# REPORTS ON DISCRIMINATION, SEGREGATION AND THE RIGHT TO ADEQUATE HOUSING

QUESTIONNAIRE

# BASIC INFORMATION

1. Name of Individual, Organization, Institution, Agency or State: Legal Resources Centre (LRC)

Type of Entity\*

* + National Government or federal governmental ministry/agency
  + Inter-governmental organization or UN agency
  + Local or regional government, agency, representative or mayor
  + Association, tenant union or housing cooperative
  + NGO network, umbrella organization
  + Community-based NGO
  + Academia
  + Foundation
  + National human rights organization, ombudsperson
  + Real estate, urban planning or construction
  + Real estate investor or investment fund
  + Trade Union

☒ Other:

The Legal Resources Centre (LRC) is an independent non-profit public interest law firm

1. Categorization of your Work

Please select one or more responses, as appropriate.

* + Public administration

☒Advocacy

* + Funding

☒Legal Assistance

☒Networking

* + Policy

☒Research

* + Technical Assistance

☒Training

* + N/A
  + Other:

1. City/Town: The LRC has offices in Johannesburg, Cape Town, Durban and Makhanda
2. State/Province: The Provinces are Gauteng, Western Cape, Kwazulu-Natal and Western Cape
3. Country (please indicate your region or “international” if focus the work of your organization covers multiple countries); The Republic of South Africa

# HOUSING DISCRIMINATION

1. What specific forms of de facto or legal discrimination or barriers towards equal enjoyment of the right to adequate housing do the following groups face in your country (please provide evidence with examples, studies, reports and relevant statistical information):

* People of African Descent, or Roma
* Racial, caste, ethnic, religious groups/minorities or other groups
* Migrants, foreigners, refugees, internally displaced persons
* Women, children or older persons
* Indigenous peoples
* Persons with disabilities
* LGBTQ persons
* Low income persons, including people living in poverty
* Residents of informal settlements; persons experiencing homelessness
* Other social groups, please specify

# Low- income persons, including people living in poverty

* **Women, children or older persons**

# Persons with disabilities

Given South Africa’s growth in population, coupled with the rural-to-urban migration, there is a demand for residential accommodation situated close to the economic hubs of cities. Sectional title schemes provide accommodation to large numbers of people, facilitating homeownership for more people and including the benefit of amenities, with the upkeep of such amenities being shared among the homeowners. With the sharing of amenities and common property, joint decision-making and co- operation is required for the running the scheme. At the time of developing the sectional title legislation, it was not drafted for application to indigent or low-income groups but rather for middle, upper-middle, and higher- income groups. 2 The Sectional Title Act 95 of 1986 (Sectional Title Act) seeks to provide for: the division of buildings into sections and common property and for the acquisition of separate ownership in sections coupled

2 D V Cowen, “the South African Sectional Titles Act in Historical Perspective: an Analysis and Evaluation,”Vol 6, The Comparative and International Law Journal of South Africa, p 3.

with joint ownership in common property; the transfer of ownership of sections and the registration of sectional mortgage bonds over, and real rights in, sections; the conferring and registration of rights in, and the disposal of, common property; the establishment of bodies corporate to control common property and for that purpose to apply rules; and the establishment of a sectional titles regulation board; and to provide for incidental matters.3

In 2011 the Sectional Title Schemes Management Act 8 of 2011 (Schemes Management Act) was enacted, amended and repealed various sections of the 1986 Act. The Schemes Management Act aims to provide for the establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and for that purpose to apply rules applicable to such schemes; to establish a sectional titles schemes management advisory council and to provide for matters connected therewith.

Although the Draft Bill seeks to amend the Sectional Title Act, we record that the Sectional Titles Act and the Schemes Management Act are interlinked and provide for the governing of sectional titles schemes. We submit that owners of sectional title schemes must be aware of the obligations placed on them, before entering into ownership agreements.

# Case Studies

The LRC is aware of the plight of residents of Flamingo Court, Garupa Heights, Sydenham Manor, Sydenham Lodge, Sydenham Terrace, Elwyn Court, Chisnam Court, Lantern Heath, Bencorrum, Raynor House, Emerald Park and Melbourne Court. The schemes located within KwaZulu Natal are purported beneficiaries of the Discount Housing Benefit Scheme, however, several beneficiaries now face imminent eviction, due to their inability to afford the escalating levy costs for maintenance of common property in the schemes. Many of the occupants of former state-owned flats have been residing in these homes for over

3 The Sectional Title Act 95 of 1986, heading.

20 (twenty) years. They purchased their flats shortly after the 1994 elections, following the decision to offer the then tenants, ownership in terms of the Discount Housing Benefit Scheme, part of the government’s overall commitment to improve the plight of the poor under the Reconstruction and Development Programme.

The levy costs extending to the installation of individual water meters, replacing aged plumbing, electrical wiring safety, roof repairs and security together with compliance with the Sectional Title Act, for these multistorey buildings have proved unaffordable for large number of the individuals surviving on social grants and struggling to secure employment, who now face imminent eviction. Large numbers of flat dwellers consult the LRC for assistance, some only after a court order for their eviction has been granted due to non-payment of sectional title levies.

# Amicus Submissions in the case of Occupiers of Erven 87 and 88 v De Wet N.O and Another

The Legal Resources Centre represented the Flat Dwellers Movement in 2017, as the *amicus curiae* in the Constitutional Court case of *Occupiers of Erven 87 and 88 v De Wet N.O and Another. (Occupiers of Erven).4* The *Occupiers of Erven case* centered around the duties of the judicial officer, when deciding eviction matters. In deciding the outcome of the case, the Constitutional Court stated that “The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a).”5 “These duties arise even in circumstances where parties on both sides are represented and a comprehensive agreement is placed before the court.”6 The Movement’s submissions were that the absence of judicial oversight in

4 Occupiers of Erven 87 and 88 v De Wet N.O and Another. (Occupiers of Erven CCT108/16) [2017] ZACC 18

5 Occupiers of Erven 87 and 88 v De Wet N.O and Another. (Occupiers of Erven), Para 48

6 Occupiers of Erven 87 and 88 v De Wet N.O and Another. (Occupiers of Erven ,Para 54

eviction orders taken “by consent” does not give effect to the right of access to courts in terms of section 347 of the Constitution. The Movement in its submissions provided the Constitutional Court with context and background that drew the Court’s attention to the lived realities and struggles of the purported beneficiaries of the Discount Housing Benefit Scheme that are governed by the Sectional Titles Act.

These challenges include:

1. Lack of education and meaningful information about rights and obligations in sectional title schemes prior to receiving ownership.
2. Budgeting capacity to afford levy costs,
3. The ability to participate in or manage body corporates in particular the finances and collection of levies necessary to maintain the scheme.
4. Owner responsibility for the maintenance and upkeep of the common property.

The culmination of the above challenges together with unaffordable levy payments and arrear levies, often results in eviction. The fact that the beneficiaries qualified for the Discount Housing Benefit Scheme, excludes them from applying for further low-cost housing benefits – a path to homelessness and extreme vulnerability.

# Flamingo Court

The Flamingo Court Scheme in Durban forms part of the Discount Benefit Scheme (DBS) that was conceptualized in terms of the Housing Act 107 of 1997. Flamingo Court is a 200-unit high rise building built in 1968 that historically offered municipal managed low-cost rental accommodation to pensioners, indigent people, single parents, and low-income earners*.* In the mid-1990s the government enacted the DBS

– with the aim of improving equitable access to the housing market for

7 “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another

independent and impartial tribunal or forum”.

all races. It encouraged the transfer of publicly owned housing to qualifying occupants.

Between 1998 and 2002, the eThekwini Municipality, using the DBS, converted the Flamingo Court building from a subsidized rental scheme to a sectional title scheme and sold the units to the residents of the building. This sale and transfer were not preceded by any meaningful information from the municipality or any state organ notifying the new owners that maintenance of the structure including all common property was also being transferred to them, neither were they informed of the obligations arising from the Sectional Titles Act or the role of a body corporate. In time, the upkeep of the costs levied for maintenance, faulty electrical wiring, water debt and compliance with the Sectional Titles Schemes legislation proved unaffordable for the owners of the units – the majority of whom were low -income earners and recipients of social assistance*.*

The Flamingo Court Scheme soon became dysfunctional as the municipality failed to consider the following realities when implementing the DBS:

* 1. The new unit owners had previously paid a subsidized rental and could not afford escalating levies required to maintain the building.
  2. the building was previously maintained by the state.
  3. the building was in a state of disrepair prior to it becoming a sectional title scheme and the deterioration of the building continued after transfer to the beneficiaries of the DBS; and
  4. the levies as well as utility bills exceeded what owners had to pay as subsidized rental and many owners could not keep up payments.

In less than 10 years after the scheme was converted into a sectional title scheme, it became indebted to the municipality and was placed under administration. Administration is a drastic step taken when a

Body Corporate has become indebted granting the administrator all the powers and duties of the body corporate. In this case an administrator was appointed to rehabilitate the Flamingo Court Body Corporate. The appointment of an administrator for the Flamingo Court Scheme only served to deepen the Schemes indebtedness. The administrator underperformed woefully. The majority levies raised was spent on fees to secure re-appointment of his term and his fees – with a meagre amount allocated to maintenance of the scheme itself. There were no meetings held with the owners of the scheme, effectively preventing the owners from participating or developing their management skills in the governance of the scheme.

In 2018, 25 unit-owners opposed a further extension of the administrator’s term of office. This opposition laid bare the obligations that the administrator failed to meet. The Legal Resources Centre represented these unit owners in the Durban Regional Court which held that in deciding this matter, the human rights of the residents of the Flamingo Court Body Corporate needed to be upheld, in the application of the Sectional Title Schemes Management Act. The application for the extension of the term of the administrator was dismissed. The court ordered the residents of Flamingo Court to convene two meetings with the assistance of the Legal Resources Centre and to elect an interim committee to manage the affairs of the sectional title scheme.

The judgment focused on the heart of the problem of the scheme: that for a sectional title scheme to remain financially viable to provide for the maintenance and running costs of the scheme, optimal collection of revenue in the form of levies was required and the administration of the scheme’s affairs required the participation and knowledge of the people residing in the building.

# Sectional Title Schemes: not suitable for low- cost housing 8

**Places an administrative obligation on owners.**

Sectional title schemes impose a large, collaborative administrative task on the former tenants/lessees and now unit owners, whose units are converted to sectional title schemes without providing them with sufficient structural support and education about the requirements arising from the Sectional Title Act.

# Sectional title schemes impose a large financial burden.

In terms of the Sectional Title Act, sectional title owners in a scheme make up the body corporate of that scheme. As the body corporate, sectional title owners are collectively responsible for the repair, upgrading and maintenance of all common areas — including all fixtures, ducts, machinery, pipes, wiring and lands registered to the scheme — as well as insurance, insurance premiums, and applicable rates and taxes for utilities for the common areas.9 The body corporate is responsible for the operating costs.10 These expenses are paid through an administrative fund and a reserve fund that are raised by levying contributions from unit owners. Owners are further collectively levied for the cost of the Community Schemes Ombud Service, which provides adjudication and dispute resolution for sectional title schemes.

Owners are further responsible for special levies that trustees may raise from time-to-time.11 Special levies are raised where the need is such that the levies cannot wait for the following financial year’s budget.

All sectional title Schemes require the owners to manage, maintain, pay levies and understand the rules governing the scheme, for a scheme to be functional and efficient.

8 Sayed Iqbal Mohamed https:/[/www.paddocks.co.](http://www.paddocks.co.za/paddocks-press-newsletter/the-)z[a/paddocks-press-newsletter/the-](http://www.paddocks.co.za/paddocks-press-newsletter/the-) challenges-of-sectional-title-in-the-low-cost-sector/

9 Section 24 Annexure 1 Management Rules Sectional Title Schemes Management Act, 8 of 2011 [Annexure].

10 STSMA, section 3(3).

11STSMA , section 3(3).

Based on the current structure of sectional title schemes, the financial burden of owning a sectional title scheme is far greater than rent paid in state subsidized housing and within the current legislative framework is an inappropriate mechanism to administer low-cost housing especially for beneficiaries of state subsidized rental accommodation. Legislative reform needs to be made12, before sectional title schemes are viewed as an appropriate solution to provide large numbers with affordable, low-cost housing.

The affordability of the lessees is not determined prior to passing of title. Prior to the passing of title to beneficiaries of low-cost housing, the state fails to carry out an affordability test to determine whether individuals receiving ownership have the financial capability to maintain their security of tenure in the sectional title scheme or the means to pay levies and special for repairs to and maintenance of common property and proportional contribution to municipal charges.

The test for affordability extends beyond the personal finances of the proposed owners, but ought to include the financial capability to meet the obligations arising out of sectional title schemes including the maintenance of the common property.

# Education and training are essential to ensure that new owners are aware of their obligations as part of a sectional title scheme.

The consequence of the state’s intention to pass ownership of title to previously disadvantaged families with limited means is that large numbers of the beneficiaries do not understand the duties and obligations arising from sectional title ownership. This has and continues to result in too many beneficiaries becoming indebted to the body corporate, and in some instances, beneficiaries losing their homes due to the indebtedness.

12 Comments and Recommendations addressed in part VI of this submission.

# Comments and recommendations to the Sectional Titles Amendment Bill

The comment is limited to Clause 2, which “seeks to amend section 4 of the Sectional Title Act, which deals with the approval of development schemes and provides for the developer to have a meeting with every lessee of a building in instances where part of such building is to be wholly or partially let for residential purposes. Section 4(3)(b) provides for the developer to answer all reasonable questions of lessees that are present at such meeting. A need has been identified to also provide for a lessee’s representative to act on behalf of such a lessee in instances where a lessee is absent from a meeting.”13 Section 4(3) of the Sectional Title Act sets out the developer’s obligations to notify lessees of the intended conversion.

The current Sectional Title Act requires developers to host a meeting to provide information, answer questions and distribute certificates relating to the scheme particulars. It is submitted that there must be greater emphasis under the law for education on the obligations of sectional title owners, to ensure equitable access to this information for all vulnerable tenants. This is especially important in relation to the education of the obligations in respect of levies and that what a lessee may owe can change from month-to-month and year-to-year.

Section 4(3) of the Sectional Title Act mandates that developers provide information to lessees about the intended scheme. The section stipulates that developers must host a meeting either in the relevant building or one nearby, and that developers must deliver an invitation letter to each lessee either personally or by registered mail. This letter must be sent at least 14 days prior to the meeting as scheduled. At this meeting, the developer is to answer any questions lessees may have about the conversion process. In addition, developers are required to provide lessees with a certificate outlining relevant particulars, including:

13 Clause 2, Memorandum on the Objects of The Sectional Titles Amendment Bill, 2020

“(a) a specified estimate by the developer or his agent of the annual expenditure in respect of:

* 1. the repair, upkeep, control, management and administration of the common property
  2. the payment of rates and taxes and other local authority charges in respect of the building or buildings and land concerned
  3. the charges for the supply of electricity, gas, water, fuel, sanitation and other services to the building or buildings and land concerned
  4. insurance premiums, and
  5. all other costs in respect of the common property which are normally recovered from the owners of units as contemplated in section 3 (1) (a) of the Sectional Title Schemes Management Act, 2011.”

The Sectional Title Act requires tenants to be given all relevant information, especially relating to the financial obligations relating to the residential complex. However, the legislation is silent on the extent of the information provision. There are no stipulations for ongoing support after this meeting, nor is there contemplation of accommodations for individuals with physical, mental or intellectual disabilities in this meeting. The meeting contemplated under section 4(3) is the sole reference to education and only information provision in the creation of sectional title schemes. This causes concern because if the developer sends invitations, hosts a meeting, and then provides a certificate to lessees they have met this legal burden. This is a very low threshold and there is evidence to doubt its effectiveness. The evidence shows indigent persons who purchased sectional title units in terms of the Discount Benefit Scheme have reported that they were coerced to purchase the Units.14

14 “Durban Apartment owners struggle with levy Payment” https:/[/www.iolproperty.co.z](http://www.iolproperty.co.za/roller/news/entry/sectional_title_properties_burden_to)a[/roller/news/entry/sectional\_title\_properties\_burden\_to](http://www.iolproperty.co.za/roller/news/entry/sectional_title_properties_burden_to)

A report of an aged domestic worker, whose primary residence was a sectional title unit in Elwyn Court purchased under the Discount Benefit Scheme demonstrate the injustice suffered by poor people who are placed in sectional schemes whose management and financial obligations they do not understand, when a proper affordability determination is not implemented.15 This is by no means an isolated incident as there are records of several indigent families having lost their homes in a similar manner.

The profile of people who purchased the state-owned units are indigent persons, pensioners or lower-income earners. This unfortunately means that the levy payments for many exceeded their government grant or their income.

# Recommendations

Subsidized rental housing ought only to be converted to sectional title schemes, once the scheme in question undergoes rigorous education and training to ensure prospective owners are capable of managing a sectional scheme. An affordability test must be embarked upon at the outset to determine whether the scheme is financially capable of forming a sustainable sectional title scheme.

In instances, where households do not ‘pass’ the affordability test it is recommended that a levy subsidy be provided to the households to ensure that they are not evicted from their homes due to an inability to meet the levy payments, resulting in homelessness.

In cases where households are classified as indigent, and incapable of meeting their obligations, it is recommended that the subsidized rental remain in place. For example, an elderly pensioner who survives on a SASSA grant and has paid a subsidized rental her entire adult life ought not to have the burden that sectional titles impose, foisted upon them

15 “ Woman Loses home over levies arrears” https:/[/www.iol.co.z](http://www.iol.co.za/news/south-)a[/news/south-](http://www.iol.co.za/news/south-) africa/kwazulu-natal/woman-loses-home-over-levies-arrears-1988005

at an advanced age – in many instances rendering their circumstances more vulnerable with the threat of homelessness.

The Sectional Title Act provides for the enforcement of financial and other obligations for a viable sectional title scheme. A prerequisite is a proper understanding of basic concepts involved in sectional title schemes, and a thorough knowledge of the rights and especially the obligations pertaining to sectional ownership – the clients of the Legal Resources Centre have not reported this benefit. We recommend that developers, tasked with housing delivery, the department of human settlements and the relevant municipalities identify budgets for meaningful information transfer for informed decisions; to ensure that beneficiaries’ tenure is not later threatened.

The Sectional Title Act seeks strict compliance with financial obligations to avoid financial instability, whilst the missing ‘lower and middle income’ sectional owners, cannot afford the contributions to common expenses such maintenance. The missing ‘lower and middle income’ groups are difficult to define in practice because indigent status creeps onto people. We question the efficacy of including such groups in the regulatory framework that assumes their ability to contribute all costs of sectional title schemes. We recommend that the Sectional Title Act not only impose obligations on owners for responsibility for the building but also elaborate the circumstances when public finance is to be provided for a solution to the problem of low-cost housing beneficiaries that fall within these missing, lower and middle sectional title holders, for maintenance costs of common property.

Whilst it is accepted that to protect tenure and reduce financial interdependence of sectional owners in sectional title schemes rates and taxes may be subsumed under municipal charges and no longer treated as body corporate charges this protection does not extend to service charges. The Movement advocates for separate meters to be installed to measure the consumption of the various services, for these services to fall under municipal charges and thereby reduce body corporate debt. The Movement’s experience is that, if no meters are

installed the body corporate collects the service charges and then pays these over to the municipality. The cost of installing meters often falls on the body corporates, which are costly, and Discount Benefit Schemes are seldom in a financial position to raise a special levy for the installation of individual such meters. We submit that meters may ensure that service charges are directly due to municipalities rather than to bodies corporate to reduce the high debts owed by sectional title schemes to municipalities and recommend the installation as a means of supporting equitable access housing in terms of S 26 (1) of our Constitution.

We recommend that maintenance of the common parts of the building be defined as investment infrastructure maintenance in the public interest, and that, the performing of public interest be ensured by the executive and the municipal government. We recommend the payment of levies by stakeholders such as the state and developers into a fund under conditions prescribed by the regulations that together with municipal subsidies correspond with “the performing of public interest” social goals to maintain infrastructure for access to housing via public/private partnerships.

The emphasis on procedures for the enforcement of financial obligations are not capable of compliance by the poor brought under the regulation of the Sectional Title Act. The sanctions in place to solve the problem of non-payment into body corporate coffers are at odds with the goals of S 26 (1) of our Constitution. One of the main reasons for offering ownership opportunities is to address our history of forced removals, the ravages of the group areas act and the pass laws. We submit that placing such beneficiaries from that historical context under the umbrella of sectional title ownership scheme financial obligations does not fulfil the duties of S 26 (1) of our Constitution. We recommend support for the maintenance of common property because if the right of access to adequate housing places a duty on both the state and private parties not to interfere unjustifiably with any person’s existing access to adequate housing then measures that limit existing access

to adequate housing surely limits the protection afforded in terms of section 26(1) of our Constitution. We recommend safeguards such as state subsidies for maintenance in the Sectional Title Act to support tenure to realize the substantive right of access to housing.

We recommend a balance in the regulatory framework for robust mechanisms that builds in and ensures protection of tenure for beneficiaries of state housing. We submit it is possible for a framework that establishes rules and standards for social housing provision that includes service delivery as well as providing guidance in respect of how developers and the state manage their resources to protect tenure.

The Sectional Title Scheme legislative framework in its current form requires reform should the state intend to use it as the legislation governing housing to indigent; low income and the ‘missing middle’ income persons within our society. The LRC submission illustrates the challenges experienced by the beneficiaries of the Discount Housing Benefit Scheme. The administrative obligations placed on sectional title owners’ places vulnerable families at risk of imminent homelessness should they not be able to meet the extensive financial obligations of residing within a sectional scheme. The lack of education and training to ensure that people understand the requirements in terms of the current sectional title scheme, is reckless and has to date resulted in large numbers of beneficiaries losing their homes – rendering them incapable of qualifying from future housing benefits. Our comments and recommendations highlight the duty on the department of human settlements to enact law that safeguards homeownership and tenure of vulnerable groups by means of adequate protection in the Sectional Title Scheme legislative framework.

1. Discrimination in housing can affect various dimensions of the right to adequate housing and other human rights. Could you provide more details regarding the specific areas in which housing discrimination is experienced? Below are examples of various forms of discrimination that can be experienced in relation to different dimensions of the right to adequate housing:

*Accessibility*

* Discrimination in relation to access to land, including water and natural resources essential for habitation;
* Discrimination in relation to housing for rental or for acquisition or in accessing public or social housing;
* Access to emergency and/or transitional housing after disaster, conflict related displacement or in case of homelessness, family or domestic violence;
* Accessibility of housing for persons with disabilities or older persons, including access to housing for independent living or to care homes;
* data collection or requirements to furnish certain certifications resulting in the exclusion of particular persons from accessing housing;

*Habitability*

* discrimination in relation to housing conditions, overcrowding or housing maintenance;
* Exposure to health risks within the home, including lack of ventilation, heating or insulation, exposure to fire or housing collapse risk, unhealthy building materials, or other unhealthy housing covered by the WHO Guidelines on housing and health;
* Exposure to other risks which render housing uninhabitable, including sexual or gender-based violence, interference with privacy and physical security in the home and neighbourhood;
* Discrimination in relation to housing renovation or permission of housing extension;

*Affordability*

* Discrimination in relation to access to public benefits related to housing;
* Lack of equal access to affordable housing;
* Discrimination in public and private housing financing;
* Discrimination related to housing and service costs, housing related fees, litigation or taxation;

*Security of tenure*

* Discrimination in relation to ownership or inheritance of housing and land and related natural resources including water including on the basis of a distinction between formal and informal tenure arrangements;
* Discrimination in relation to evictions, resettlement and compensation for loss or damage of housing, land or livelihoods;
* Differential treatment in land or title registration, permission of housing construction;

*Availability of services, materials, facilities and infrastructure*

* Provision of water, sanitation, energy, waste collection and other utility services; their quality or cost, including interruptions/blackouts including policies relating to disconnection from utility services;

The right to adequate housing includes the right to be provided with basic services such as sanitation, water, and refuse removal. In South Africa, the discrimination in relation to housing is also evident in the provisioning of basic services, with people in rural areas and on the outskirts of towns generally having poor access to basic services, or no services at all. By 2010, about 90% of the population had access to water, 69% had access to sanitation, 64% had access to refuse removal, and 81% had access to electricity.16

However, these statistics mask the inequalities along racial lines as well as the disparity between people living in rural areas and those residing in urban areas. In terms of race, black people have the lowest levels of access to basic services such as sanitation as they constitute the majority in informal settlements located on the outskirts of urban areas.17 For example, in 2009 the proportion of black households without access to toilets was more than the national average, and

16 Department of Human Settlement *Measuring Success in Human Settlements Development: An Impact Evaluation Study of the Upgrading of Informal Settlements Programme in Selected Projects in South Africa*; Report 2011 Pretoria, South Africa, 2011.

17Ndinda C; Uzodike N; Winaar L “Equality of access to sanitation in South Africa” *Africanus*

(2013), 43, 96–114.

whereas only 0.1% of whites made us of the backet system, around 9.8% of black people had not access to a toilet or made use of the bucket system.18 Over the last five years, the LRC has litigated several cases dealing with basic services. We will discuss a few of these cases below to illustrate the disparity that still exists in relation to basic services in the country.

*Mmangweni Community – Lusikisiki*

In 2018 the LRC assisted the Mmangweni Community near Lusikisiki in the former-Transkei homeland to ensure that they receive access to water. The community consisted of about 227 residents who lived in a deep rural area without access to basic services. The community is in the jurisdiction of the OR Tambo District Municipality. They had been reliant on accessing water from a nearby dam that was also used for washing and as water for cattle. The water from this dam was contaminated with *E.coli* and unsafe for human consumption. It was also far from some of the homesteads and elderly residents had to walk long distances and carry heavy buckets of water home.

The LRC approached the court and asked that the municipality be declared in contravention of section 27 of the Constitution for their failure to provide the community with adequate water. We also asked the court to compel the municipality to provide water tanks to the community that will be refilled by the municipality and provide a minimum of 25 litres of water per person per day. The municipality agreed to the order and provided ten 5000 litre tanks to the community that they refill on a weekly basis. This has ensured access to water for a community that have never had access to safe, healthy, and sustainable water sources. Unfortunately, there are many similarly situated communities around the country, that, due to their location in the rural areas of the country are not included in formal water programmes or are simply forgotten by the municipalities responsible for them. Most of these people are black and live in the former homelands of South Africa.

18 Ndinda C; Uzodike N; Winaar L “Equality of access to sanitation in South Africa” *Africanus*

(2013), 43, 96–114.

*Mshengu and other v Msunduzi Local Municipality and others*19 *- Access to basic services for farm dwellers*

One of the groups that have been particularly negatively affected by the inequitable access to basic services are farm dwellers and labour tenants residing on private farms. They often live in rural areas, have insecure tenure, and are dependent on the farm owner to ensure that they have access to water, sanitation, and refuse removal. Most of these farm dwellers are black or coloured and are disproportionately affected by the failure of municipalities to provide them with basic services.

In a precedent-setting case, the Pietermaritzburg High Court in 2019 confirmed that municipalities have a constitutional obligation to provide basic services to farm dwellers and labour tenants on private land. The LRC acted on behalf of a number of farm dwellers and the Association for Rural Advancement (AFRA) in this matter and argued that the failure by the municipalities to provide basic services to the farm dwellers and labour tenants violated their constitutional rights. The municipalities argued that they did not have the duty to provide the services as they were prevented from doing so because the farms were privately owned and that the responsibility therefore fell on the farm owners and the dwellers themselves. The court dismissed this argument and stated that “As state, the first respondent is the water services authority and, as such, the obligation to provide water and sanitation for farm occupiers and labour tenants rests on it, not on the landowners. The court dismissed this argument and stated that:

*“The landowners have no direct statutory obligation to provide such services unless contracted to do so by the water services authority in terms [of Section] 19 of the Water Services Act (WSA). Even in instances where landowners are to provide water services to another in terms of a contract, [Section] 26(3) of the WSA authorises the water services to authority, if the*

19 *Mshengu and Others v Msunduzi Local Municipality and Others* (11340/2017P) [2019] ZAKZPHC 52; [2019] 4 All SA 469 (KZP) (29 July 2019).

*intermediary fails to perform its obligations in terms of the agreement to ‘take over the relevant functions of the water services intermediary’.”*

It was clear that the municipalities had, in their Integrated Development Plans, their yearly planning documents, not made adequate provision for the farm dwellers and the labour tenants and have not prioritised this particularly vulnerable group. The court ordered them to provide an actual plan for how their rights will be realised. The court also directed the municipalities to comply with regulations by installing “a sufficient number of water user connections to supply a minimum quantity of potable water of 25 litres per person per day or six kilolitres per household.” The flow rate in water user connections should, it recommends, not be less than 10 litres per minute. And most importantly, these water user connections must be within 200m of the farm dwellers’ households.

The court went further, ordering the municipalities to install, as per regulations, a Ventilated Improved Pit toilet in each household. It also directed municipalities to provide farm dwellers with refuse collection, for a cleaner and healthier environment. This case is an important development in the jurisprudence on basic services in the country and aims to address the disparity between basic service delivery in urban areas and the delivery of services in more rural areas and to vulnerable people on private land.

*Sanitation and refuse collection in Makhanda, Eastern Cape*

The small town of Makhanda (formerly Grahamstown), in the Eastern Cape, is an example of many small towns in South Africa that have been brought to its knees because of poor municipal administration, lack of financial resources, capacity, expertise, and corruption. The township on the outskirts of Makhanda is particularly affected by the poor service delivery – they receive hardly any refuse removal services, their water is routinely cut off, and their sanitation services are so poor that raw sewerage often pool in the streets and in residents’ homes. Most of the town’s black population reside in the township.

In 2019 and 2020, the LRC launched two cases regarding service delivery – one dealing with sanitation and the other with refuse. The refuse case is aimed at

addressing the failure by the municipality to collect and manage residents’ waste. The municipality used to provide one black bag to residents per week to manage their rubbish, but in April 2018 they suddenly stopped this practice and refuse collection became sporadic. Residents had no choice but to make use of illegal dumping sites. They lived far from the formal municipal dumpsite and could not keep the rubbish on their premises as it attracted rats, and insects, and had a terrible smell.

The waste management in town was so poor that the illegal dumpsites mushroomed near residential plots and schools. When it rained, the rubbish from the dumpsites was washed into the rivers and natural waterways and caused blocked drains and polluted the environment. The failure to manage the waste was one of the contributing factors to the sanitation crisis as the blocked drains caused sewerage to run into the streets and the homes of residents. In turn, the sanitation case was particularly important for the long-term development of Makhanda as all housing developments had been halted due to the inadequate sanitation situation. Since 2014 no new housing developments could be undertaken as the existing wastewater treatment works was already functioning at 78% over its capacity. Blocked drains are responsible for many of the spills while crumbling sewerage pipes often burst causing large spills with raw sewerage flooding homes.

The relief in the sanitation case was divided into two parts. Part A dealt with immediate relief that our individual clients want. This included weekly visits by the municipality to unblock the drains near the homes of the residents, regular threading of the sewerage pipes, and lime treatments20 for the areas affected by the spills. Our clients also sought an order that the municipality identify all the sewerage spills in town and produce a plan on how the spills will be managed until a more sustainable solution can be found.

Part B of the application is aimed at finding a long-term solution. Our clients are asking the court for an order directing the municipality and the provincial and national governments to appoint a qualified person to assess the sanitation needs

20 Lime is a calcium-containing mineral that is commonly used to treat sewerage spills. It neutralises the smell of the sewerage and sanitises the affected areas.

in Makhanda, draft a report on the budgetary requirements to meet those needs, and implement the recommendations. This includes the upgrading of the sewerage treatment works and the replacement of broken pipes.

The relief in the refuse case is aimed at finding a long-term solution for the problem of waste management in town. It firstly seeks to declare that the municipality’s by-laws and waste management systems are unconstitutional to the extent that they fail to protect and fulfil the residents’ rights to an environment that is not harmful to their health. It also seeks to ensure compliance with the National Environmental Management (Waste) Act (NEMWA) and places an obligation on the municipality to review its bylaws to make it compliant with the NEMWA.

Furthermore, we seek an audit of the waste management needs in town, together with an indication of the steps that will be taken to meet the identified needs within 3 months after the audit is filed with the court. The municipality will also be directed to clean all of the unofficial dump sites and provide residents with three black bags a week, that are collected on a weekly basis. In addition to this, the municipality will be subject to a structural interdict that will see them having to report to the court on the progress that they have made in implementing the order. This is important to ensure actual compliance with the order and to allow the court to retain some form of control over the process of implementation.

While the relief in the sanitation case has been granted, the municipality has not complied with the order and contempt proceedings must be launched. A court date for the refuse case is yet to be set.

*Location*

* Discrimination in relation to freedom of choice of the place of residency within the country, within a particular region or location;
* Discrimination based on place of residence or address, such as exclusion from invitation to job interviews or access to credit;
* Exposure to environmental health risks, such as external air quality, flooding, toxic ground exposure; noise; risk of landslides etc.;
* Living quality and physical security in the neighbourhood, including geographical disparities in policing and law enforcement;

*Cultural adequacy*

* Discrimination in relation to the recognition of culturally adequate dwellings as housing as well as equal access to public space;
* Prohibition of accessing, maintaining or constructing culturally adequate housing;
* Lack of recognition of mobile forms of residency.

The LRC has been involved in several cases which challenged discriminatory laws which denied women in customary marriages the right to security of tenure. These cases have secured a community of property regime for black women, strengthening their right to security of tenure and financial freedom by ensuring that a husband and his wife/wives equally share the right of ownership and other rights to family property and house property without discrimination.

The Recognition of Customary Marriages Act (RCMA) was enacted in 2000 to undo some of the injustices faced by black women in the past. However, certain provisions of the Act perpetuated discrimination. Section 7(1) of the RCMA stipulated that the proprietary consequences of a customary marriage entered into before the commencement of the Act (2000) continue to be governed by customary law. In most instances, this default position was out of community of property. Women bore the laborious and expensive task of applying to a court for redistribution of property if the marriage ended. In the cases *Elizebeth Gumede v President of RSA* and *Ramuhovhi v President of RSA*, Section 7(1) of the RCMA was declared unconstitutional on the basis that it discriminated against elder black women who were married during a time when laws actively prevented women from holding joint family property. A similar legal challenge was successful in the *Sithole* case, which challenged a section of the Matrimonial Property Act on the basis that it maintained and perpetuated discrimination created by the Black Administration Act which deemed marriages between black couples to be automatically out of community of property.

The LRC has also sought to uphold the tenure rights of persons residing on land held by traditional authorities. The Ingonyama Trust Board is a traditional authority which holds about 30% of the land in the KwaZulu-Natal province, with the sole trustee being the Zulu king. The ITB attempted to convert customary law rights held by persons residing on communal land into lesser rights of leasehold.

In 2019 the LRC filed an application against the Ingonyama Trust (**“the Trust”**) and the Ingonyama Trust Board (**“the Board”** or **“the ITB”**) for undermining the security of tenure of residents and occupiers of Trust-held land in KwaZulu-Natal, and extorting money from them, by unlawfully compelling them to conclude lease agreements and pay rental to the Trust to continue living on the land. Their action has transgressed the constitutional rights of thousands of occupiers of Trust-held land.

The LRC acts on behalf of the thirteen applicants who brought the application to obtain a relief for themselves and to secure a solution for all occupiers of Trust- held land who find themselves in a similar situation. The Rural Women’s Movement (RWM) is one of the LRC’s clients with an interest in the enforcement of the Interim Protection of Informal Land Rights Act 31 of 1996 and section 25 of the Constitution. The application extends to all occupiers of Trust-held land who could not act in their own name because they lacked the funds to hire a lawyer to challenge the action of Ingonyama Trust. This form of standing is recognised in section 38(c) of the Constitution and in the public interest under section 38 (d) of the Constitution that the Ingonyama Trust not infringe the constitutional rights of the occupiers of Trust-held land to enjoy security of tenure.

The Ingonyama leases issued to individuals for residential sites came to light between 2015 and 2016 at a workshop in the Zululand district in which different women complained of receiving accounts for rental arrears from Ingonyama Trust Board’s lawyers that they simply could not pay. They were extremely anxious about having outstanding accounts, and worried what the consequences would be. They said that when they had signed applications for tenure rights, it had not been explained to them that these were lease agreements requiring the annual payment of rent and which escalates with 10% annually. One woman, a widow, complained that an employee of the Ingonyama Trust Board had denied her permission to build a garage for a car on her own property now that they held a

lease over it. At a workshop at Jozini, we heard that people there were directed to the Inkosi’s place by their induna arrive to find long queues. They joined the queues and were helped by young women who took their details and asked them to sign their names. They were told that their details would be sent to Pietermaritzburg. They insist that they had no idea that this would result in rental statements or lease agreements. People in Jozini were extremely fearful about the consequences of the arrears statements that they receive. Most of them are struggling to make a living and simply cannot afford the rental amounts demanded. In order to make ends meet, quite a few women rent out rooms in their houses to teachers or people from elsewhere who have local jobs. They depend on the rental from these rooms to buy food and pay school fees. However, amakhosi and izinduna advise them that since they are running businesses their residential leases must be converted to business leases, and they must pay over a portion of the rental they receive to the Ingonyama Trust Board in addition to their own rent. This has made people extremely anxious and scared. They have no other means of earning a living. They are not sure whether they must evict their tenants, or how they can keep them secret. A group of young women and men who wanted to start a farming business on an empty piece of land to build a future in circumstances where it is impossible for them to get jobs. They were told they would have to pay the Ingonyama Trust Board R250 000 per annum for the land they had identified. This is absolutely beyond their means and has made them despair about their dreams of bringing vacant land into production. In 2014 a woman from Bergville had started a small crèche, but she was told that in order for her to continue she needed to take out a lease with the Ingonyama Trust Board. She now gets yearly statements which she cannot pay and lives in fear that her crèche and her house will be taken away from her. Many of the leases were in the names of individual women (widows). This is because of the high numbers of unmarried women with families in KwaZulu-Natal. In many families there are simply no adult men to sign the leases. There were reports of some cases in which the Ingonyama Trust Board or the inkosi insists that the lease must be in the name of whatever man they find on the property, because they assume that a man must always be the household head. This creates great difficulties if the man is just a boyfriend of the woman who owns and has established the property. The Ingonyama Trust leases have the effect that land which is a family asset is registered in the name of one person to the exclusion

of other family members. Where this is a man it has a direct negative impact on the tenure security of female members of the family. Historically, under customary law, parts of the land were used primarily by women and in many instances, women accessed arable land directly. Unmarried women and widows were also able to acquire areas of arable land directly and in their own right. However, this practice was consistently undermined by colonial and apartheid laws which provided that land could be allocated only to the male head of the family. Pursuant to this injunction, Native Commissioners persistently vetoed allocations of land directly to women. Hence, over time, allocation of arable land to women stopped and it was only allocated to men. Moreover the Black Areas Land Regulations (Proclamation R188 of 1969) provided that Permission to Occupy (PTO) certificates should be issued only in the name of the male household head, ignoring the rights of other family members in land. This notwithstanding, women continued to occupy and use the land. It is, therefore, not surprising that in most rural areas that the RWM has worked in, the cultivation of arable land remains the prerogative of women. Despite the fact, however, that women are the primary users and occupiers of rural land, old order rights held by men undermine the status of use and occupation rights held by women within family-based systems of land rights in extended families under customary law. When customary and PTO rights are converted into leasehold registered in the name of a man, the consequences of women’s past exclusion is not only formalised but their vulnerability is increased by potentially exposing them to eviction from the land. The leases issued by the Ingonyama Trust Board therefore undermine, rather than enhance, women’s security of tenure. In addition to a denial of their legal status, women may also find a commensurate decline in their social and bargaining position in the household and in the community. This is particularly important because the family-based nature of land rights is deeply embedded in customary law and is likely to persist just as it has in the past. However registering rights to one person alters the power dynamics within families, and severely weakens the status and ability of those excluded to assert or secure their rights within family decision making processes. Single women will, in this respect, be in an even weaker position than before to assert their rights in family held land. If they are to encounter conflict with the male holder, or his wife they will have little option but to leave the household and find accommodation elsewhere. We encounter various examples of sons and their wives evicting the

widowed mother and unmarried sisters from the natal home, because of internal family problems. Consultations with rural women over the past 30 years, demonstrate that many women choose to have children outside of marriage. We have observed that the social stigma of not marrying is not nearly as bad as it used to be. These days, mothers often advise their daughters not to marry because of the problems that come with marriage. Mothers often advise daughters not to marry to guard against evictions from their marital homes and that their futures will be more secure if they establish themselves independently with their children.

Articles by Dorrit Posel and Stephanie Rudwich21 and by Christine Mhongo and Debbie Budlender22 document the steady decline in marriage rates among black women in South Africa. This has resulted in increasing numbers of single women heading households in KwaZulu-Natal in particular. The right to equality as provided for in section 9 of the Constitution is a right to substantive equality. Substantive equality requires, in the context of securing land rights for women, an examination of their actual, social and economic conditions and their relationship to systematic patterns of domination within society. In this regard, The primary purpose of the equality provisions, in the Constitution, is to recognise the social and economic disparities between groups and individuals and to seek to eliminate the sources and effects of past and present disadvantage and discrimination. A substantive understanding of equality in this regard ought to recognise that women, and more especially rural women, are subject to inequality which is deeply structural and has become embedded in the very way that African societies are organised as a direct result of apartheid, its laws and value systems. The action of the Ingonyama Trust perpetuates the ideology of male dominance. Furthermore, instead of realising the security of tenure of thousands of occupiers of Trust-held land, the Ingonyama Trust is infringing them.

In the circumstances, the applicants submitted the court had wide powers to grant an appropriate remedy and given the constitutional dimension of the case, it has all the powers available to it in section 38 of the Constitution to grant “appropriate relief” and the powers in section 172 of the Constitution to make an order that is “just and equitable”. The LRC awaits judgment in this matter.

21 Reference Marriage, Land and Custom

22 Reference Marriage, Land and Custom

1. Are there any particular current laws, policies or practices in your country, region or town/community that contribute to or exacerbate discrimination in relation to the right to adequate housing?

Post-apartheid town planning within South Africa has continued with the spatial discrimination in that; new low income housing developments tend to be located on the periphery of cities in a phenomenon known as inverse densification, where the majority live far from economic opportunities, services and amenities. In South Africa this has been exacerbated by the rising cost of well-located residential properties coupled with a general failure of our government to implement social and affordable housing.

The **Agnes Sithole** application concerned the discriminatory legacy of the Black Administration Act 38 of 1927 (“**the BAA**”) and sought to address the legacy of section 22(6) of the BAA, in terms of which Black couples who concluded civil marriages under that Act were married, by default, out of community of property. The case illustrates how silent discriminatory laws frustrate access to and security of tenure. Ms Sithole brought the application in her personal interest and in the interest of the many Black women whose marriages were subject to section 22(6) of the BAA, who remain married out of community of property, and who are unable because of lack of knowledge of their rights, and lack of access to legal representation, to act in their own name.

Section 22(6) of the BAA denied hundreds of thousands of Black women the protection that is afforded by a marriage in community of property. By doing so, it exacerbated their vulnerability and rendered them entirely dependent on the goodwill of their husbands, who generally control the bulk of the family’s wealth and assets. The BAA was repealed and replaced by new legislation. However, that new legislation did not and does not adequately reverse or remedy the continuing discriminatory impact of section 22(6) on the lives of Black women.

This happened as follows:

Section 22(6) of the BAA was repealed by the Marriage and Matrimonial Property Amendment Act 3 of 1988 (**“the 1988 Amendment Act”**).

However, sections 21(1) and 21(2)(a) of the Matrimonial Property Act

88 of 1984 (“**the Property Act**”), as amended by the 1988 Amendment Act, maintained a marriage out of community of property as the default position of Black persons who married before the 1988 Amendment Act. The result of those provisions is that a wife whose marriage is out of community of property remains subject to that regime unless her husband consents to the regime being changed to in community of property. Given the imbalance of power that generally exists between a husband and wife, this consent is very frequently difficult to obtain.

As a consequence of the provisions of the 1988 Amendment Act, section 21(2) (a) of the Matrimonial Property Act perpetuated the harm created by section 22(6) of the BAA. In this application, Ms Sithole sought an order declaring section 21(2)(a) of the Act unconstitutional and a declaration that all marriages concluded out of community of property under section 22(6) of the BAA be converted to marriages in community of property. Further that couples who wish to opt out of this system may do so by executing and registering a notarial contract to this effect thereby shifting the burden of altering the property regime from Black women (who desire the equality and protection provided by a marriage in community of property) to Black couples who wish to be married out of community of property – to better promotes equality and protects Black women.

The relief sought has a substantial impact. The expert affidavit of Deborah Budlender, filed along with the application estimated that the number of women were married out of community of property under section 22(6) of the BAA (and have not subsequently altered the matrimonial property regime) is likely over **400 000**. The relief promoted the achievement of equality to ensure that these women are better protected. At the time of her marriage, the officiating priest told her and her husband that marrying out of community was the only option available to them, as Black persons. They

knew no better and did not seek further advice. As a consequence, they concluded a civil marriage, out of community of property, under section 22(6) of the Black Administration Act. She recently discovered that in 1988 the law was amended to give Black couples who had married out of community of property an opportunity to alter their matrimonial property regime. They could do so by executing and registering a notarial contract within the two-year period after 2 December 1988. She was not aware of the detail of this amendment at the time. She did however recall discussions with neighbours in the late 1980s that changes had taken effect and that the marriages of Black persons (including existing marriages) would henceforth be deemed to have been concluded in community of property. The belief that she was married in community of property (which was incorrect) gave her a great deal of hope, comfort and security.

In January 2018, she discovered her mistake during her domestic violence application when the magistrate informed her that she was still married out of community of property. This revelation caused her a great deal of distress. Between 1972 and 1985, she stayed at home and raised their family. She conducted her own home-based business, selling clothing. All of her income was used to pay for the education (including tertiary education) of their children, and for family and household expenses. Her contributions to the family and its expenses led directly and indirectly to the increase in the value of her husband’s estate.

Their family home was acquired in 2000 and registered in her husband’s name. During the next few years, her relationship with her husband deteriorated - mainly due to his engaging in extra-marital affairs. At some point, her husband started threatening that he would sell their family home. She disagreed vehemently and told him that he could not do so. She sought legal advice and launched proceedings to ensure her protection in terms of the domestic violence laws. During these proceedings, she learned that she was still married out of community of property and that her husband did not need her consent to sell their family home. Her husband’s threats to sell the house continued. She could not allow this to happen because it was also her home and selling it would render her homeless; and rob her of an asset that, but for the discriminatory laws in place at the time of their marriage and

continuing thereafter, would have been registered jointly in their names or (at the very least) would have fallen into their joint estate. On 10 August 2018, she obtained an interim interdict restraining her husband from alienating their family home pending the outcome of the constitutional challenge.

She was advised that the Divorce Act offers certain protection to women who married out of community of property under the BAA, but was not willing to sacrifice her principles and divorce her husband in order to secure an equitable distribution of their assets. She argued that she should not be compelled to do so in order to achieve equality and protection and submitted that the law should make provision for, and protect, women in her position since the existing laws fail to do so.

# SECTION 22(6) OF THE BLACK ADMINISTRATION ACT

Her marriage was concluded in terms of the now repealed section 22(6) of the Black Administration Act. Section 22(6) provided that:

“A marriage between Blacks, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, Commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community.”

In brief, the salient features of section 22(6) are the following: The default position was that Black couples married under the BAA would be married out of community of property; Black couples were permitted to marry in community of property if specific requirements were satisfied. These requirements included that the couple must, at any time in the month preceding the marriage, jointly declare to the marriage officer their intention to be married in community of property.

They were not aware that such a declaration was an option. As is explained in the expert affidavit of Ms Budlender, this lack of knowledge

was likely common amongst couples marrying under the BAA. Unlike the democratic government of today, the apartheid state had little interest in ensuring that Black couples were informed of their rights. It is reasonable to assume that the majority of couples married under the BAA did not make declarations and were married out of community of property. Section 22(6) of the BAA has had pernicious consequences, particularly for Black women. These include the following: First, it denied Black women the protection of a marriage in community of property. It is accepted that, in general, marriages in community of property work in favour of women. The reason for this is that women are less likely to be employed than men and, if they are employed, they are likely to earn less than men. One of the primary reasons is that women traditionally bear the main responsibility for housework, bearing children and childcare. The position of women in this regard is widely acknowledged. This is addressed in Deborah Jean Budlender’s expert affidavit. If a woman is married in community of property, the assets acquired with her husband’s income fall into the joint estate and she becomes co- owner of those assets. If the couple is married out of community of property, the assets amass in the husband’s separate estate. The wife has no right of ownership in relation to those assets and the husband is able to use and dispose of them without his wife’s consent. He may recklessly fritter away the family’s wealth, leave the property to somebody other than his wife upon his death, or (as her husband had threatened to do) unilaterally sell the family home. This may negatively impact upon the rights and interests of the wife. She may be forced out of her home, leaving her vulnerable and unsafe. She may be left with nothing to live on in her old age or to ensure her basic needs are met (including healthcare, food and security).

Second, the BAA unfairly discriminated against Black people. Under section 22(6), the default position for Black couples was marriage out of community of property. By contrast, the laws regulating civil marriages between couples of other races set the default position as marriage in community of property. One of the consequences of the law’s unequal treatment of different racial groups is that Black women were afforded less protection than White women and other women. There is no rational basis for this differentiation.

# REPEAL OF SECTION 22(6) OF THE BAA

Parliament has taken certain steps to address the ongoing legacy and impact of that provision. The steps taken by Parliament include the following:

Section 22(6) of the BAA was repealed by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. That Amendment Act inserted sections 21(2)(a) and 25(3) into the Matrimonial Property Act 88 of

1984, thereby giving persons married out of community of property under section 22(6) of the BAA the opportunity to change their matrimonial property regime within two years of 2 December 1988. Couples were required to do so by executing and registering a notarial contract to that effect.

Section 21(2)(a) of the Property Act permitted couples to change their matrimonial property regime to include the accrual system provided for in Chapter 1 of the Act. In full, section 21(2)(a) provides that:

“(2)(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property—

1. entered into before the commencement of this Act in terms of an antenuptial contract by which community of property and community of profit and loss are excluded; or
2. entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case may be, or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect.”

Section 25(3)(b) of the of the Matrimonial Property Act permitted couples married out of community of property under section 22(6) of the BAA to cause the provisions of Chapter 2 of the Act to apply to their marriage. In full, section 25(3)(b) provides as follows: “(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act 38 of 1927), may—

...

(b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered.”

The Divorce Act was also amended in order to address part of the legacy of the BAA. Sections 7(3) to (5) provide that a divorce court may order the equitable distribution of assets between spouses married out of community of property under section 22(6) of the BAA. Sections 7(3)(b), 7(4) and 7(5):

“[(3)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name%3A%27LJC_a70y1979s7(3)%27%5d&xhitlist_md=target-id%3D0-0-0-365439) A court granting a decree of divorce in respect of a marriage out of community of property-

…

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of [section 22 (6)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name%3A%27a38y1927s22(6)%27%5d&xhitlist_md=target-id%3D0-0-0-115295) of the Black Administration Act, 1927 ([Act 38 of 1927](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name%3A%27a38y1927%27%5d&xhitlist_md=target-id%3D0-0-0-19869)), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first- mentioned party.

1. An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which

would have otherwise have been incurred, or in any other manner.

1. In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account-
   1. the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) *(b)* of this section may have in terms of [section 22 (7)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name%3A%27a38y1927s22(7)%27%5d&xhitlist_md=target-id%3D0-0-0-115299) of the Black Administration Act, 1927 ([Act 38 of 1927](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title%3Bpath%3Bcontent-type%3Bhome-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name%3A%27a38y1927%27%5d&xhitlist_md=target-id%3D0-0-0-19869));
   2. any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the ante-nuptial contract concerned;
   3. any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
   4. any other factor which should in the opinion of the court be taken into account.”

Further, section 21(1) of the Matrimonial Property Act permits couples to apply to court, at any time, to alter the matrimonial property regime applicable to their marriage. In order to achieve this, both spouses must **consent** and certain procedural requirements must be satisfied. Section 21(1) provides as follows:

“(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—

1. there are sound reasons for the proposed change;
2. sufficient notice of the proposed change has been given to all the creditors of the spouses; and
3. no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.”

# INADEQUACY OF EXISTING MEASURES

These measures are significant steps towards remedying the discriminatory legacy of section 22(6) of the BAA – but substantively inadequate. They do not assist women who cannot (or will not) divorce their husbands and who are unable to obtain their husbands’ consent to the alteration of their matrimonial property regime. She submitted that the following is relevant in this regard: First, the protections afforded by sections 21(1) and 21(2)(a) of the Act assume that the wife is able to obtain her husband’s consent to alter the matrimonial property regime applicable to their marriage. In reality, many women have been unable (and are unable) to obtain such consent. As explained above, a marriage in community of property generally favours the wife. Many men are unlikely to give up the position of power that they occupy (i.e. as the person who owns and controls the family’s assets) and convert their marriage into one which is in community of property. This was borne out by the expert affidavit of Deborah Budlender. She describes research carried out in the 1970s on the differing attitudes of men and women to the nature of relationships within a marriage. The research showed that many men believed that they should be the primary decision-maker rather than making decisions through discussion and consensus. Such men are unlikely to agree to change to the matrimonial property system when such a change would shift a significant portion of the decision-making power to their wives. For women in this position, the protective measures under sections 21(1) and 21(2)(a) are not available. Second, even if a woman were able to obtain the consent of her husband to alter the matrimonial property regime, the protections afforded in sections 21(1) and 21(2) would only be available if the woman has the knowledge of her rights, and access to legal assistance, to approach a court and/or arrange the execution and registration of a notarial contract. A substantial portion of the women married under the BAA are not in such a position. Third, section 7 of the Divorce Act does not assist women would cannot (or will not) divorce their husbands for religious, social, or financial reasons. She fell within this category. As is explained above, she did not want to divorce her husband for religious reasons (my Catholic faith) and was in mourning for her son and could not divorce during the mourning period. Other women may not be able to afford the cost and consequences of a divorce or may be prevented from divorcing by social or family pressure. For these women, the remedy provided by sections 7(3) to (5) of the Divorce Act is of no assistance.

In cases where a woman is unable to divorce her husband or to change the property system of their marriage, she will continue to suffer the discriminatory impact of section 22(6) of the BAA. This results in the violation of her

constitutional rights, including: The right to equality under section 9 of the Constitution, which provides that everyone is entitled to equal protection and benefit of the law. This includes the full and equal enjoyment of all rights and freedoms. As long as the legacy of section 22(6) is allowed to persist, Black women married before 1988 will not enjoy the full protection afforded to white and other women married before 1988, and women married after 1988. The right to dignity under section 10 of the Constitution: Black women in her position are trapped in a position in which they have no control over their families’ assets. They did not choose to be in this position – it was imposed upon them by the discriminatory laws of the colonial and apartheid states. As the law stood, there was no way of changing this position. Socio-economic rights including housing, healthcare and education (sections 26 and 27 of the Constitution): Women in her position do not exercise control over the family’s wealth or assets. This made them vulnerable. Should their husbands choose to force them from their homes, to recklessly dispose of the family’s assets, or to disinherit them, they are left with nothing – without the means to secure housing or to satisfy other basic needs such as food or healthcare.

Section 21(2) (a) of the Matrimonial Property Act did not remedy or reverse the negative impact of section 22(6) on Black women but in fact maintained it by retaining the default position set by section 22(6) of the BAA, being marriage out of community of property by requiring Black women to obtain the consent of their husbands in order to change the default position. In this regard, section 21(2)(a) of the Act perpetuated the discriminatory effects of section 22(6) of the BAA and are inconsistent with the Constitution.

# On 14 April 2021 the Constitutional Court confirmed the order of the high court and made the following order:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 (‘the MPA’) are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 (‘the BAA’), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
5. In terms of section 172(1) (b) of the Constitution, the orders in paragraphs 1 and 2 shall not affect the legal consequences of any act done or omission in relation to a marriage before this order was made.
6. From the date of this order, Chapter 3 of the Matrimonial Property Act will apply in respect of all marriages that have been converted to marriages in community of property, unless the affected couple has opted out in accordance with the procedure set out in paragraph 3 above.
7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. costs …….
9. Can you explain exemptions in national law that allow (certain) public, private or religious housing providers to give preferential or exclusive access to housing to members of a particular group, for example based on membership, employment contract, public service, age, disability, civil status, sex, gender, religion, income or other criteria?

No.

1. In case there may be differential treatment of particular groups in relation to housing, please explain why such treatment could be justifiable according to international human rights standards - for example positive measures benefiting a particular group to overcome systematic discrimination or disadvantage-or if it would amount to discrimination?

Not applicable in South Africa

# SPATIAL AND RESIDENTIAL SEGREGATION

1. What forms of spatial segregation along racial, caste, ethnicity, religion, nationality, migration status, heritage, economic status/income or other social grounds can be observed in urban and urban-rural contexts in your country? One of the most visible manifestations of the legacy of South Africa’s past is a geography marked by segregation and inequities across space. Apartheid aimed to bring people together in urban communities based on racial classification. South Africa’s apartheid history created cities that are segregated according to race, with the majority of black people living in densely populated areas on the outskirts of urban areas where access to job opportunities, basic services, and proper housing is low. In comparison, the minority white population live in well- developed areas that are less populated, have better access to basic services, and are close to job opportunities. While people of different races are no longer segregated by law, the consequences of the discriminatory apartheid laws are still apparent in urban and peri-urban areas. One of the most visible manifestations of the legacy of South Africa’s past is a geography marked by segregation and inequities across space. Apartheid aimed to bring people

together in urban communities based on racial classification. A dual economy was created which reserved land, economic opportunities, education and services for whites, while locking black people out of the central economy. This reality pervades the spatial segregation today. Although middle class black people have moved into cities and into powerful positions in the core economy, the deepest levels of poverty coincides with the former African homelands or bantustans where people still live in rural areas far outside of the economic hubs of the country.

1. What impacts do these forms of spatial and residential segregation have on affected communities? Please point to indicators such as rates of poverty, un- employment and under-employment; prevalence rates of malnutrition; disparities in access to services and facilities (such as access to schooling, health care or other public benefits); disparities in access to infrastructure (lack of and/or poor quality provision of water, sanitation, transportation, energy, waste collection and other utility services); rates of exposure to environmental health risks (poor air quality, flooding, toxic ground exposure, etc).

Poverty rates for black Africans are between 40 to 60 times higher than whites. Poverty rates are highest for black Africans, followed by coloured, then Indians/Asians and then whites. This represents the racial hierarchy imposed by the apartheid system.23 Black areas remain further away from major transport networks and hubs of employment. Nearly 71% of the population use minibus taxis as their primary source of commuting while two-thirds of the lowest income earners spend more than 20% of their household income on transport.24 Peripheral areas are characterised by high unemployment, low household incomes and poor public services. In 2016, only 26% of working age adults were in employment in the former Bantustans. The gap between household income between Gauteng metros and former bantustans have widened between 2001 and 2016, indicating that spatial disparities in income have increased over time.25

23 ‘Edged Out: Spatial Mismatch and Spatial Justice in South Africa’s Main Urban Areas’, Socio- Economic Research Institute, 2016.

24 High Level Panel Report, pg 452.

25 Diagnostic Report on Spatial Inequality Commissioned for the High Level Panel, pg 15.

Assessments have shown that poverty is lowest in Gauteng, highest in Limpopo, followed by Eastern Cape and KZN.26

1. Have any particular historical or current laws, policies or practices in your country, region or town/community caused or exacerbated segregation?

South Africa’s apartheid history has been the main driving force behind the current state of segregation in the country. The Black Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936 laid the foundation for segregation by demarcating the spaces within which black residents could legally settle. Black persons were prohibited from acquiring land outside of scheduled areas which were reserved for blacks By deliberately restricting areas where black persons could lawfully purchase, hire, or occupy land to scheduled reserves in rural areas, the Acts excluded them from accessing vast portions of land in South Africa. The Natives (Urban Areas) Act 23 of 1920 provided for the establishment of black locations and single-sex hostels in predetermined urban areas on a temporary basis as long as they were employed. As part of the overall aim of spatial racial segregation, independent homelands were created for different tribal affiliations.

The Black (Urban Areas) Act 21 of 1923 enabled the development of separate residential areas for black residents in the vicinity of urban centres. In particular, the Act regulated the housing spaces where black inhabitants could legally settle by authorising local authorities to demarcate, plan and develop separate locations. As alternative settlement options, the Act provided for the lease of municipal plots to black tenants and endorsed hostel accommodation for single black men working in urban areas. This was primarily to provide a cheap labour force in the urban areas.

The three pillars of spatial apartheid were influx control measures, group areas legislation and the prevention of illegal squatting. Under apartheid, a variety of statutes applicable to land and planning demarcated and controlled urban black settlement and entrenched the insecure tenure status and poor location of housing of South Africa's black urban population. The Group Areas Act 41 of 1950, the Prevention of Illegal Squatting Act 52 of 1951, and the Physical

26 Diagnostic Report on Spatial Inequality, pg 17.

Planning Act 88 of 1967 were all particularly instrumental in facilitating the restructuring of apartheid urban areas. The Group Areas Act 41 of 1950, which was modelled on the provisions of the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945, was a powerful mechanism for facilitating the spatial restructuring of apartheid urban areas. The Act enabled spatially segregated urban development through establishing land- use zones according to different racial groups, while controlling the tenure status, use and occupation of land within towns and cities. In practice, the Group Areas Act 41 of 1950 prohibited the multiracial use or occupation of urban land. The Act thus divided urban areas into segregated zones where only members of a particular race could reside and work. Twenty-seven years after the first democratic election, the legacy of these legislative measures continue to plague the South African housing landscape. The geography of apartheid cities is largely intact and former homelands experience the deepest levels of poverty. Legislation regulating traditional leadership in these areas entrenches tribal identities imposed by the Bantu Authorities Act of 1951. In certain areas these laws have been interpreted to imply that traditional leaders have unilateral decision-making power over communal land.

1. In your view, what factors (current or historical) are the principal *drivers* of spatial and residential segregation in urban and urban-rural contexts in your country?

Since the transition to democracy, state subsidised housing (commonly known as RDP housing) has been used to undermine spatial segregation in urban areas. One of the unintended consequences of RDP Housing provided by the government entrenches spatial inequality because this housing is built on cheap land located on the margins of cities, which locks people into poverty. Despite the expansion of low-cost RDP housing, the supply is not fast enough to offset the growing demand for housing partly due to rapid urbanisation. Well-located, public land is sold on the open market rather than being released for the development of housing to address spatial inequality. There is little upgrading of existing informal settlements within the urban areas. Inherited apartheid spatial planning still defines development, where those who are on the fringes of urban areas are far removed from areas with high employment. A large proportion of black people

still live in former homelands, urban townships and informal settlements around urban areas.

1. Are there examples in your country of where spatial and residential clustering has been a result of voluntary choices of residence by members of particular groups?

There are few examples in South Africa where spatial and residential clustering has been the result of voluntary choices by members of a particular group. As outlined in this submission, the history of South Africa has to a large extent shaped the spaces where racial groups reside, and these choices were rarely voluntary. There are however two examples that we will discuss in this submission:

*Orania, Northern Cape*

In 1990, on the cusp of the new democratic dispensation, a small group of white Afrikaans-speaking people (referred to as Afrikaners) established the small town of Orania in the Northern Cape Province. The town is founded upon the remnants of an abandoned housing site and is privately owned through a holding and shareholding company. People residing in the town acquire living and usage rights to the properties in the town. Orania is based on a particular cultural and religious philosophy. Residents are expected to live in accordance with the practices of the Afrikaner culture, speak Afrikaans, and abide by the Christian religion. Implicit in this philosophy is that people are also expected to be white, with the town housing no people of colour.

Residents must apply to the town council to be given residential rights in the town and pass a test to prove that they can abide by the Afrikaner-Christian way of life. The town has its own currency (the Ora) and a population of roughly 1500 people. According to its 2016 Economic Development Plan, the group has earmarked funds for investment in infrastructure development, secondary and tertiary education, residential, commercial and industrial expansion, and information technology infrastructure expansion, with an eye on future investments that

includes the establishment of an agricultural school, a local pension fund, and an import substitution action plan.

Orania has successfully resisted attempts to have it incorporated into any municipality. The residents of Orania rely heavily on the principle of self- determination provided for in section 235 of the Constitution of the Republic of South Africa to underpin their decision to live separately. The President of the Orania Movement, Carel Boshoff IV, explained in a 2017 interview that Orania is a dynamic embodiment of Afrikaner self-determination. The existence of the town is in many ways a direct reaction to the loss of Afrikaner political power under the democratic dispensation and an attempt to keep alive the values of the apartheid- regime’s policy of separate development along racial lines.

While Orania may be the embodiment of self-determination, its mere existence is at odds with principles of equality, non-discrimination, and human dignity entrenched in the Constitution. The fact that it has managed to remain in in existence almost undisturbed, expand its population, and enhance its economic growth is quite extraordinary given the history of South Africa and the attempts to ensure that divisions along racial lines are eradicated. It is unlikely that the group will ever secede from South Africa, or that it will yield great economic power, but it is a painful reminder of how far the country still has to go in order to achieve racial integration.

***Clairwood***

The LRC represents the Clairwood Ratepayers and Residents Association, a community based in an area close to the Durban Bay which was established by indentured labourers over 135 years ago. Due to the close proximity to the Durban Port, it increasingly became used by logistic companies and changed from a residential to a mixed-use area as more warehouses and trucking yards were developed. In 2014 the Ethekwini Municipality adopted the Back of Port Local Area Plan (LAP) which envisaged that Clairwood would cease to be a residential area and would be transformed into a logistic hub.

Residential properties were to be expropriated and residents were planned to be relocated. None of this has occurred, but instead, logistic companies are operating while property is zoned as residential and in some instances, properties are rezoned to light industrial. The Municipality is currently ratifying illegal conduct and approving rezoning applications despite the supporting infrastructure not being in place. Many people have died as a result of the high volume of trucks on the inadequate road network. The shift from residential to industrial use is not being done in a planned or orderly manner, and as a result, Clairwood has become hostile to its residents, while much of it remains zoned for residential use.

The LRC has instituted legal proceedings to review and set aside the decision to rezone an area in Clairwood on the basis that the current infrastructure does not support the Back of Port Local Area Plan and as a result, has been endangering the lives and safety of community members. The application will also seek an order directing the Ethekwini Municipality to make sufficient plans to improve the existing infrastructure within the Clairwood area.

1. The preservation of cultural identity, the right to self-determination of indigenous peoples and the protection of minority rights are examples of grounds for which groups may choose to live separately. Can you comment on how these forms spatial/territorial separation are evidenced in your country, if these communities they are subject to discrimination and suffer adverse consequences from spatial segregation such as through disparities in access to services, infrastructure, living conditions, etc.?

As outlined above, the town of Orania is one of the few examples of separate residential living along racial lines. As stated above they have been allowed to exist in democratic South Africa, despite the Constitutional values of equality, human dignity, and non-discrimination. In this sense they have objectively not experienced any discrimination or adverse consequences for this choice.

1. In your view, are certain forms of observed residential separation/voluntary clustering compatible with human rights law and if so why? (for example to protect rights of minorities or to respect the freedom of choice of individuals to decide with whom to live together).

There are various international and regional documents that deal specifically with self-determination. The South African Constitution allows for both international and foreign law to be considered when interpreting rights in the Bill of Rights. Section 39(1)(b) provides as follows: “When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.” The United Nations Charter in Article 1 includes the provision that the UN is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self- determination of peoples, and to take other appropriate measures to strengthen universal peace” inclusion of self-determination into the UN Charter highlights not only its importance within the UN system, but also its utility in maintaining peaceful relations within the global system.

However, it should be noted that self-determination here is used in a statist sense, and not in regard to a ‘people’. Nevertheless, once the concept of self- determination was incorporated into the UN Charter it “became a right for peoples everywhere”. The UN Charter further elaborates on self-determination within Articles 55, 56, 73, and 76(b). Within Chapter IX the question of international economic and social cooperation is dealt with in Article 55, which states that “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” the UN will undertake to promote various initiatives conducive to fostering the above. A final point of interest within the UN Charter is Article 76(b).

Found in Chapter XII – concerning the international trusteeship system – Article 76(b) states that the UN will “promote the […] advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.” The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in turn deals with the right to self-determination in the context of indigenous peoples. Article 3 prescribes that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Article

4 proclaims that “[i]ndigenous peoples, in exercising their right to self- determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”.

In Article 2 of the United Nations Declaration on Minority Rights – also known as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities – the rights of minorities in self-determining their “own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination” is enshrined.

On a regional level, the African Union (AU) offers minority protection mainly through ‘inherited’ treaties established under its forebear, the Organisation of African Unity (OAU). The African Charter on Human and People’s Rights and the African Commission on Human and Peoples’ Rights were established to codify both human, communal, and anti-colonial rights. Here minorities fall under the term ‘communal groups’, and Article 20 of the charter notes that “[a]ll peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination”, and that the ‘people’ “shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

Section 235 of the Constitution states that “[t]he right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self- determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.” Section 235 alludes not to a right, but merely that a “recognition of the notion of the right to self-determination is not precluded” Section 31 of the Constitution also provides for the right to a cultural, religious or linguistic community and states that:

*“1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community ¬*

1. *to enjoy their culture, practise their religion and use their language; and*
2. *to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.*

*2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”*

The Constitution does not envision the possibility of political independence or the option of a particular group seceding from the territory of South Africa. What is does envision is that persons that belong to cultural, religious, or linguistic communities may enjoy their practices, language, and culture, but must exercise this right in a manner consistent with the Bill of Rights. The Bill of Rights provide for the rights to equality, human dignity, and non-discrimination based on race, language, culture, or ethnicity. Furthermore, the Constitution in section 235 does not afford a right to self-determination but makes a weaker statement – it does not preclude the recognition of the notion of the right to self-determination. It is our submission that while certain forms of voluntary residential clustering can be compatible with human rights law in South Africa, it cannot be conducted in a manner that is not compatible with the rights in the Bill of Rights. International law seems to recognise the right to self-determination, but this right must still be exercised within the confines of South Africa’s Constitution. Given our history of racial segregation, the notion that a group of people can establish a residential clustering that excludes people based on race, ethnicity, culture, or identity, is a violation of the right to equality and human dignity - it amounts to unfair discrimination under the Constitution.

1. Are there any laws or policies requiring certain individuals (and their families) to live in particular housing provided to them or in a particular geographical area (e.g. asylum seekers, migrants, IDPs, refugees, ethnic, religious, linguistic or other minorities, indigenous peoples, persons with disabilities, public service and military personnel)?

No

1. In your view, what are the principal *barriers* to diminishing spatial, including residential segregation?

The main barrier to diminishing spatial and residential segregation is financial. Well-located land and housing are expensive and beyond the reach of the vast majority of South Africans living on the periphery of urban areas. Land on the outskirts of urban areas is usually cheaper and more affordable, especially for government. The RDP housing programme saw most of the houses being built on land located on the periphery of urban areas where black people were historically removed to during the apartheid regime. This perpetuated the spatial segregation and was a cheap way for government to provide in the housing needs of people without challenging the obvious racial segregation created by the apartheid system.

There is also resistance to urban transformation from certain groups who benefit from ongoing processes of exclusion, including commercial farmers, traditional leaders, urban property developers and political elites who distribute houses and mining licences. Private sector developers prefer to construct housing and commercial developments in already established zones of economic and social activity leaving poor areas undeveloped and entrenching existing spatial divides. Municipal efforts to induce the private sector to invest in poor areas have been resisted by developers while property owners have organised into strong lobbies to protect their interests.

A further difficulty is that while legislation and policies exist to ensure spatial justice, the implementation is slow and there is a lack of political will to enforce the legislation and policies. The *Tafelberg* case27 (to be discussed below) is a good example where the City of Cape Town acted contrary to the legislation and policies, and refused to concede this failure, until a court judgment ordered them to abide by their constitutional and legislative duties. This continued failure to abide by national law, slows down the achievement of inclusive housing developments and perpetuates segregation in the cities.

27 Discussed more fully at question 27.

South Africa’s high corruption rate has also exasperated the slow achievement of spatial justice. While the country has limited resources to invest in housing developments, there is no doubt that the available resources are greatly diminished due to corruption in government projects. In *Glenister v President of the Republic of South Africa and Others28* the Constitutional Court pointed out:

*“That corruption has become a scourge in our country and it poses a real danger to our developing democracy in that it undermines the ability of government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.”*

The corruption has been coupled with very little accountability for those that are responsible for the mismanagement of housing projects in the country. The presidency of Jacob Zuma between 2009 and 2018, saw the rise of state capture and an increase in irregular expenditure in the national and provincial departments of Human Settlement that is responsible for the provisioning of housing. For example, in September 2020, the former Head of Department of the Free State Department of Human Settlement, Mpho Mokoena, testified in front of the Commission on State Capture, that during the 2010/2011 financial year, around R631 million was spent by the Department on a housing project in the province without receiving anything in exchange.29

The money was hurriedly paid to contractors to build housing in the province, after it became apparent that the Department had grossly underspent its yearly budget. Payments were made before building commenced and the result was that no houses were delivered to the people of the Free State, while contractors left with the money. By September 2020, no official involved in this scheme had been held to account for their role in this project. This is unfortunately a familiar theme in South Africa, with few officials being held accountable for mismanagement and corruption. The failure to address the mismanagement and hold officials accountable, impacts on the realisation of spatial justice and the right to adequate housing under the Constitution.

28 2011 (3) SA 347 (CC) para 58.

29 E Bates “R631m vanishes in Free State housing scam – with no arrests a decade later” *Daily Maverick* (23 September 2020) https[://ww](http://www.dailymaverick.co.za/article/2020-09-23-r631m-)w.d[ailymaverick.co.za/article/2020-09-23-r631m-](http://www.dailymaverick.co.za/article/2020-09-23-r631m-) vanishes-in-free-state-housing-scam-with-no-arrests-a-decade-later/

# MEASURES AND GOOD PRACTICES TO CURB DISCRIMINATION AND REDUCE SEGREGATION

1. What laws, policies or measures exist at national or local level to prevent or prohibit discrimination in relation to the right to adequate housing?

In most large cities of the world low-income earners live in less well-located parts of the city. The democratic government has enacted some legislation and policies to eradicate spatial injustice and to prevent discrimination in relation to the right to adequate housing. While the legal framework aims to address some of the issues around inclusionary housing and compel developers and government to ensure that spatial justice is achieved, the implementation of the laws and policies are erratic and often require legal intervention to force implementation.

*National Development Plan 2030 (NDP)*

In May 2010 President Jacob Zuma appointed the National Planning Commission, an advisory body made up of 26 experts drawn largely from outside the government, to draft a vision and national development plan. The NDP was launched in 2012 and is a detailed blueprint for how the country can eliminate poverty and reduce inequality by the year 2030. One of the strategic objectives of the NDP is the reversal of the spatial effects of apartheid. In the NDP, spatial justice means ‘*the historic policy of confining particular groups to limited space, as in ghettoization and segregation, and the unfair allocation of public resources between areas, must be reversed to ensure that the needs of the poor are addressed first rather than last’*.30

The NDP acknowledges that apartheid left a terrible spatial legacy, and that while some progress has been made towards providing homes and services, limited progress has been made in reversing entrenched spatial inequalities. The NDP proposes a national focus on spatial transformation across all geographical scales. It envisions policies, plans, and instruments to reduce travel distances and costs for poor households and proposes that by 2030 a larger portion of the

30 National Development Plan 2030, pg 277.

population should live closer to places of work. It envisions that transport must be safe, reliable, and energy efficient that requires:

* *Strong measures to prevent further development of housing in marginal places*
* *Increased urban densities to support public transport and reduce sprawl*
* *More reliable and affordable public transport and better coordination between various modes of transport*
* *Incentives and programmes to shift jobs and investments towards the dense townships on the urban edge*
* *Focused partnerships with the private sector 3 to bridge the housing gap market.*

The NDP also focusses on the challenges presented by the rural areas in South Africa that tend to be economically marginalised, and the legacy of the former “homelands” continue to impact on access to transport and economic opportunities. The NDP therefore propose the creation of vibrant urban settlements and the revival of the rural areas, that will include:

* *Establishing new norms and a national spatial framework.*
* *Integrating diffuse funding flows into a single fund for spatial restructuring.*
* *Reviewing the housing grant and subsidy regime to ensure that the instruments used are aligned with positive changes in human settlement policy.*
* *Reforming the planning system to resolve fragmented responsibility for planning in national government, poorly coordinated intergovernmental planning, disconnects across municipal boundaries and the limitations of integrated development plans.*
* *Strengthening government’s planning capabilities.*
* *Developing neighbourhood spatial compacts to bring civil society, business and the state together to solve problems.*
* *Enabling citizens to participate in spatial visioning and planning processes.*

While the NDP provides the blueprint for eradicating inequality in housing, the implementation of this strategy is largely dependent on effective legislation and policies.

*Spatial Planning and Land Use Management Act (SPLUMA)*

SPLUMA came into effect in 2015, placing the objective of achieving spatial justice firmly as a principle for all future development decisions. The object of SPLUMA is to correct spatial development planning and land use laws and practices that were “based on racial inequality; segregation; and unsustainable settlement patterns.” National planning for the purposes of SPLUMA consists of the compilation, approval and review of spatial development plans and policies or similar instruments including a national, provincial and municipal spatial development framework. It requires spatial development frameworks to address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation.31

SPLUMA has three components namely (1) redressing past spatial imbalances and exclusions; (2) including people and areas previously excluded, and (3) upgrading informal areas and settlements. SPLUMA creates both a framework for making decisions based on principles and standards and a roadmap to decision-making that establishes a series of rules and actions to be followed by officials. Section 7(a) of SPLUMA contains certain principles of spatial justice, being:

*“(i) past spatial and other development imbalances must be redressed through improved access to and use of land;*

1. *spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;*

31 Spatial Planning And Land Use Management Act, Section 7.

1. *spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons;*
2. *land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas;*
3. *land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas; and*
4. *a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application”*

When a municipality considers and decides on a land use application, it must also have regard to the applicable spatial development frameworks.

*City of Johannesburg - Inclusionary Housing Policy: Incentives, Regulations and Mechanisms*

To give effect to the provisions of SPLUMA, some municipal areas are also adopting their own policies to ensure spatial justice and inclusionary housing. In 2019, the City of Johannesburg adopt a first-of-its-kind inclusionary housing policy that compels private developers to make 30% of the homes in all future residential developments affordable, regardless of where they are built. It prescribes to private developers that at least 30% of their housing developments should be for low income and low-middle income households, or to households who otherwise would not afford to live in those developments. Proper implementation of this policy is key, and time will tell whether it will achieve a more just residential pattern.

The City of Johannesburg’s “Corridors of Freedom” project also seeks to connect disparate parts of the city through efficient public transport and develop mixed- use developments where residential areas, office parks, shops, schools and other public services are close together, stimulating economic activity and creating opportunities for emerging entrepreneurs.32

*Draft Expropriation Bill, 2020*

The Draft Expropriation Bill has been published which provides for certain instances where property may be expropriated for nil compensation. This includes instances where property is held for the main purpose of appreciation; where an organ of state holds land that it is not using for its core functions; where an owner has abandoned land; and where the market value of land is equivalent to or less than direct state investment into the land. If passed and effectively implemented, the Bill may be a mechanism for the expropriation of land in the public interest, which includes the development of housing to reduce spatial inequality.

1. Have your State, regional or local Government adopted any positive measures, such as measures of affirmative action, to reduce discrimination, segregation or structural inequality in relation to housing? To what extent have such initiatives been successful to address housing discrimination and segregation?

Most municipalities have policies which include a rates rebate for property owners who are senior citizens, disability grantees and medically boarded persons.

1. Have any particular laws, policies or measures been implemented to limit or reduce residential segregation? To what extent have such policies raised human rights concerns?

See answer to question 21 above.

32[https://www.joburg.org.za/departments\_/Pages/City%20directorates%20including%20departm](https://www.joburg.org.za/departments_/Pages/City%20directorates%20including%20departmental%20sub-directorates/development%20planning/Corridors%20folder/The-Corridors-of-Freedom-Key-Features-Are.aspx)

[ental%20sub-directorates/development%20planning/Corridors%20folder/The-Corridors-of-](https://www.joburg.org.za/departments_/Pages/City%20directorates%20including%20departmental%20sub-directorates/development%20planning/Corridors%20folder/The-Corridors-of-Freedom-Key-Features-Are.aspx) [Freedom-Key-Features-Are.aspx](https://www.joburg.org.za/departments_/Pages/City%20directorates%20including%20departmental%20sub-directorates/development%20planning/Corridors%20folder/The-Corridors-of-Freedom-Key-Features-Are.aspx)

1. What is the role of the media, as well as other non- governmental organizations, of religious and governmental institutions, in fostering a climate that reduces or exacerbates discrimination in relation to housing and segregation?

South African civil society and the media have played a significant role in addressing the challenges of discrimination and segregation in housing in the country. Most legal challenges regarding the right to housing in section 26 of the Constitution were bought by civil society organisations such as the Legal Resources Centre, Socio-Economic Rights Institute, Ndifuna Ukwazi, Abahlali baseMjonmolo, Reclaim the City, and grassroot civil society organisations that work daily to address the inequitable housing situation in the country. The legal challenges have primarily been aimed at challenging inequitable housing policies, legislation, or practices, while others have aimed to address gaps in the housing framework of the country.

As detailed in this submission, the jurisprudence that have been developed by the courts in response to some of these legal challenges is vast and have gone far in creating a framework for housing that is more equitable and responsive to the needs of individuals and vulnerable communities. The reality is however that the implementation of legislation, policies, and projects by government are frequently hampered by corruption, maladministration, and a perceived lack of resources. This remains a challenge to civil society that struggle to ensure the implementation of court orders and government action.

In this context, activist groups such as Abahlali baseMjonmolo and Reclaim the City go far in advocating and protesting for the right to adequate housing and spatial justice. Protest and advocacy efforts are important mechanisms to create awareness about housing issues, and place pressure on government to act and address the problems experienced on ground-level. In this context, communities themselves also have an important role to play as they often organise themselves and participate in protest action around housing and service delivery. There were 219 service delivery protests recorded in 2019 in South Africa and these protests

have become powerful mechanisms for communities to highlight their plights and prompt government to action.

Chapter 9 institutions such as the South African Human Rights Commission has also played an important role in litigation on issues associated with housing, often acting as *amicus curiae* in housing litigation. Similarly, the Office of the Public Protector has been an important mechanism to investigate and report on corruption in the public sector. The reports of the Public Protector often divulge information that points to corruption and mismanagement of housing projects. For example, in March 2021, the acting-Public Protector found that a housing project aimed at alleviating congestion in hostels and in informal settlements in the Limpopo province was tainted with tender fraud and resulted in the building of temporary tin shacks that have major structural and non-structural defects.33 As a result of this report, the parties involved in the tender fraud was arrested and charged.

The media plays a critical role in highlighting issues around housing and spatial inequality. Media coverage around housing rights protests and basic services protests play an important role in highlighting the issues faced by communities at ground level. The work of investigate journalists also play an important role in holding government to account for corruption and mismanagement of housing projects, or decision that seek to perpetuate spatial inequality in the country. Civil society often have a good relationship with the media and are able to work with journalists to ensure that the plight of clients and communities are highlighted in news stories.

1. Which institutional mechanisms exist to report, redress and monitor cases of discrimination or segregation in relation to the right to adequate housing and how effective have they been to address discrimination?

The Rental Housing Act 50 of 1999 was enacted to promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market. It places a duty on government to promote a stable

33 Zuzile M “Temporary housing project to alleviate congestion in hostels has major defects: public protector” *Times Live* (15 March 2021) https[://www.ti](http://www.timeslive.co.za/news/south-)mes[live.co.za/news/south-](http://www.timeslive.co.za/news/south-) africa/2021-03-15-temporary-housing-project-to-alleviate-congestion-in-hostels-has-major- defects-public-protector/

and growing market that meets the demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons. It further provides that a landlord may not unfairly discriminate against tenants, members of their household or visitors. Complaints may be lodged with the Rental Housing Tribunal which will attempt to resolve the dispute. A ruling of the Tribunal is deemed to be an order of the Magistrate’s Court.

The Community Schemes Ombud Service is the regulatory authority for all community schemes in South Africa. It regulates the conduct of people in community schemes and provides access to dispute resolution services.

1. In your view, what are the principal barriers to seek justice for discrimination/segregation in relation to the right to adequate housing?

One barrier to seeking justice to discrimination in the allocation of RDP housing is that the allocation process is linked to political authority, generally the local ward counsellor. There have been instances where councillors have been accused of denying people access to housing on the basis of their political party affiliations. Another barrier is gender representation within leadership structures which negatively impacts on tenure security for women, particularly in areas administered by traditional leadership.

1. Can you specify how individuals and groups subject to structural discrimination or experiencing segregation can submit complaints to administrative, non-judicial or judicial bodies to seek relief? Please share any leading cases that have been decided by your courts or other agencies in this respect.

There are a number of avenues that can be used by individuals and groups to challenge the structural discrimination that they have experienced in relation to housing. The South African Constitution in section 38 has a flexible approach to standing and allow individuals or groups to act not only in their own interest, but also in the public interest and in the interest of groups or individuals that are similarly situated. This approach has allowed for the development of a vast and rich jurisprudence on housing rights in the country. It is not possible to discuss all

the leading cases in this submission, so we will discuss some of the cases and provide a list of others that have established important principles in relation to housing. Some of the cases have already been addressed in this submission and will not be repeated here.

The seminal judgment on the right to adequate housing in South Africa is the Constitutional Court’s judgment in *Government of the Republic of South Africa and others v Grootboom and others*.34 The LRC represented the South African Human Rights Commission in this case as *amicus curiae*. The case dealt with the provisioning of emergency housing to residents of Wallacedene, an informal settlement on the eastern outskirts of Cape Town. It was established during the 1980s and is mainly occupied by people of colour. The applicants, including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living.

They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The order was granted pursuant to section 28(1)(c) of the Constitution, which guarantees the right of children to, among other things, shelter.

On appeal by all three spheres of government (national, provincial and local) to the Constitutional Court, the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) intervened as amici curiae in the case. Although the parties to the case focused their arguments on section 28(1)(c) (the right of every child to shelter), the amici broadened the issues to include a consideration of section 26 of the Constitution, which provides for the right of access to housing. They essentially argued that all members of

34 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

the community, including adults without children. The Constitutional Court established principles that have guided subsequent housing cases in the country:

* 1. Housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: "there must be land, there must be services, there must be a dwelling.35
  2. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society.”36
  3. The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources.
  4. Thus, in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), "the question will be whether the legislative and other measures taken by the state are reasonable." The Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent".37 The housing programme must include measures that are reasonable both in their conception and in implementation.
  5. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to

35 Para 33.

36 Para 35.

37 Para 41.

"create the conditions for access to adequate housing for people at all economic levels of our society."38

* 1. The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources.
  2. Thus, in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), "the question will be whether the legislative and other measures taken by the state are reasonable." The Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent".39 The housing programme must include measures that are reasonable both in their conception and in implementation.

The principle of reasonableness that was established in this case has become an important guiding principle in housing litigation in South Africa. It sought to address the housing rights of people who had historically been marginalised by the apartheid regime.

The right to adequate housing was further developed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd.* 40 This also an important case regarding the duties of municipalities to provide alternative accommodation in cases where people are evicted by private land-owners. The occupiers of 7 Saratoga Avenue are a community of 86 desperately poor people living in disused industrial property in Berea, Johannesburg. In 2006, they were sued for eviction by the owner of the property. They opposed the application, stating that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation pending ultimate access to

38 Para 35.

39 Para 41.

40 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December

2011)

formal housing as part of the national housing programme. They joined the City of Johannesburg ('the City') to the proceedings and sought an order compelling it to do so.

The Constitutional Court held that a court cannot grant an eviction order pursuant to the PIE Act unless it is just and equitable to do so. In deciding whether an eviction is just and equitable, the Court considered that many of the occupiers had lived on the property for a very long time, the occupation had once been lawful, Blue Moonlight was aware of the occupiers’ presence when it purchased the property, and the eviction of the occupiers would render them homeless while there was no competing risk of homelessness on the part of Blue Moonlight (as there might be in circumstances where eviction is sought to enable a family to move into a home).

The Court found that eviction would not be just or equitable until the city could provide the occupiers with alternate housing. In other words, the Court found that, in circumstances where an eviction of occupiers from private property would render the occupiers homeless, the rights of the property owners may have to temporarily yield to the occupiers’ right to housing. The Court then ordered the city to provide the occupiers with adequate alternate housing. In so doing, the Court rejected the city’s contention that the city did not have adequate financial resources with which to provide alternate housing.

Linked to the principle of alternative accommodation is the challenge to discriminatory rules that may exist in the accommodation that is provided. In *Dladla and Another v City of Johannesburg,*41 the Constitutional Court dealt with discriminatory rules regulating temporary accommodation. The applicants in the case were evicted from a building in the Johannesburg inner city. However, the eviction was subject to the condition that the City of Johannesburg provide them with temporary alternative accommodation in a location as near as feasibly possible to the building in which they lived. The City entered into a contract with a service provider which provided temporary accommodation at the Ekuthuleni Shelter.

41 *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC)

The rules of the shelter required residents to live in separate dormitories based on sex. This prevented heterosexual couples from staying together and separated children over the age of 16 from their caregivers of the opposite sex. Residents were also prohibited from being inside the shelter between 8am and 5.30pm every day and had to return to the shelter by 8pm or they were locked outside. The Constitutional Court found that the rules of the shelter deprived the residents of their fundamental rights to dignity, freedom and security of the person and privacy. The right to dignity includes the right to family life and therefore the family separation rule disrupted the family unit. It also found that the lockout rule was demeaning as it reduced the resident’s control over their own lives. Although a temporary measure, the alternative accommodation remained a measure to achieve the progressive realisation of the right to adequate housing in terms of Section 26 of the Constitution.

In 2020, the Western Cape High Court granted an important order regarding spatial justice and inclusionary housing in South Africa. In *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others*42 the court set the sale of what became known as the “Tafelberg site”. The property is located in the Cape Town suburb of Sea Point on the Atlantic Sea Board and is just 3.5km outside of Cape Town CBD. In March 2017, under then premier Helen Zille, the City-owned site was sold to the Phyllis Jowell Jewish Day School for R135-million. At the time, the province wanted to use the revenue to buy a building for the Western Cape Education Department, but activists instead wanted the 1.7ha site to be used for social housing.

Housing activists, Reclaim the City and Ndifuna Ukwazi, then launched a court application to halt the sale of the property, arguing that the site must be used to build affordable social housing to address spatial apartheid in the City. They represented people who either lived in the CBD in very poor conditions or had to travel long distances to the CBD for their work. In addition, their children had to travel long distances to school in the mornings to access education in the CBD.

42 *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020)

In the last 25 years, neither the Western Cape Government nor the City of Cape Town had provided any social and affordable housing in the CBD, which exasperated the spatial apartheid experienced by residents living on the outskirts of the city that have to travel to the CBD for work.

In addition to setting the sale of the site aside, the court issued a declaratory order that the Western Cape government and the City of Cape Town failed constitutionally to provide access to affordable housing to people who qualified. The court ruled that both the City and the province must draw up a combined policy to address this and report back to the court by 31 May 2021 with an update on this plan. This is an important step towards addressing the history of spatial apartheid in Cape Town and eradicating residential segregation.

*List of important litigation in relation to housing rights*

* [Auto Cinema Investments v Occupiers of Stanhope Compound ('Stanhope](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/49-auto-cinema-investments-v-occupiers-of-stanhope-compound) [Compound')](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/49-auto-cinema-investments-v-occupiers-of-stanhope-compound) *eviction - Stanhope mining compound - Johannesburg - access to justice*
* [*Changing Tides (Pty) Ltd v Unlawful Occupiers of Chung Hua Mansions*](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua)[*and Others* ('Changing Tides')](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/66-occupiers-of-chung-hua-mansions-v-hoosein-mahomed-and-others-chung-hua) *unlawful eviction - inner city of Johannesburg - Johannesburg High Court*
* [*City of Johannesburg v Changing Tides Properties and the Unlawful*](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/117-city-of-johannesburg-v-changing-tides-properties-and-the-unlaawful-occupiers-of-tikwelo-house-tikwelo-house)[*Occupiers of Tikwelo House* ('Tikwelo House')](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/117-city-of-johannesburg-v-changing-tides-properties-and-the-unlaawful-occupiers-of-tikwelo-house-tikwelo-house) *amicus curiae - appeal against order to provide alternative accommodation - City of Johannesburg - Supreme Court of Appeal (SCA)*
* [*Dladla and the Further Residents of Ekuthuleni Shelter v City of*](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/124-residents-of-ekuthuleni-shelter-v-city-of-johannesburg-and-another)[*Johannesburg and MES (*'Dladla')](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/124-residents-of-ekuthuleni-shelter-v-city-of-johannesburg-and-another) *rights to dignity, privacy and adequate housing - shelter accommodation - inner city Johannesburg*
* [*Goge v Metropolitan Evangelical Services (MES) and Another*](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/833-metropolitan-evangelical-services-v-hloniphokwake-goge-goge)[('Goge')](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/833-metropolitan-evangelical-services-v-hloniphokwake-goge-goge) *spoliation order - occupation of shelter - eviction - right to reoccupy after period of absence - Johannesburg High Court*
* [*Hawerd Nleya and Others v Ingelosi House (Pty) Ltd* ('Ingelosi](https://www.seri-sa.org/index.php/litigation/cases?id=443%3Ahawerd-nyele-and-others-v-ingelosi-house-pty-ltd-ingelosi-house) [House')](https://www.seri-sa.org/index.php/litigation/cases?id=443%3Ahawerd-nyele-and-others-v-ingelosi-house-pty-ltd-ingelosi-house) *application for leave to appeal - just and equitable eviction - Gauteng Local Division of the High Court - Supreme Court of Appeal*
* [*Hlophe and Others v City of Johannesburg and Others* ('Hlophe')](https://www.seri-sa.org/index.php/litigation/cases?id=196%3Ahlophe-and-others-v-city-of-johannesburg-and-others-hlophe) *Chung Hua - enforcement application – contempt*
* [*Mthimkulu and Others v City of Johannesburg and Others*](https://www.seri-sa.org/index.php/litigation/cases?id=306%3Amthimkulu-and-others-v-city-of-johannesburg-and-others-mthimkulu)[('Mthimkulu')](https://www.seri-sa.org/index.php/litigation/cases?id=306%3Amthimkulu-and-others-v-city-of-johannesburg-and-others-mthimkulu) *emergency housing - City of Johannesburg - South Gauteng High Court*
* [*Occupiers of 10-18 Salisbury Street, Johannesburg v City of*](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/90-occupiers-of-10-18-salisbury-street-johannesburg-v-city-of-johannesburg-and-johannesburg-metropolitan-police-department-)[*Johannesburg and Johannesburg Metropolitan Police Department*](https://www.seri-sa.org/index.php/litigation/cases/12-litigation/cases/90-occupiers-of-10-18-salisbury-street-johannesburg-v-city-of-johannesburg-and-johannesburg-metropolitan-police-department-) *illegal eviction - Johannesburg CBD - Johannesburg Metropolitan Police Department (JMPD) - fire brigade*
* *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)
* [*Residents of Industry House and Others v Minister of Police and Others*](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/790-residents-of-industry-house-and-others-v-minister-of-police-and-others-raids-case)[('Raids case')](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/790-residents-of-industry-house-and-others-v-minister-of-police-and-others-raids-case) *police raids - constitutionality of section 13(7) of the SAPS Act - search without a warrant - South Gauteng High Court*
* *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (*CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (10 June 2009)
* [*Schubart Park Residents Association and Others v City of Tshwane*](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/116-schubart-park-residents-association-and-others-v-city-of-tshwane-metropolitan-municipality-and-others-schubart-park)[*Metropolitan Municipality and Others* ('Schubart Park')](https://www.seri-sa.org/index.php/litigation/cases/19-litigation/case-entries/116-schubart-park-residents-association-and-others-v-city-of-tshwane-metropolitan-municipality-and-others-schubart-park) *amicus curiae - Schubart Park – difference between 'evacuation' and 'eviction' of occupiers - Constitutional Court*

# DATA ON DISCRIMINATION IN HOUSING AND SPATIAL/RESIDENTIAL SEGREGATION

1. Is any data on housing disparities, housing discrimination and spatial segregation collected and publicly available? If so where can it be accessed? Are there any practical or legal barriers to collect and share such information in your country?

The Department of Statistics conducts annual surveys and analyses such as the General Household Survey that are used as an instrument to measure the progress of development as well as the challenges and disparities in the level of development within the country and its individual communities. Data that measures segregation is found in the Census as well as Theil’s Entropy Index that is used to calculate the degree of inequality using population data. There are no barriers relating to the collection and distribution of this data because Statistics SA is a public body/government department and thus makes these records available to the public in accordance with section 15 of the Promotion of Access to Information Act 2 of 2000. The Promotion of Access to Information Act also allows anybody to request information held by a public body. This information must then be made available unless it can be shown that the information falls under one of the grounds of refusal in Chapter 4 of the Act. These grounds of refusal should not pose a barrier to accessing information about housing and segregation as the majority of the information held by the departments concerned with housing and spatial planning is not

1. Can you kindly share any studies or surveys by local, regional or national Governments or by other institutions to understand better housing disparities, housing discrimination and spatial segregation and how it can be addressed (e.g. title and link, or kindly submit document).

* Housing from a human settlement perspective, in-depth analysis of the General Household Survey Data 2002-2014 ([http://www.statssa.gov.za/publications/Report-03-18-06/Report-03-18-](http://www.statssa.gov.za/publications/Report-03-18-06/Report-03-18-062014.pdf) [062014.pdf](http://www.statssa.gov.za/publications/Report-03-18-06/Report-03-18-062014.pdf))
* Stats SA General Household Survey 2019 (<http://www.statssa.gov.za/publications/P0318/P03182019.pdf>)
* Employment and housing discrimination against LGBT refugees and asylum seekers in SA ([http://www.passop.co.za/wp-](http://www.passop.co.za/wp-content/uploads/2012/02/2013-Leitner-South-Africa-PASSOP-LGBT-report-1.pdf) [content/uploads/2012/02/2013-Leitner-South-Africa-PASSOP-LGBT-](http://www.passop.co.za/wp-content/uploads/2012/02/2013-Leitner-South-Africa-PASSOP-LGBT-report-1.pdf) [report-1.pdf](http://www.passop.co.za/wp-content/uploads/2012/02/2013-Leitner-South-Africa-PASSOP-LGBT-report-1.pdf))
* South African Human Rights Commission fact sheet on the right to adequate housing ([https://www.sahrc.org.za/home/21/files/Fact%20Sheet%20on%20the%2](https://www.sahrc.org.za/home/21/files/Fact%20Sheet%20on%20the%20right%20to%20adequate%20housing.pdf) [0right%20to%20adequate%20housing.pdf](https://www.sahrc.org.za/home/21/files/Fact%20Sheet%20on%20the%20right%20to%20adequate%20housing.pdf))
* Social Justice Coalition annual report 2017/18 ([https://sjc.org.za/wp-](https://sjc.org.za/wp-content/uploads/2018/09/sjc_annual_report_2017_2018.pdf) [content/uploads/2018/09/sjc\_annual\_report\_2017\_2018.pdf](https://sjc.org.za/wp-content/uploads/2018/09/sjc_annual_report_2017_2018.pdf))
* Ndinda C; Uzodike N; Winaar L “Equality of access to sanitation in South Africa” *Africanus* (2013), 43, 96–114.
* Mutyambizi C; Mokhele T, Ndinda C, & Hongoro C “Access to and satisfaction with basic services in informal settlements: Results from a baseline assessment survey” *International Journal of Environmental Research and Public Health* 17 (2020).

1. Can you provide information and statistics related to complaints related to housing discrimination, how they have been investigated and settled, and information on cases in which private or public actors have been compelled successfully to end such discrimination or been fined or sanctioned for non- compliance?

Throughout this submission we have referred to case law relating to housing discrimination and it will not be repeated here. It is difficult to establish with certainty the number of housing cases that are dealt with by South African courts on a yearly basis and there is no clear database that captures the housing litigation in the different courts in the country. There are however some data available around the Rental Housing Tribunal and the number of cases that they deal with on a yearly basis. Every province is supposed to have its own tribunal.

The Rental Housing Act of 1999 (RHA) states that while advertising or negotiating for a lease agreement, or after one has been entered into, “a landlord may not unfairly discriminate against such prospective tenant or tenants, or the members of such tenant’s household or the bona fide visitors of such tenant” on the basis of race, gender, marital status, sexual orientation, ethnic or social origin, or language. While not all of the cases before the tribunals are associated with

discrimination or spatial justice, this is the best data that we have to indicate the effectiveness of this mechanism. There is at present no comprehensible indication from a national point of view of the number of cases finalised by the tribunal. However, the Western Cape province is the only province which provides intelligibly recorded figures according to the Annual Report 2019/2020, with:

* 775 Complaints received.
* 381 Adjudicated/finalised cases: and
* 394 Outstanding cases.

By 2020 there was however a significant backlog in cases in the Western Cape. For example, between 1 October 2020 and 31 December 2020, the Western Cape Rental Housing Tribunal (WCRHT) reported to the provincial legislature that it made significant progress in addressing its backlog, by reducing its cases from 1 635 to 1 167. This is a reduction of 468 cases. Further to this, 614 complaints were entered, 1 513 cases were closed, while 1 529 remain open. This illustrates that while the mechanism exists to address disputes in relation to housing, it may take time to ensure that it is adjudicated.