

CENTRE ON
HOUSING RIGHTS
AND EVICTIONS



**Comment on General Notice 1851 of 2006: Prevention of
Illegal Eviction from and Unlawful Occupation of Land
Amendment Bill, 2006 as published in the Government
Gazette No 29501 dated 22 December 2006**

by

The Centre on Housing Rights and Evictions (COHRE)

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BACKGROUND

The Centre on Housing Rights and Evictions (COHRE) is a Geneva-based, international non-governmental human rights organisation founded in 1994 as a foundation in the Netherlands (Stichting COHRE). COHRE maintains offices in a number of countries around the world, including South Africa. COHRE's various offices coordinate global, regional and local activities in pursuit of its mission, which is to promote housing rights for everyone, everywhere.

COHRE has been granted Special Consultative Status by the United Nations Economic and Social Council (ECOSOC, since 1999), and the Organisation of American States (OAS, since 2002). COHRE also has participatory status to the Council of Europe (CoE, since 2003) and Observer Status with the African Commission on Human and Peoples' Rights (ACHRP, since 2003).

Working closely with local partners in South Africa, COHRE has carefully studied the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 as published in General Notice 1851 of 2006 contained in Government Gazette No 29501 dated 22 December 2006.

We have a number of concerns we urgently wish to bring your attention:

SUBMISSION

1. Municipalities are under an obligation under the Housing Code in Chapter 12: Housing Assistance in Emergency Housing Circumstances to take a proactive approach to dealing with people in desperate need whose immediate housing needs cannot be met by then existing low income housing development schemes. Chapter 12 pertains to people who find themselves "in an emergency housing situation such as the fact that their shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction."
2. Municipalities are under a further obligation under the Housing Code in Chapter 13: Upgrading of Informal Settlements to take proactive measures to secure the in situ upgrading of informal settlements where feasible.

3. Section 9 of the Housing Act and Paragraph 12.4.1 of Chapter 12 of the Housing Code requires municipalities to investigate and assess the need for emergency housing within their areas of jurisdiction and to plan proactively therefor. If the circumstances do merit the submission of such a plan for approval to the Provincial housing department, the municipality must submit one.
4. The enumerated categories of different Emergency Housing Situations catered for in Chapter 12 of the Housing Code are listed under Section 12.3.5.1.
5. The guiding principle of Chapter 13 of the Housing Code is the minimization of disruption and preservation of community within informal settlements. Thus, it discourages the displacement of households and acknowledges that only in certain limited circumstances may it be necessary to permanently relocate households that are living in hazardous circumstances or in the way of essential engineering or municipal infrastructure. Legal processes for eviction should only be initiated as a last resort.
6. Under either Chapter 12 or 13 of the Housing Code, rather than eviction, a municipality must purchase the land on which an informal settlement is situated and upgrade the settlement *in situ*, alternatively, provide alternative accommodation for the inhabitants.
7. In his judgement in *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W) the judge summed up the housing policy as follows:

"The Housing Act imposes specific obligations on local government in this regard. Section 9 requires every municipality to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to: ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis; set housing delivery goals in respect of its area of jurisdiction; identify and designate land for housing development⁴ ensure that conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed; create and maintain a public environment conducive to housing development which is financially and socially viable; promote the resolution of conflicts arising in the housing development process; and initiate, plan, coordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction.

In terms of section 2 of the Housing Act, municipalities must perform the above functions in a manner which: gives priority to the needs of the poor in respect of housing development, involves meaningful consultation with individuals and communities affected by housing development; ensures that housing development is economically,

fiscally, socially and financially affordable and sustainable; and ensures that housing development is administered in a transparent, accountable and equitable manner and upholds the practice of good governance.

THE EMERGENCY HOUSING PROGRAMME

The National Housing Code's "Programme for Housing Assistance in Emergency Housing Circumstances," was adopted in terms of the Housing Act, ("the Emergency Housing Programme") and was a direct response to Grootboom's ruling that the State's positive obligations in terms of section 26 of the Constitution include an obligation to provide temporary relief for persons in crisis or in a desperate situation -

"The Grootboom judgment furthermore suggested that a reasonable part of the national budget be devoted to providing relief for those in desperate need....Consequently, this Programme is instituted in terms of section 3(4)(g) of the Housing Act, 9997, and will be referred to as the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. Essentially, the objective is to provide temporary relief to people in urban and rural areas who find themselves in emergencies as defined and described in this Chapter."

Clause 12.3.1 of the Emergency Housing Programme defines an emergency as, inter alia, a situation where -

"the affected persons"...owing to circumstances beyond their control ... are evicted or threatened with imminent eviction from land or unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences or whose homes are demolished or threatened with imminent demolition, or situations where pro-active steps ought to be taken to forestall such consequences."

The Programme makes funding available from the Provincial Departments of Housing for emergency housing assistance.

The Programme requires municipalities to investigate and assess the emergency housing need in their areas of jurisdiction and to "plan proactively" therefor. Where an emergency housing need is foreseen municipalities must apply to the relevant Provincial Department of Housing for funding for the necessary assistance. After approval by the MEC of the relevant Provincial Department of Housing, the funding is made available to the municipality for direct implementation of the assistance. In terms of the Programme the Provincial Department of Housing may provide support to ensure the successful implementation of the assistance.

While the Programme is flexible in order to cater for diverse situations, it does lay down certain minimum standards. It requires that water and sanitation be provided and that the floor area of a temporary shelter be at least 24 metres squared. Notably an amount of R23 892.00, including VAT, may be made available to municipalities, per grant."

8. Chapters 12 and 13 of the Housing Code in the main covers persons falling within a socio-economic group previously disadvantaged by racial discrimination (and suffering from ongoing socio-economic disadvantage), certain categories of which would now be excluded from the protection of PIE, as proposed by the PIE Bill. The following are categories of such persons (there are no doubt others) who would now be excluded from the protection of PIE:
 - 8.1 inner-city tenants who had to run the gauntlet of the Group Areas Act, and whose tenancy has subsequently been terminated following withdrawal of rental payments because of the failure of landlords to maintain the premises;
 - 8.2 persons (black) who had their site and residential permits upgraded to ownership, then took out bonds and then found themselves retrenched (and, as a result unable to make the necessary payment in relation to their bonds). Such persons would probably have been the victims of inferior education as a result of the operation of the Bantu Education Act, No 47 of 1953 and thus at a disadvantage in a competitive economic environment;
 - 8.3 informal settlements which previously had legal status as emergency camps under the Prevention of Illegal Squatting Act (PISA) and still remain vulnerable to eviction. The legal history of one such informal settlement, Thembelihle (which is situated in Lenasia, Johannesburg), is instructive, as other vulnerable communities currently enjoying the protection of PIE have a similar status. The legal history is set out below:
 - 8.3.1 In terms of Administrator's Notice 575 dated 28 November 1990 regulations for the control and administration of Thembelihle by the administrator of the Transvaal were published in the Government Gazette in terms of Section 6(6) of the Prevention of Illegal Squatting Act number 52 of 1951;
 - 8.3.2 In terms of Administrators Notice 633 dated 27 November 1991, Thembelihle was declared to be a transit area in terms of Section 6(3) of the Prevention of Illegal Squatting Act;

- 8.3.3 In terms of Administrators Notice 311 dated 6 July 1993, Thembelihle was declared to be a defined area outside a local authority as contemplated in Section 2(11) of the Black Local Authorities Act 1982;
- 8.3.4 In terms of Section 2(11) of the Black Local Authorities Act:
- "An Administrator may by notice in the official Gazette define for the purpose of this sub-section an area outside a local authority area and exercise in such area the powers conferred upon the City Council in a local authority area under this act."*
- 8.3.5 On 3 December 1994 the Premier of Gauteng published Proclamation number 24 (Premiers) 1994 in an Extraordinary Provincial Gazette. This proclamation was made in terms of the powers granted to him in Section 10 of the Local Government Transition Act. The proclamation dealt with, *inter alia*, the dissolution of certain local government bodies and their replacement with new transitional local authorities. Section 2(2) of the proclamation read as follows:
- "Administrators Notice no 310 of 6 July 1993, number 546 of 6 December 1993, number 633 of 27 November 1991 read with number 311 of 6 July 1993, no 32 of 3 February 1993 and number 272 of 24 June 1992, are as from the effective date repealed under section 13 (6)(a) of the Local Government Transition Act, 1993, insofar as they apply to the area of the townships known as Doornkop/West of Soweto, Finetown/Thembelihle (Lenasia Transit Area), Alexandra Far East Bank and Diepsloot/Nietgedacht, respectively";*
- 8.3.6 In terms of Section 9 of Proclamation 24 of 1994 the assets, liabilities, rights and obligations of the Administrator in respect of Thembelihle were transferred to the Greater Johannesburg Transitional Metropolitan Council. In terms of the aforesaid Section 9 as amended by Premier's Proclamation 42 of 1995 the assets, liabilities, rights and obligations of the Greater Johannesburg Transitional Metropolitan Council in respect of Thembelihle were transferred to the Southern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council. In terms of Notice 6766 of 2000 published in the Provincial Gazette Extraordinary on 1 October 2000 the City of Johannesburg became the successor in law in respect of all the resources, assets, liabilities, right, obligations, titles and the administrative and other records of the Southern Metropolitan Substructure of the Greater Johannesburg Transitional Metropolitan Council.

9. The Thembelihle community was under intense pressure for a number of years to relocate to Vlakfontein. In 2003, the City brought an application in the High Court for an order of eviction from Thembelihle and relocation to Vlakfontein. The case was defended. The City of Johannesburg has never set the application down for hearing. Although this case is still pending the City now seeks to relocate at least part of the community to Lehae, a new township some three kilometres away on the outskirts of Lenasia. (Thembelihle is situated in the heart of Lenasia, a prosperous urban area, and the community has immediate and easy access to jobs, schools, clinics and other facilities within Lenasia). The Thembelihle community contends for an *in situ* upgrading in terms of Chapter 13 of the Housing Code. A feasibility study in this regard is awaited from the City of Johannesburg. If the amendments to PIE are made the community will be precluded from raising any non-compliance by the authorities with Chapter 13 as the basis for an argument that eviction and relocation would be unjust and inequitable, if fresh legal action was to be instituted for their eviction. Indeed if the City of Johannesburg was to proceed with the pending application for eviction and relocation to Vlakfontein the community may be precluded from relying on PIE in its defence.
10. It is an anomaly that these categories of persons, to whom either or both Chapters 12 and 13 of the Housing Code apply, should now be removed from the protection of PIE and thus rendered more vulnerable to eviction and the exacerbation of their need before the benefits of Chapters 12 and 13 can be applied to them. This is in direct contravention of the tendency of the courts to maximise the protection from forced eviction of the socio-economically disadvantaged, as demonstrated by the following judgments:
- Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)
 - President of RSA and Another v Modderklip Boerdery (Pty) Ltd (2005) (5) SA 3 (CC)
 - City of Cape Town v Rudolph 2004 (5) SA 39 (C)
 - City of Johannesburg v Rand Properties (Pty) Ltd and Others 2006 (6) BCLR 728 (W)
 - Property Lodging Investments (Pty) Ltd v The Unlawful Occupiers of Erf 705, Halfway Gardens Ext 80 and others: TPD case no: 6292/ 2006 (unreported)

In the final two cases, the courts expressly linked eviction to compliance by the municipality with its obligations under the Housing Code.

11. In *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 (6) BCLR 728 (W) the judge put it as follows at paragraph 65 of his judgement:

"The facts of the present matter reflect the plight of thousands of people living in the inner city, in deplorable and inhuman conditions. Our Constitution obliges the State to act positively to ameliorate these conditions. These obligations have been, and continue to be designed at a macro level. We now require a coherent plan and the implementation of this plan at the micro level. The obligation is to provide access to adequate housing to those unable to support themselves and their dependants."

12. In consequence thereof the judge included the following paragraphs in his order:

"(3)The Applicant is directed to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.

(4) Pending the implementation of the programme referred to in paragraph 3 above, alternatively until such time as suitable adequate accommodation is provided to the Respondents, the Applicant is interdicted from evicting or seeking to evict the current Respondents from the properties in this application."

13. Implicit in such an order is recognition by the court that the existence or implementation of a plan for the housing of specific occupants is a relevant factor in determining whether an eviction would be just and equitable in terms of PIE. In short, the courts have been careful to ensure that before evictions taking place the intended benefits to prospective evictees of Chapters 12 and 13 of the Housing Code become available to them. The courts have been careful to ensure that evictions do not exacerbate the conditions that Chapters 12 and 13 are designed to ameliorate.
14. The occupiers in this case includes persons who have never had the consent of the owner or person in charge of land to reside on the premises concerned and thus would continue to have the protection of PIE. Others are former tenants and would, if the amendment is adopted, fall outside of the protection of PIE. Both categories are from the same desperately needy socio-economic group.
15. Sachs J in the Port Elizabeth Municipality places the State's obligations under Section 26(3) of the Constitution in the following historical framework:

"PISA, accordingly, gave the universal social phenomenon of urbanisation and intensely racialised South African character. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was both a consequence of and a threat to the policy of racial segregation. PISA was to prevent and control what was referred to as squatting on public or private land by criminalising it and providing for a simplified eviction process. The powers to enforce politically motivated, legislatively sanctioned and State sponsored eviction and forced removals became a corner stone of apartheid land law. This marked a major shift, both quantitatively and qualitatively (politically). Evictions could be sought by local government and achieved by use of criminal rather than civil law. It was against this background and to deal with these injustices, that section 26(3) of the Constitution was adopted and new statutory arrangements made.....that a third aspect of section 26(3) is the emphasis it places on the need to seek concrete and case specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do namely, take all relevant factors into account would appear otiose (superfluous) even odd. Its use in section 26(3) however serves a clear constitutional purpose. It is there precisely to underline how non prescriptive the provision is intended to be. The way in which the courts are to manage the process has, accordingly, been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission."

16. The obligation of the State and its organs to make provision for the housing of those disadvantaged persons whom PIE is intended to protect is set out in and flows from Section 26(2) read with Section 7(2) of the Bill of Rights. This obligation must be carried out in a context in which land holdings in South Africa are skewed as a result of past racial discrimination. The role of the courts in playing a key mediating role between the rights of current land-owners and the needs of disadvantaged communities and persons flows from Section 26(3) of the Bill of Rights. The intended amendments limit the creative role afforded by the courts and processes of mediation in resolving the tension between those who currently own land and the homeless, and will thus hinder and obstruct the implementation of housing policy as contained in Chapters 12 and 13 of the Housing Code.
17. This exclusion of one category (for example former tenants or mortgagors or occupiers of former emergency camps under the Prevention of Illegal Squatting Act) and inclusion of another (persons who have never had the consent of the owner or person in charge of land to occupy it) in the same disadvantaged group (that is the socio-economic group previously disadvantaged by racial discrimination and suffering from ongoing socio-

economic disadvantage) under the protection of PIE is, we submit, unconstitutional. This is because it offends the provisions of Section 9(1) of the Constitution which enshrines the right of persons to the "equal protection and benefit of the law." It is submitted that any limitation of this principle should be applied against advantaged persons (that is current landowners) in preference to it being applied against disadvantaged persons, where their interests conflict (in this case the conflict between the right to property and the right to have access to adequate housing).

18. To remove the protection of PIE from the categories of persons listed in Section 2(2) of the intended amendment and to increase their vulnerability to eviction prior housing becoming available to them in terms of national housing policy may also be in contravention of the obligation under Section 26(1) of the Bill of Rights of the State to desist from impairing the right of access to adequate housing, as enunciated by Yacoob J at 66G-H in *Government of the RSA v Grootboom and Others* 2001 (1) SA 46.
19. The proposed amendments result in a more limited protection of the right to have access to adequate housing. This is a retrogressive measure in contravention of the dicta of Yacoob J at paragraph 45 of the Grootboom judgement: *"It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses"*.
20. In addition to these fundamental objections are those which may be described as matters of detail. We will not deal with these. However, there is one further amendment which we find disturbing. Currently organs of state can bring eviction proceedings under PIE for land / buildings within their area of jurisdiction. That would now be amended to land which organs of state administer or control. The current formulation more clearly seems to bring eviction proceedings by municipalities under, for example, health, building and fire by-laws within the purview of PIE. Is it the intention of this amendment to enable municipalities to invoke health, building and fire by-laws to evict people outside of the purview of PIE? If not, then what is the purpose of this particular amendment?