice boards on the property, each containing copies of the order with Xhosa and Afrikaans translations." However, according to the Sheriff, this only occurred prior to the first eviction of 3 February and that he was not required to give notice for the eviction that took place on 2 and 3 June because it was the same piece of land for the same community as the February eviction. This approach means that any person who occupied the land as a “home” after the date of the interdict (24 January 2014) gets no notice. While some efforts were apparently made to notify the occupiers prior to the February removal, no notice was provided to those evicted in June, four months after the first eviction took place.

According to an occupier who moved with her family onto the land in December 2013, after living in a backyard shack, they were first evicted from the land in February but erected another shack because they had nowhere else to go. On 2 June police blockaded the area with barbed wire. Their local councillor tried convincing the police officers to have a calm discussion in an office but "they didn’t want to listen to what the councillor had to say. They started shooting at the people and people started to disperse and they started to pepper spray the people...the whole situation was out of control. It was chaotic and people had to run away." 39

The issue with the service of interdicts against unknown and unnamed potential occupiers has been ventilated in the Yawa judgment, handed by Budlender AJ in the Western Cape High Court (see the beginning of section 4 of this submission for more on the Yawa case). His judgment stated that because the identity of unknown and unnamed potential occupiers will change from day to day, the form of service proposed in respect of the occupiers was unsuitable. This form of service, very similar to that outlined in the Lwandle and Fischer interdicts, consisted of the Sheriff erecting notice boards along the boundaries of the property, with the application and interim order affixed, as well as the Sheriff reading out the contents of the interim order on the property. According to Budlender AJ:

The second means of service can be disposed of very quickly. If the Sheriff reads out the order today, it will be of no purpose or effect in respect of any person who is not present when he reads out the order, and who intends to occupy the land tomorrow or thereafter. It will be effective only in respect of any people who at the moment of announcement happen to be in the process of occupying the land, or visiting it. It will not give any notice of the order to any other people intending to occupy the land, and will be entirely ineffective as far as they are concerned. The first method of service will be of very dubious efficacy. The documents on the notice board will have to remain there indefinitely if they are to have any effect at all. One can readily imagine that the

38 Ibid.
39 The Citizen "Evictions were traumatic, says Lwandle couple" (29 July 2014): http://citizen.co.za/221501/evictions-traumatic-says-lwandle-couple/.
According to Budlender AJ, “the difficulties with service illustrate the fundamental problem with the order which is sought.”

In summary, the interim interdict granted to SANRAL is unlawful and unconstitutional as it acts as a de facto eviction order, without providing the unnamed occupiers the procedural protections and substantive defences contained in the PIE Act.

5. Proactive Ways to Address Land Occupation

The Lwandle Ministerial Enquiry’s terms of reference refer to the desire to “establish the real causes of the land occupation” as well as the need to “find humane and lasting solutions to the housing challenges in our country.” Further, the terms of reference state that “government is concerned about the unlawful occupation of land because systems are in place to deal with the housing challenges”, referring to the fact that “there is a waiting list for the provision of housing in terms of the government programmes.”

This section will address some of these broader challenges around housing provision which are relevant to the Lwandle case in Cape Town, as well as to other municipalities throughout the country.

5.1. “You Can’t Live in the Waiting List”

In her recent budget vote speech the Minister of Human Settlements Lindiwe Sisulu acknowledged that the delivery of state-subsidised housing has been in decline for the past several financial years, with the DHS being unable to meet the projected target of 220 000 units a year since 2008. According to the Minister, delivery of houses has “dropped drastically across all provinces, some reaching lows of a 30% drop in delivery”. At the same time, the Minister stated that government has no “credible data list against which a municipality can verify the waiting list and make appropriate [housing] allocations”.

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

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40 Yawa para 13.
41 Ibid.
44 Speech by L N Sisulu, Minister of Human Settlements (15 July 2014).
45 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).
reality there is a “range of highly differentiated, and sometimes contradictory, policies and systems in place” that governs the allocation of housing.\textsuperscript{46} 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 extremely 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.

There is the need to be honest, upfront and transparent to the general public 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.\textsuperscript{47} Continued lack of information and transparency frustrates intended beneficiaries, creates the impression of more corruption than there likely is, and leads to protest (as the Minister noted in her speech).\textsuperscript{48} 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 Ministry, Department of Human Settlements, provincial government and municipalities to abandon the discourse of the “waiting list” and “queue” if necessary, in favour of a more accurate description of how housing opportunities are allocated.\textsuperscript{49}

5.2. Emergency Housing Programme (EHP)

An important, yet underutilised, national housing programme is the Emergency Housing Programme (EHP).\textsuperscript{50} The EHP provides funding to municipalities to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of emergency situations of exceptional housing need, \textit{including evictions}. However very few municipalities have proactively implemented the EHP since 2004, and provinces have been reluctant to release funds for this programme.

According to the 2012 Housing Development Agency (HDA) “Guidelines for the Implementation of the Emergency Housing Programme”, “proactive responses to [emergency] situations are a challenge for the housing delivery system in South Africa. It is not always possible to plan for, predict and prevent all emergencies, or to deliver formal and adequate housing to all those in need, due to resource constraints. Often formal housing

\begin{itemize}
  \item \textsuperscript{46} Ibid.
  \item \textsuperscript{47} Ibid.
  \item \textsuperscript{48} Ibid.
  \item \textsuperscript{49} Ibid p. 82.
  \item \textsuperscript{50} Department of Human Settlements “Emergency Housing Programme” Part 3 Volume 4 of the National Housing Code (2009).
\end{itemize}
programmes are not rapid and responsive enough to address the speed by which hazardous situations and emergencies arise. Consequently, there is a need for a policy that can rapidly and effectively release funding to address homelessness and exceptional need.\(^5^1\)

While the EHP received attention through Constitutional Court judgments such as the Joe Slovo and Blue Moonlight cases, and is known mainly in relation to the controversial temporary relocation areas (TRAs) that have been built in terms of it,\(^5^2\) the programme has considerable potential if implemented properly.

5.3. Informal Settlement Upgrading

The legal and policy framework for human settlements emphasise that informal settlement upgrading is “one of the most important programmes of government”.\(^5^3\) The Upgrading of Informal Settlements Programme (UISP) states that relocations or evictions of informal settlement communities should only be considered as a last resort, a principle reinforced by the Constitutional Court in the Abahlali judgment.\(^5^4\) The recent past has seen significant investment in planning, capacity development and financial resources for incremental, \textit{in situ} informal settlement upgrading along the lines envisaged in the National Housing Code and UISP. The Housing Development Agency (HDA) and the Department of Human Settlements, through the National Upgrading Support Programme (NUSP), have been working for several years on building capacity, undertaking planning, and producing technical assessments.

However, in situ informal settlement upgrading has yet to be implemented at scale, and the informal settlement communities with which SERI works are no closer to seeing actual implementation than before. SERI has been forced to go to court in respect of two informal settlements – Slovo Park and Makause – in order to review the failure of the City of Johannesburg and Ekurhuleni Metropolitan Municipality respectively to take a decision to make an application to the provincial government for funding to upgrade the settlements in terms of the UISP.\(^5^5\)

The Minister’s silence on informal settlement upgrading in her recent budget vote speech is therefore of great concern. Whether this was an intentional omission in a speech concerned with provincial “mega projects” or merely an oversight, it is worrying that the Minister would exclude this crucial component of the human settlements policy. There have been longstanding concerns about the apparent failure or unwillingness on the part of municipalities and human settlement officials to implement informal settlement upgrading projects. In this light, it is extremely important that the Minister underscore the importance of in situ

\(^{51}\) Ibid.
upgrading projects and to provide an important signal to municipalities that informal settlement upgrading is a priority development of the Ministry and the DHS.

While informal settlement upgrading is high on the national agenda and there is optimism that we might be on the brink of a long awaited implementation phase, it is not clear if there is real buy-in from provincial government and municipalities, particularly local councillors, for this approach. This buy-in is critical as in situ upgrading is premised on bottom-up participatory planning, and this is where a programme or project is won or lost. What is needed to translate plans into implementation is the budget to do so. Provincial and municipal decision-making about their share of the national housing budget is critical in this regard; specifically whether or not, and how much, they allocate to informal settlement upgrading.

6. Conclusion

What constitutes a home deserving of constitutional protection is clearly of vital importance to those who continue to struggle for a place in which they can live in peace and security. Until the general crisis of homelessness and inadequate housing in urban areas is addressed, housing rights and the rights of property owners will continue to clash. The challenge is to provide adequate homes by releasing well-located urban land for residential purposes, upgrading existing informal settlements, and establishing a comprehensive public housing programme. Meanwhile, officials at all levels of government and private landowners are required to act towards those facing homelessness in a way that promotes ‘good neighbourliness’ and the value of human dignity which lies at the heart of the housing rights in the Constitution.56

This submission summarises important aspects of eviction law and jurisprudence in South Africa. The policy and legislative framework around evictions is in fact very well set out, thanks to a number of judgments handed down by the Constitutional Court over the years. However there have been a number of attempts to circumvent the legislation that protects unlawfully occupiers, namely the PIE Act. Municipalities have been allowing this to happen, either by obtaining, or by participating in, interim interdicts enforced again unknown and unnamed people unlawfully occupying land. The unconstitutionality and unlawfulness of such orders, which have the effect of eviction orders, has been determined by the Constitutional Court in Zulu, as well as by the High Court in Fischer. In these cases the legislative and policy framework was not implemented and the process set out in the PIE Act not followed. In the case of the Lwandle eviction, it appears that the PIE Act was actively undermined by SANRAL, with the acquiescence of the City.

Currently, the Constitutional Court has not finally decided the question of what constitutes a “home” in circumstances like the Fischer or Lwandle cases, however according to Sandra Liebenberg, this question is “obviously of great importance to those whose structures are being demolished on the basis of the perception of the Anti-Land Invasion Unit staff that no-

one lives in them.\textsuperscript{57} While the final judgment in the \textit{Fischer} or \textit{Zulu} cases might offer some guidance, she argues that further legal challenges to demolitions of the Lwandle kind will probably be necessary before the legal rules which apply in this situation are fully clarified.\textsuperscript{58} It is clear from both the \textit{Fischer} and \textit{Lwandle} cases that police and Anti-Land Invasion Unit officers are neither best-placed, or lawfully entitled, to decide if a structure constitutes a home or not. This must be decided by a court, which properly evaluates personal circumstances of the people occupying the structure for residential purposes.

There are important government programmes to deal with both the causes and effects of evictions or relocations: the EHP and the UISP. Effective emergency housing policies need to be put in place, in situ informal settlement upgrading should be implemented at scale, and the reliance on the myth of the “waiting list”, as a form of social and political control, should be abandoned on favour of a more responsive, pragmatic approach to those in need of land and housing in urban areas. There is undoubtedly increasing demand for access to land and housing in urban areas, which inevitably becomes politicised. However, urbanisation is a historical phenomenon, and affordable and liveable human settlements play a crucial role in addressing the associated pressures. Government should be developing proactive and comprehensive responses to urbanisation and the growing need for well-located, affordable accommodation in South Africa’s urban centres.

In conclusion, unlawful land occupation needs to be looked at holistically. Land owners in South Africa have responsibilities and obligations. If unused land is going to be left vacant – and land speculation in cities should be actively discouraged by government, particularly given the shortage of well-located land and the need to redress apartheid spatial patterns - owners need to take responsibility for securing it. This could involve building a fence and ensuring that there is adequate security on the property. If someone breaks done a fence and builds a shack on a piece of land, this can be dealt with immediately as the first line of defence against an occupation.

In most cases however, people have lived on a property for some time, and have nowhere to go once their shacks are demolished and they are chased off the land without the provision of alternative accommodation. The Lwandle eviction clearly shows this.

All subsequent interventions by the Minister, SANRAL, the City of Cape Town and the HDA to remedy the situation should be monitored so as to learn lessons and prevent violent evictions of this nature occurring in future.\textsuperscript{59}

\textsuperscript{57} Liebenberg “What the law has to say about evictions” \textit{Mail and Guardian} (1 September 2014).
\textsuperscript{58} Ibid.
7. Recommendations

In terms of the above, SERI has a number of concrete recommendations for the Lwandle Ministerial Enquiry and other key stakeholders to take forward:

7.1. Organs of state must refrain from using land occupation interdicts

This Enquiry should recommend that organs of state, particularly municipalities and provinces, refrain from requesting or using land occupation interdicts – as used in the Zulu, Fischer and Lwandle cases – which are directed at unknown persons and are often abused to remove people from land where they have made a home. These interdicts are unlawful and unconstitutional in that they operate as de facto eviction orders, without affording occupiers due notice and a chance to put their personal circumstances in front of a court.

Organs of state should instead attempt to secure their land with fences and security guards, to prevent unlawful occupation in the first instance. Where land occupation has already taken place, they should engage with occupiers and follow the PIE Act.

7.2. Multi-stakeholder process to develop guidelines on the PIE Act

It is clear that the policy and legislative framework as set out in the PIE Act and Constitutional Court jurisprudence is not being implemented properly. While this is often due to a lack of political will, there is the need for a set of guidelines or regulations that set out the different roles and processes in terms of the PIE Act, as well as guidance on how to operationalise the underpinning principles that have developed over the years.

We propose that a high-level, consultative multi-stakeholder forum be constituted by the Minister of Human Settlements in order to develop these guidelines. This process should include representatives from the national department, HDA, South African Local Government Association (SALGA) and the SAHRC as well as civil society organisations like SERI, the Legal Resources Centre (LRC), Lawyers for Human Rights (LHR), Centre for Applied Legal Studies (CALS), NADEL etc.

7.3. Develop minimum standards for compliance with the EHP

The Department of Human Settlements (DHS), in collaboration with SALGA and the HDA, should develop minimum standards for municipal compliance with the EHP. An instruction should be issued to municipalities that, within a year of this Enquiry’s recommendations, all municipalities in South Africa must report to the Minister on how they intend to comply with the EHP. An ongoing monitoring process should then be implemented.

7.4. Political clarity on informal settlement upgrading

The importance of in situ informal settlement upgrading cannot be overstated. There is the need for the Minister to come out strongly in favour of this approach: the importance of
assisting people with access to services and tenure security where they are and the need to minimise relocations, as clearly articulated in the UISP, the recent human settlements Medium Term Strategic Framework (MTSF) and the Constitutional Court in the landmark Abahlali judgment.\textsuperscript{60}

### 7.5. Improve data collection and monitoring of evictions

Currently there is almost no data on the number of evictions or forced relocations taking place in South Africa. Data does not appear to be collected by municipalities, provincial departments, Sheriffs, the Department of Justice or Rental Housing Tribunals. Neither does Statistics South Africa (Stats SA) collect this kind of information in any of its surveys. According to recent report published by the Studies in Poverty and Inequality Institute (SPII) on the monitoring of the progressive realisation of the right of access to adequate housing in South Africa, a data “wish-list” includes inter alia the number of evictions and relocations carried out per year and the percentage of these that were forced.\textsuperscript{61}

The Department of Human Settlements, in collaboration with Stats SA and other relevant stakeholders, needs to prioritise the collection of this data for monitoring and analysis purposes.

### 7.6. Investigation of housing databases and allocation processes

The “housing waiting list” – or, more accurately, the housing databases and needs registers that have and are being developed to register housing needs and allocate housing opportunities - need to be investigated in terms of their usefulness, efficacy and cost. The DHS and provincial housing departments must also report on what steps have been taken to address the myriad challenges with the Housing Subsidy System (HSS) and corruption in the allocation of houses. The department must investigate the current de facto allocation processes at municipal level across the country. There is a critical lack of transparency in housing allocation processes and thus the need to look at which points in this complex process greater transparency is most urgently required. At present, perceptions of corruption in housing allocation process - particularly the influence of ward councillors and community liaison officers (CLOs) - are extremely high. These must be proactively addressed so that there is greater information on, understanding of, and buy-in around government housing programmes, budgets and projects.

\textsuperscript{60} In the Abahlali case, the Constitutional Court said that “no evictions [in terms of the PIE Act] should occur until the results of the proper engagement process are known”. This engagement would include “taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction” (para 114). Therefore eviction or relocation is always the last resort, and only after in situ upgrading has been considered.

Currently, development planning processes, such as municipal IDPs, are not linked to housing needs and demand capture processes and systems. This means that very little information is available to households about when and where they can expect to get access to a state-subsidised housing opportunity, if they qualify in terms of the criteria set out in the National Housing Code. People “can’t live in the waiting list” and therefore there need to be options available for people, including serviced sites (where land is deliberately unlocked for occupation) as well as low-income public rental options at scale.