

# A CONSIDERATION OF THE SQUATTER ISSUE IN RELATION TO THE NATURAL ENVIRONMENT

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# ABSTRACT

Environmental conservation is the achievement of the highest quality of living for mankind by the rational utilization of the environment. It advocates practices that will perpetuate the resources of the Earth on which man depends or in whose continued existence man takes an interest, and is opposed to the view that resources may always be used in the short run for personal profit or for the immediate benefit of living generations.

In addition to the numerous obstacles to environmental conservation, in South Africa conservation has recently also become threatened by the establishment of squatter settlements throughout the country. This study is an attempt to give a general picture of how the squatter issue has been dealt with in South Africa, both legislatively and judicially; and also to examine the implications of these legislative and judicial decisions for environmental conservation.

Instances of squatting can be attributed to rapid urbanisation, population growth and housing shortages. Unfortunately the quest for shelter forces people to live in squalor and poverty and these living conditions create many negative environmental impacts. The Prevention of Illegal Squatting Act 52 of 1951 is the most comprehensive piece of legislation aimed at controlling squatting. However from the cases arising out of the provisions of this Act it is clear that environmental protection is not an aim of the Act; instead the Act reflects the State's policies of apartheid, influx control and controlled urbanisation. Recently the Less Formal Townships Establishment Act 113 of 1991 was enacted, in order to prevent squatting, by affording people the opportunity to own homes in less formal settlements. While this Act goes a long way in addressing housing needs it does not do so with due consideration for environmental protection. The single case on this

Act also does not concern itself with environmental protection or conservation.

This study concludes that, for the moment at least, environmental conservation is not a priority in South Africa. The focus at present is on securing the right to shelter for all South Africans. However, our Constitutional Bill of Rights recognises the right to shelter as well as the right to a healthy environment and the submission of this study is that both these rights should be given equal status.

I declare that the contents of this thesis are the result of my own original work, except where otherwise acknowledged.

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# CHAPTER 1

## INTRODUCTION

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" All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security " and " slums shall be demolished and new suburbs built where all have transport, roads, lighting, playing fields, crèches and social centres."

Four decades have elapsed since this proclamation in the Freedom Charter and the crisis of homelessness has grown rather than been resolved.

### 1.1. Urbanisation and the Population

One of the most striking social phenomenon of our times has been that of urbanisation. Urbanisation is a universal phenomenon in which vast numbers of people have, for a variety of reasons, moved away from rural areas towards cities and towns. This mass migration of people creates numerous social and economic problems. In South Africa efforts to constrain urbanisation have failed and many cities in the country are currently experiencing rapid urban growth. It has been predicted that urban populations will increase by some 20 million people in the next 25 years<sup>1</sup>. But urbanisation in this country, according to Gawith<sup>2</sup>, has not been met by a corresponding increase in the provision of land and shelter; and this has resulted in massive housing backlogs. Wyngaard<sup>3</sup> quotes a recent article in the Cape Times in which the then Minister of Housing indicated the current need for housing in South Africa to be in the region of 1,4 million housing units. The article goes on to state that more than 330 000 units would have to be provided every year for the next 10 years, if the backlog is to be eradicated.

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<sup>1</sup> Urban Foundation *Policies for a New Urban Future*, 10: 'Homes for the poor' (1990)

<sup>2</sup> Gawith M. 'The need to incorporate environmental and community concerns in the planning and development of informal settlements', *Environmental Implications of Informal Housing* Habitat Council Symposium, (1993)

<sup>3</sup> Wyngaard G. 'The need for housing and its environmental implications', *Environmental Implications of Informal Housing* Habitat Council Symposium, (1993)

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## 1.2. The Squatter Phenomenon

One of the most obvious manifestations of wholesale urbanisation accompanied by housing shortages has been the occupation of undeveloped land in the city, and informal housing is becoming an increasingly common feature of South African cities. It is estimated that some 7 million people currently live in informal settlements throughout South Africa<sup>4</sup>. Some of the most notorious squatter settlements are those in Khayelitsha (old Crossroads), Hout Bay, Nyanga, Noordhoek, Greater Inanda, Ntuzuma, the Midrand ( eg. Snake Park and Ivory Park ), Tokoza, Katlehong, Botshabelo, Mangaung, KwaDabeka and Cato Manor. Gawith<sup>5</sup> notes that until a few years ago "land occupation and informal housing occurred predominantly on the peripheries of our cities within apartheid's spatial framework". She suggests that the seemingly more permissive climate of the 1990's has created opportunities for communities to overcome the social and financial costs of living on the periphery by occupying land closer to urban opportunities. Locational advantages such as proximity to transport, services and jobs appear to be some of the other reasons for the increase in urban informal settlements.

The Urban Foundation estimates that one in six South Africans, more than seven million people, are housed informally.<sup>6</sup> On the other hand the government gives a far lower figure, suggesting that there are two million shanty dwellers living in 864 camps.<sup>7</sup> The wide divergence in these figures probably arises from the lack of clarity regarding definitions and terminology in the context of informal housing in South Africa. Hart<sup>8</sup> describes informal housing as, essentially housing which is established unconventionally. Two broad types of informal housing can be recognised within this definition. The first is spontaneous informal housing and the second is site and service. Site and service schemes offer formal

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<sup>4</sup> op. cit. n1

<sup>5</sup> op. cit. n2

<sup>6</sup> op. cit. n1

<sup>7</sup> Debates of Parliament 1991-04-30 col 1264 and annexures of House M246 of 1991

<sup>8</sup> Hart T. 'Informal housing in South Africa : An overview' *South Africa in Transition: Urban and Rural Perspectives on Squatting and Informal Settlements in the Environmental Context* (1993) UNISA Pretoria

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tenure and involve a consolidation process in which households are upgraded from starter shacks to more formal dwellings. Included in spontaneous informal housing are what Hart refers to as free standing settlements, ie. "discrete clusters of informal housing, produced outside the normal processes of township establishment and constructed using a wide variety of relatively unconventional materials". According to Hart it is these settlements that are probably the stereotypical image of informal settlement and 'squatting' among the broad South African community. However Hart stresses that informal housing is not necessarily synonymous with squatting. Squatting refers to people who are in illegal occupation of land or dwellings, and hence site and service schemes are not squatting, nor are free standing settlements which are, for example, on tribal land in homelands. In South Africa the definition of squatters has been influenced by political considerations that go far beyond the simple protection of property rights. The Prevention of Illegal Squatting Act 52 of 1951 does not define the term squatting; nor does it define who is a squatter; instead application of the Act has depended largely on judicial interpretation. Rabie and Fuggle<sup>9</sup> use the terms informal housing and squatting synonymously, and this approach will be followed for the purposes of this dissertation, simply because, it is submitted, that most instances of informal housing occur illegally.

### **1.3. Informal Housing and the Environment**

The subject of informal housing has evoked a wide spectrum of controversy and emotion. According to Hart numerous institutions, fearful of uncontrolled urban expansion and political mobilisation, have attacked the concept of informal housing. On the other hand, he says, informal housing has been welcomed and mobilised as an integral part of the national housing policy in many developing countries. Social commentators (not specified by Hart) have condemned informal housing as a vehicle for urban and rural poverty, yet others have celebrated it as an expression of the creativity and determination of people who do not enjoy access to formal housing. Hart submits that against this background the environmental debate around informal housing is in its infancy. Internationally attention has

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<sup>9</sup> Fuggle R. and Rabie A. *Environmental Management in South Africa*, (1992) Juta and Co.

only recently become focused on residential 'environments of poverty'<sup>10</sup> and their effects on both the people that live in them and the urban or rural contexts in which they are situated. In South Africa, to date, little has been said in public debate about environmental concerns in the context of the housing crisis.

The establishment of informal settlements affects the environment in numerous ways. O' Regan<sup>11</sup> contends that the exact extent of the effects, on the environment, of the establishment of informal settlements depends largely on the definition of the environment. Definitions of the environment could be limited to just the natural environment, ie. resources such as air, water, soil, plants and animals<sup>12</sup>. On the other hand, the environment could be defined to include the built environment, ie. buildings, roads, bridges and towns; and even the socio-economic and cultural environments. It is submitted that in the narrow definition of the environment, informal settlements pose the threat of water pollution, soil erosion, air pollution, solid waste pollution, deforestation and the extinction of species. When the environment is defined broadly, the erection of unsightly buildings may threaten the aesthetic quality of the environment, or they may not be compatible with the character and land use of the surrounding areas and this may have a negative impact on the socio-economic well-being of a environment renders all decisions about informal housing, environmental decisions. This makes protection of the environment very complex and will involve policy decisions prioritising some interests over others. In the context of informal housing the risk is that the views of powerful interests will be heard and the views of the powerless not heard at all. The Environment Conservation Act<sup>13</sup> comprehensively defines the environment as "the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms". It is submitted that this definition embraces a wide variety of consequences that arise due to

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<sup>10</sup> Hardoy E. and Satterwaithe D. *Squatter Citizen : Life in the Urban Third World* (1989) Earthscan, London

<sup>11</sup> O' Regan C. 'Legal regulation of informal housing and the environment' *South Africa in Transition: Urban and Rural Perspectives on Squatting and Informal Settlements in the Environmental Context* (1993) UNISA Pretoria

<sup>12</sup> op. cit. n9

<sup>13</sup> 73 of 1989 s1(x)

the existence of informal settlements, including those that actually affect the inhabitants of the settlement itself.

In her paper Gawith<sup>14</sup> identifies the relationship between informal communities and the broader bio-physical environment. She contends that the relationship is not 'unidirectional', with informal settlers negatively impacting on and degrading the environment through pollution and exploitation of environmental resources. Instead, she says, interaction with the environment is a two way process in that the quality of the surrounding and immediate environment has very direct impacts on the quality of life of the informal settler community.

Gawith identifies:

1. the impacts of informal settlers on their environment,
- and 2. impacts of the environmental characteristics of a site on a community's quality of life.

Included in the first category is the utilisation of and impact on natural resources. Particular reference is made to the fact that poor people are often dependent on their surrounding natural environment for resources such as energy, water, food and building materials. Such utilisation often leads to the depletion of the resource, pollution and particularly in the use of natural water resources, people become increasingly exposed to water borne diseases. Also in this category of impacts, it is argued that, from the formal residents perspective, the development of an informal settlement will impact visually on the affected area, more so if the settlement is not in keeping with the surrounding land uses. Environmental characteristics such as topography, drainage, soil conditions and micro-climatic considerations, such as wind, impact on the quality of life in informal settlements. These characteristics may, for example, result in pollution, flooding or soil erosion. It is submitted that these impacts contribute in a large measure to the squalor and social decay associated with informal settlements.

Against this background the subject of informal housing and the environment usually gives rise to confrontation between civil and environmental activists. Environmentalists argue that inhabitants of informal settlements pose a serious threat of environmental damage; while the homeless counter with the argument that basic housing rights should take priority over

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<sup>14</sup> op. cit. n 2 at pages 28 & 29

environmental concerns. In South Africa environmental concerns in the land and shelter delivery process have traditionally been secondary to spatial and political requirements. While these criteria may become less important with the dismantling of apartheid there is a danger that the current urgency to meet the land and shelter requirements of the rapidly growing urban population may dominate the planning and decision making process. The Interim Constitution, supporting both sides in the controversy, recognises the sanctity of shelter and the right to choose the place where one wants to stay; it also recognises the environmental right not to be made subject to an environment detrimental to one's health and welfare. Van der Walt<sup>15</sup> submits that society is not, in truth, faced with the choice of the lesser of two evils, posed by the housing crisis and the environmental threat. According to him 'both are aspects of one and the same problem : the rational control and planning of land use in terms of a suitable and responsible land use ethic'. He suggests that the solution to the housing crisis and to the environmental threat can be worked out together by establishing a land use ethic in terms of a new philosophical, theoretical and conceptual framework, which is not based upon the perception of ownership as an absolute and unlimited right, but which recognises that all land rights should be exercised reasonably and with due regard for the rights of all others.

The purpose of this dissertation is to highlight the way in which the South African judiciary has dealt with the issue of informal settlements, particularly those in the urban areas, throughout the apartheid era and now in the post apartheid era; and as a conclusion to identify the environmental impact of this judicial activity.

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<sup>15</sup> Van der Walt A. J. 'Informal Housing and the Environment : Land Rights in Transition' *South Africa in Transition: Urban and Rural Perspectives on Squatting and Informal Settlements in the Environmental Context* (1993) UNISA Pretoria

## CHAPTER 2

# LEGISLATIVE ENACTMENTS DEALING WITH INFORMAL SETTLEMENTS

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During the apartheid era housing law was dominated by a huge body of legislation aimed at the establishment and entrenchment of racial segregation. Some of these laws included the Trespass Act 8 of 1959, the Group Areas Act 36 of 1966, the Black Land Act 27 of 1913, the Development and Housing Act 103 of 1985, the Development Trust and Land Act 18 of 1936, the Housing Development Act 4 of 1987, the Housing Act 2 of 1987, the Development Act 3 of 1987, the Rural Areas Act 9 of 1987, the Community Development Act 3 of 1966 and the Housing Act 4 of 1966.<sup>16</sup> The legislative provisions of these Acts affected the nature and content of both formal and informal housing rights. As part of the reform process that was initiated in 1990 a number of these statutes have now been repealed, but some of the relevant Acts are still in force. There are two main pieces of legislation, presently in existence, that are relevant to informal housing and that govern township development in urban areas, ie. the Prevention of Illegal Squatting Act 52 of 1951 and the Less Formal Townships Establishment Act 113 of 1991.<sup>17</sup> What follows is an in depth examination of the provisions of these Acts as they affect the squatter issue.

### 2.1. The Prevention Of Illegal Squatting Act 52 of 1951

Rapid industrial growth in the war years, together with a rapid increase in the process of urbanisation, without an accompanying increase in the availability of urban housing, led to the emergence of informal settlements inhabited by urban squatters. On the 25th of March 1944, James Mpanza together with a group of followers took possession of a piece of

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<sup>16</sup> These Acts were supported by the Expropriation Act 63 of 1975 and the Health Act 63 of 1977; which both empower local authorities to undertake certain acts such individuals are housed in clean and hygienic condition.

<sup>17</sup> It is worth mentioning that the Upgrading of Land Tenure Rights Act 112 of 1991 also regulates informal settlement by providing recognition for informal settlements as 'formalised townships'. In addition the Provision of Certain Land for Settlement Act 126 of 1993 makes provision for the settlement of rural communities.

vacant ground in Orlando and settled down in shanties. By 4 April, 6 to 8 thousand people had settled in the squatter camp. On 6 April, the Government published War Measure 31 of 1944. The purpose of the measure was to prevent this and other instances of urban squatting. The War Measure was extended over a number of years and finally expired in 1950. It was replaced by the Prevention of Illegal Squatting Act 52 of 1951.

The Prevention of Illegal Squatting Bill was presented to the House<sup>18</sup>, by the Minister of Justice, in May 1951. In his introduction, the Minister referred to the Government's decision not to extend War Measures more than was necessary and to replace these measures with permanent legislation, as the reason for replacing War Measure 31 of 1944 with the Bill. He declared that the purpose of the Bill was to "systematically tackle and combat the evil of urban and peri-urban squatting". During the debate on the Bill the point was raised that the Minister of Justice was perhaps not the person to be introducing the Bill. It was suggested that it ought rather to have been the Minister of Native Affairs, or the Minister of Public Health who introduced the Bill. Members also drew attention to the fact that while the Bill was necessary measure to deal with the emergency created by the movement of Natives from the locations into the cities, it did not adequately address the squatting problem. Dr. Gluckman referred to squatting as a "deep seated disease and the disease is a lack of suitable accommodation". In this regard he described the Bill as "merely a palliative and not a curative agent". Sharing similar views Mr. Lovell said : " the Minister claims quite hopelessly, that this Bill will combat an evil. The evil which exists is that there is an enormous housing shortage for urban Natives in urban areas. That evil has been with us for many years and how a police measure can combat an evil of that kind, the Lord alone knows". Mrs. Billinger suggested that this type of legislation should have been coupled with a constructive housing plan. Mr Nel, on the other hand, suggested that while providing more houses was an important solution to the squatting problem 'the root of the evil' was a lack of planning during the industrialisation process. Mr Serfontein, in his discussion of the Bill, referred to the colour policy of the Nationalist Party, ie.: "the Party realises the danger caused by the influx of Natives to the cities and it undertakes to protect the European character of our cities and to take vigorous and effective steps to care for the safety of persons as well as property and the peaceful lives of the inhabitants". He said that the Bill was nothing but an implementation of that declared policy. Mr Kahn attacked the

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<sup>18</sup> Debates of the House of Assembly 22 May 1951 cols 7343ff.

Bill as being "part and parcel of a scheme of the Government to try and satisfy the labour-hungry farmers of this country, who cannot get labourers and now propose to use foul means to drive the Natives to work for them on their farm". He also criticised the provisions of clause 1 as being "reckless and irresponsible because they are [were] so wide and so untrammelled in their effect and in their implication that there is no single South African, in the course of a week of normal activity, social and business, who can avoid a contravention of this particular clause". On the clause dealing with locations, s1(b), he argued that it was "going to make the social and communal life of the African people in South Africa a matter of daily or weekly crime," considering the problems previously encountered in obtaining the permission of the local authority or the person in charge of the location. The fear was also expressed by various members that the provisions in the Bill allowing for the establishment of emergency camps amounted to legalising and giving official recognition to squatter camps. Both Dr. Gluckman and Mrs. Billinger expressed the fear that these emergency camps would be a permanent feature of urban life and the easier option for local authorities who were faced with the duty of providing housing for their people. Despite these issues the Bill was adopted by the House.

### **2.1.1. Provisions of Act 52 of 1951**

Prior to 1991 this was the central piece of legislation governing the establishment of informal housing. Originally the Prevention of Illegal Squatting Act was introduced to control squatters in urban areas, however the amendments to the Act in 1988 introduced new provisions to control rural squatters as well. The 1951 Act was introduced expressly to replace War Measure 31 of 1944. The War Measure provided that:

"Whenever it appears to a magistrate from sworn statements in writing placed before him by the owner or occupier of any land or building situated within his district -

(a) that any persons have entered upon such land or building without the permission of the said owner or occupier, are remaining thereon or therein against his will, and refuse despite warning to depart therefrom and,

(b) that the conditions and circumstances under which such persons are living on the land or in the building are such that unless they are without delay removed therefrom, the health or safety of the public generally or of any class or classes of persons ( including the said persons themselves ) or the maintenance of peace and good order may be endangered

the magistrate may take all such steps as appear to him to be reasonably necessary to effect the immediate removal of such persons, if necessary, by force, from that land or building and further order the demolition and removal from such land, of all buildings or structures which may have been erected thereon by any such person."

This attempt to contain urban squatting was however not successful. An application of the provisions of the War Measure merely resulted in the evicted squatters moving to other pieces of vacant land in the vicinity. Indeed a Commission of Inquiry ( appointed to investigate the deaths of three policemen at the Moroka Squatter Camp in August 1947 ) concluded that:

"In cases where the natives can find no other home, the application of the War Measure would merely cause hardship and bring no improvement. We understand that a Bill to take the place of the War Measure ... is being considered by the Department of Justice ... We believe such an enactment to be indeed necessary, but its application should go hand in hand with the measures ... for leading the stream of workseekers into the most useful channels and for ensuring that native workers and their families can find a lawful home in the vicinity of his employment."<sup>19</sup>

The Fagan Commission also made similar recommendations.<sup>20</sup>

The Prevention of Illegal Squatting Act 52 of 1951 drew directly on the experience of the 1940 squatter movements. The Act in principle is in conformity with the War Measure but departs from it in a few respects, especially where a trial is now provided for, unlike before. The preamble to the Act declares its purpose as being "to provide for the prevention and control of illegal squatting on public or private land". It contained provisions whereby a magistrate could , after having given the squatter three days notice and an opportunity to be heard, order the eviction of the squatters and the demolition of their homes. The Act also contained a sweeping criminal provision in Section 1. Section 3 gives magistrates the discretion, upon convicting a person, to make an order of ejection and demolition. The Act also contains provisions enabling local authorities to establish emergency camps, ie. managed squatter areas.

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<sup>19</sup> Report of the Commission Appointed to Enquire into the Disturbances of 30 August 1947 at Moroka Emergency Camp, Johannesburg Annexure 1945-1948 at 104.

<sup>20</sup> Report of the Native Laws Commission 1946-48 (UG28/48) para 37

### **Criminalisation Provisions**

The Prevention of Illegal Squatting Act actually criminalises squatting. Section 1 makes it an offence to:

"enter upon or into without lawful reason, or remain on or in any land or building without the permission of the owner or lawful occupier of such building".

This provision was a response to the reluctance of the police to intervene to arrest members of the Johannesburg squatter movements in the Moroka Disturbances; because they believed that they could only step in to prevent criminal acts or to arrest people committing such acts.<sup>21</sup> The section creates two separate offences: entering upon land or buildings without a lawful reason and remaining on land or buildings without permission. In a charge of 'remaining' the onus is on the State to prove that neither the owner nor the lawful occupier has given the necessary consent. The penalties for contravention are provided in section 2: a fine not exceeding R1000 and/or imprisonment not exceeding six months. In addition, on conviction, the court has the discretion of ordering ejection of the person and demolition of the structure.

### **Provisions for Removal**

The Act contains two types of removal powers: the criminal provisions and the administrative procedures. The criminal provisions are contained in section 3 and may come into effect when a court is convicting a person on a charge of contravening section 1 of the Act. The accused and his family are then removed and transferred to a place indicated by the court. The magistrate at that place can then order a 're-removal' and 're-transfer' if satisfied that the place indicated provides no suitable accommodation, or that the people concerned can be accommodated more suitably elsewhere, or that they have no proper employment within a reasonable distance from that place. Despite the far-reaching provisions of sections 1 and 3 they did not prove to be an effective technique for removing entire communities of squatters. Some of the reasons for its inefficiency included the fact that using section 1 to effect the removal of entire communities required the State to embark on a large scale prosecution programme, something that it is often reluctant to undertake. Secondly, use of section 3 required a successful prosecution under section 1 and

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<sup>21</sup> These were the actual findings of the above mentioned Commission.

it was often very difficult to prove the elements of the crime. Thirdly, section 3 gives the magistrate a discretion as to whether to order the eviction of the person convicted under section 1 and it was argued that this discretion ought to be exercised only after due consideration of a wide range of factors, inter alia, the nature of the area concerned, the attitude of the neighbours, the policy and views of the Department of Community Development or any other interested landlord, the prospects of a permit being issued for continued lawful occupation of the premises, the personal hardship which such an order may cause and the availability of alternative accommodation. Finally, convicted persons could appeal against the sentence, a process which could take up to a year and which would automatically suspend the operation of the sentence pending the appeal. Section 5 creates an administrative procedure for a similar removal and transfer order, made by a magistrate after an administrative enquiry and after three days notice to the affected persons. These procedures exist without the necessity of a prior criminal trial and conviction. In terms of section 5 the magistrate can order removal of persons from the land and demolition of any structures, where the magistrate is satisfied that 'the health and safety of the public generally' would be endangered if such a removal did not take place.

### **Summary Procedures of Demolition**

The summary procedures for the demolition of squatter settlements have their origins in the squatter problems experienced in the 1970's at the Crossroads.<sup>22</sup> In 1976 the Prevention of Illegal Squatting Amendment Act 92 of 1976 was passed. This Act introduced two provisions:

(1) S3A placed an onus on landowners and lessees to remedy the squatter problem themselves, by making it an offence to erect, cause to be erected, or permit the erection of buildings and structures, intended for occupation by persons, if the plans had not been approved by the relevant local authority. Where the structure had been erected without the necessary approval it became an offence to permit occupation and where the other elements were proved the owner/lessee was deemed to have given consent and hence he now became obliged to demolish and remove the structure at his own expense within seven days.

(2) S3B assisted owners and government functionaries to demolish unauthorised structures without bothering about judicial process. It provided that in certain given circumstances

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<sup>22</sup> op. cit. n11

demolition could occur without an order of court. The only safeguard provided against this extensive power was that the structure could only be demolished after seven days written notice had been given to the person who had erected it or caused it to be erected. This section authorises summary demolition only, and not summary eviction.

In response to the judicial criticism levelled at the 'flagrant contempt of the law' and the 'ruthless disregard for the rights of people', caused by the application of the provisions of section 3B, the legislature enacted the Prevention of Illegal Squatting Amendment Act 72 of 1977. This Act was an attempt to prevent the use of litigation by squatter communities threatened with eviction and demolition of structures, under the Act. The Amendment removed the seven day notice requirement in s3B(2) - no notice at all is now required - in addition, the Amendment ousts the jurisdiction of the court in civil squatter actions; by requiring that the applicant in these matters to first prove a right or title to the land on which the structure is erected, before the court can be competent to provide a remedy. The effect of this provision was to add a new element to the requirements for a *mandament van spoile* : in addition to proving peaceful possession and unlawful deprivation of possession that applicant now also had to prove a right or title to the property.

### **Provisions for Establishing Emergency Camps**

Section 6 of the Prevention of Illegal Squatting Act 52 of 1951 contains provisions similar to those contained in the War Measure. Section 6 empowers local authorities to establish emergency camps 'for the purpose of the accommodation of homeless persons'. On approval of the Minister of Justice or Native Affairs the local authorities could issue and publish in the Government Gazette, regulations dealing with the administration, maintenance, sanitation, control of trading and health, in the emergency camp. Section 6(5) makes it clear that the emergency camps were intended as temporary places of accommodation. According to the section the Minister may bring the legal existence of the emergency camp to an end, by declaring that the area shall no longer be an emergency camp. Section 6(A) however creates areas of 'controlled squatting', where the intention is that they should in due course be developed into permanent residential areas. It is provided that in these areas the ordinary laws relating to township establishment shall not apply.

### **The 1988 Amendments to the Act**

In 1988 the Prevention of Illegal Squatting Amendment Act 104 was enacted. O' Regan describes the effects of the amendments introduced by the Act as "substantially increasing the penalties and reducing the rights of persons accused of contravening the legislation".<sup>23</sup> The most important features of the amending Act are: the extension of the powers of forced removal and summary demolition in terms of the Act, the erosion of traditional common law principles governing the rights of the accused and the powers of the judiciary and the introduction of new and sweeping provisions to regulate rural squatting.

The key criminal provisions contained in section 1 remained unchanged, however in an attempt to address the technical inefficiencies encountered in applying the section, section 2(1) now provides that:

"If in the prosecution of a person for the contravention of subsection 1 it is proved -  
(a) that he entered upon or into any land or building of any other person, it shall be presumed that person entered upon or into the land or building without lawful reason.  
(b) that he remained on or in any land or building of any other person, it shall be presumed that the person so remained without the permission of the other person unless the contrary is proved".

These provisions create rebuttable presumptions which aid the State in proving elements of the charge and shifts the burden of proof to the accused to prove the 'lawful reason or permission'. This is contrary to the fundamental principles of our common law, that he who alleges must prove. Where the charge is one of 'remaining on the land' the subsection does not create a rebuttable presumption and the onus of proof is still on the State. In addition, section 11B of the Act now provides, in a manner contrary to our common law, that an appeal against a criminal conviction will no longer have the effect of suspending the sentence. Also contrary to the general principles of law, a magistrate is now obliged, in terms of section 3(1) to order the eviction of a person convicted in terms of section 1 of the Act. This new provision avoids the need to exercise a discretion according to certain guidelines.

In addition to section 1, there is another provision which contains criminal penalties and

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<sup>23</sup> O'Regan C. 'No More Forced Removals' *South African Journal of Human Rights* pg361 (1989)

which could result in forced removals. Section 4 of the Act is aimed at curbing 'squatter farming'.<sup>24</sup> In terms of the amendment when a person is convicted of contravening section 4, the court must make an order ejecting the occupants of the land concerned.

The 1988 amendments also altered the administrative procedures for the removal of squatters. A magistrate is now, in terms of section 3(2), given the administrative power to move the persons where it has been proved to his or her satisfaction, either by an owner or a legal occupier, that persons have entered upon the land of that owner or occupier without consent and are refusing to depart; or by an administrator or local authority that persons have 'entered and are congregating upon any land ... whether with or without consent of the owner or occupier.' The previous requirement that the magistrate must be satisfied that the health or safety of the population are under threat has been removed. The amendment Act does provide some checks on the exercise of the judicial discretion conferred in this section. Section 11A provides that the Minister of Constitutional Development and Planning may by notice in the *Gazette*, 'determine the general policy in regard to the prevention of illegal squatting which shall be adhered to in the Republic,' and it is submitted that the magistrate would have to take this policy into account in exercising his discretion. Section 6 also contains far-reaching administrative procedures of removal. It is submitted that these procedures were actually intended to be used to control rural squatting. Section 6E of the Act provides for the establishment of 'local committees' in areas falling outside the jurisdiction of local authorities. A local committee must order an investigation into the occupation of land, where the local committee 'has reasonable grounds to believe' that the land is being occupied by persons not in the employment of the owner or legal occupier of that land; even if such persons are there with the owner's or legal occupier's consent. Where the committee finds that the land is being so occupied section 6F(2) provides that:

"it shall cause the owner or legal occupier ... to be served with a notice in writing in which the finding of the committee is set out and the owner or legal occupier is directed to eject those persons from the building ... concerned in the manner mentioned in the notice within a period of 30 days or after the date on which the notice has been served on him".

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<sup>24</sup> Squatter farming has been described (by O' Regan op. cit. n23) as a practice whereby people are allowed on land, in breach of s1, in return for the payment of site fees.

A landowner or occupier who is aggrieved by the notice served upon him or her may, in writing, submit an objection to the committee. This objection shall be considered by the committee whose decision thereafter shall be final. A landowner or occupier who fails to comply with the decision of a local committee shall be guilty of a criminal offence; for which the maximum penalty is a fine of R10 000 and/or imprisonment for a period of five years. Section 6F(6)a makes it clear that the local committee may not require the landowner or legal occupier to forcibly eject a person without first obtaining a court order. A landowner need only issue a request to the relevant persons to vacate the property. Thereafter any person who fails to comply with the local committee's order shall be guilty of an offence and upon conviction the court shall order the summary ejection of that person from the property. O'Regan submits that the order issued by the committee ejecting the persons must be subject to the *audi alteram partem* principle.<sup>25</sup>

The extensive powers of summary demolition that existed have not been amended much by the 1988 enactment. The only amendment is to add an ouster clause to the provisions of section 3B. It now reads as follows:

"it shall not be competent for any person to ask for any order, judgement or other relief in any civil proceedings of whatever nature in any court that are founded on the demolition or intended demolition or the prevention of demolition under this section of any building or structure, or on the removal or intended removal or the prevention of removal of any material or contents thereof from the land on which the building or structure is situated, and it shall not be competent for any court to grant or give such order, judgement or other relief unless such person first satisfies the court on a balance of probabilities that *mala fide* action has been or is to be taken".

The 1988 Amendment Act abolishes the provisions governing emergency camps. The Act now contains provisions to govern the establishment, regulation and abolition of informal settlement areas, to be known as transit areas. Section 6(11) of the Act provides that any emergency area established under the previous provisions shall be deemed to be a transit area established under the new provisions. According to these provisions transit areas are to be temporary settlement areas. Section 6(2) gives local authorities powers to expropriate land in order to establish transit areas. However, section 6(4) provides that no compensation

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<sup>25</sup> op. cit. n11

shall be payable in respect of an expropriation where the land 'is occupied by homeless persons' unless the owner or lawful occupier can prove that it is so occupied without his permission. In 1986 the Abolition of Influx Control Act 68 amended s6 of the Prevention of Illegal Squatting Act by allowing the Minister of Constitutional Development and Planning the power to "designate a portion of land ... as land on which persons who are unable to find accommodation may reside". Such designated areas constitute more permanent areas of informal settlement. In terms of the amendment Act provincial administrators now also enjoy the powers under section 6. In the case of both transit and designated areas Parliament has provided that the ordinary township planning rules shall not apply.

The 1988 amendments to the Prevention of Illegal Squatting Act make it a punitive and prohibitory piece of legislation; placing sweeping powers in the hands of landowners, administrators and local committees; criminalising the conduct of people who are simply trying to find shelter for themselves; excluding the jurisdiction of the courts and contradicting basic common law principles. O' Regan submits that these amendments need to be seen in the context of State policies at that time. She says that the State policy was one of orderly urbanisation and the Act was a means to direct urbanisation in terms of this policy.

### **The 1985 Report of the Constitutional Affairs Committee**

In March 1985 the State President called upon the Constitutional Affairs Committee of the President's Council to look into the matter of a future urbanisation policy. The Committee in its report<sup>26</sup> recognised that the influx control strategy for urbanisation had failed. It recognised that rapid urbanisation tended to lead to urban squatting. It argued that squatting was a threat to orderly and planned urbanisation. However, it also noted that the demolition of squatter settlements under Act 52 of 1951 did not have the intended effect of preventing or reducing the number of squatter settlements. Accordingly the Committee concluded that: "any strategy aimed at dealing with the existence of squatter settlements in South Africa and the prevention of further such settlements will in the first instance have to accept that further Black urbanisation is inevitable, will have to take account of existing conditions of

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<sup>26</sup> Report of the Committee for Constitutional Affairs of the President's Council on an Urbanisation Strategy for the Republic of South Africa PC3/ 1985

overcrowding in urban areas and will have to recognise that large parts of the population cannot afford formal housing".

Not long thereafter in 1991 a White Paper on Land Reform was published, which drew on the recommendations of the President's Council, in declaring a new land policy.

## **2.2. The White Paper on Land Reform 1991**

In his opening address to Parliament on 1 February 1991 the State President announced that legislation aimed at repealing all statutory measures regulating rights to land on a racial basis would be introduced. A White Paper on Land Reform as well as supporting legislation was also envisaged.

The new land policy which was introduced in the 1991 White Paper focused on land as a basic resource common to all South Africans. Provision was made for the continued use of land as a multi-purpose commodity and a productive asset, but without racial restrictions. In general, the land policy had been formulated in as balanced a manner as possible to accommodate the aspirations of the population as a whole, without losing sight of the basic functions of the land and the responsibility to conserve it for future generations.

The Paper recognised (at pg. 10) that peace, progress and stability cannot be achieved unless every effort was made to ease the present housing shortage. It was noted that the continuing backlog in housing has potentially unfavourable implications for the maintenance of the quality of life in established residential areas as well. The Paper suggested that the housing shortage should be eased in order also to lessen the pressure on established residential areas, to counter unlawful squatting and prevent established communities from being displaced, and to protect community life against social disorder, disruption and the disregard of community values. According to the Paper the urban housing shortage was only too evident from the squatter phenomenon in recent years. In the Paper the Government accepted that the urbanisation process and the squatter phenomenon cannot be separated. The Government also accepted its responsibilities in this regard, not only towards the homeless who seek a livelihood in the urban areas, but also towards established urban communities. The Paper stated that the Government believed that the emphasis in dealing

with squatting should always be on guiding these people towards land which is suitable for less formal settlement and on which at least rudimentary but upgradable services are available.

According to the Paper squatting that takes the form of trespass on and taking over the property of another could not be tolerated in any orderly society and was strongly condemned by the Government (at pg. 10). The same applies to disorderly settlement on land that is neither suitable nor intended for occupation. In order to ensure that the action against such activities is timely and preventative, the Government proposed that sufficient and affordable residential sites be made available.

While the provision of housing, and particularly opportunities for less formal settlement, enjoy high priority, according to the Paper, it remained the Government's intention to protect the established urban environment against deterioration and decay. In this regard the Residential Environment Bill was proposed and was directed at achieving this aim in so far as it relates to the continued orderly existence of the established urban environment (at pg. 10). Provision was made in this Bill for measures to protect the urban environment through effective management, the clearing up and prevention of urban decay, the abatement of nuisances, and the combating of exploitation and other malpractices.

The Government (at pg. 16) made a commitment to the conservation and preservation of land for future generations, in pursuing the policy positions outlined in the Paper. The Government recognised that air, water and land pollution as well as problems of soil erosion and damage to the environment give rise to the deterioration of the natural resource base, which in turn impairs the country's capacity to sustain economic growth and create prosperity in the long run. The Government therefore intended to ensure that the negative effects of the changing land use pattern are countered and that proper use was made, also from a conservation point of view, of the opportunities created by the new land policy.

It is submitted that the new land policy as declared in the White Paper is certainly very laudable. It attempts to clarify the land policy, in order to satisfy the needs of all South African citizens. The policy is also very progressive because it recognises land as a vital natural resource that needs to be preserved and conserved. It does not, however, suggest

whether the goals set out in the Paper can in fact be achieved without having to prioritise basic needs of the people, over environmental conservation. Furthermore the policy is merely a statement of intent and its true efficiency can only be determined when it is put to practical use, particularly by the Government.

### **2.3. The Less Formal Townships Establishment Act 113 of 1991**

The Deputy Minister of Planning introduced the Less Formal Townships Establishment Bill to the House<sup>27</sup>, as one of the pieces of legislation introduced by Parliament in its attempt to repeal all statutory prescriptions which regulate rights to land on a racial basis. The primary aim of the Bill, he said, was "the speedy provision of suitable land for the settlement of people without homes, in a less formal but orderly way, which can be upgraded, with shortened procedures for the establishment of less formal towns. The purpose of the Bill is the establishment of a just dispensation with regard to land. Opportunities for the acquisition and utilisation of land are broadened and thus existing rights are protected and safe-guarded". The Minister described the methods of development and settlement envisaged in the Bill as in accordance with the principles of free enterprise and as creating opportunities for the private sector to also become involved in the process of land development and settlement of the homeless. He referred to the speed of action permitted by the Bill as proof of the Government's earnestness in providing land for the homeless. The fact that the Stamp Duties Act was not applicable and that transfer duties were not payable, he said, indicated that the Government did not intend to enrich itself by capitalising on the need of those individuals for whom the Act was intended. Furthermore, according to him, the Government's policy regarding the devolution of power was strongly emphasized in the powers conferred on the Administrator by the Bill. In the discussion of the Bill the member, Mr. Hoon said that the Bill together with a series of other legislation, "had become a necessity for the Government; firstly to prepare the territory of South Africa for the new South Africa, and secondly to make the necessary arrangements for the National Party and the Government's new constitutional dispensation of one land, one nation, one Parliament and one Government". The Minister of Local Government and Agriculture suggested that the Bill had the potential to address the needs of the victims of

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<sup>27</sup> Debates of Parliament 10 June 1991 cols 12250ff.

apartheid, but only if economic and financial viability was promoted within the townships established under the Act. Mr. Cassim described the vast powers conferred on the Administrator as the Bill's strength and weakness. The powers conferred on the Minister are supposed to result in speedier action. However they are very discretionary. Mr. Cassim agreed with the Urban Foundation that the efficacy of the legislation will have to be tested and monitored against the rate of delivery. Mr. Rabie applauded the provisions allowing the private sector to undertake township development. These provisions he felt would save the Government both time and money. Against this Mr. Hoon felt that the provisions could be abused by private landowners that established 'squatter camps' on their land for their own gain, in the guise of less formal townships. Mr. Rabie summarised the fundamental characteristics of the Bill as follows: 1. the Bill brings township establishment within a system and a specific structure, 2. in addition to formal township establishment, provision is also made for informal township, less formal township and township establishment in the case of communally owned land, 3. all forms of township establishment are aimed at making it conducive to be upgraded, so that it is still possible to say that the ultimate ideal of same quality and grade of township establishment is possible in all areas and will apply in the future, 4. the Bill creates cheaper procedures for township establishment, 5. the Bill creates procedures aimed at bringing about greater simplicity and speed in view of township establishment and the rapid urbanisation process that it has to accommodate, 6. the Bill is aimed at bringing about greater uniformity in the system of township establishment, 7. the Bill recognises the reality of a diversity of communities that establish townships according to different settlement patterns in the urbanisation process, and 8. the Bill is characterised by the fact that preference is given to and the foundation is being laid for a system of individual ownership that is promoted on every level of township establishment.

Sharp criticism was levelled at the bill by Mr. Oosthuisen who said of the Bill, 'In the long title of the Bill mention is made of less formal settlement. It actually means informal settlement and in South Africa informal settlement is squatter settlement. The National Party is therefore legalising squatting in South Africa. In the discussion of the Bill reference was made to clause 29, in terms of which the Administrator when deciding to make use of the procedures provided in the Act is not compelled to give reasons for his decision or to hear any further representations or objections in connection with the exercising of his powers in terms of the Bill. The concern was expressed that this amounted to an exclusion of the *audi alteram partem* rule and that this deficiency would deter the private sector from becoming

involved in township establishment. The Bill was adopted by the House, despite these and other criticisms.

### 2.2.1. Provisions of Act 113 of 1991

Thus control of the use of land by squatter communities as residential settlements is also regulated under the Less Formal Townships Establishment Act 113 of 1991. The preamble to the Act sets out its purpose:

"To provide for shortened procedures for the designation, provision and development of land, and the establishment of townships for less formal forms of residential settlement; and to regulate the use of land by tribal communities for communal forms of residential settlement".

The Act is divided into four chapters, respectively providing for: a shortened process for less formal settlement, shortened procedures for less formal township establishment, settlement by indigenous tribes and miscellaneous provisions which include, inter alia, the amendment of related legislation<sup>28</sup>. Chapter I of the Act cuts through and dispenses with all the red tape which restricted the acquisition of land in the past and now enables the Administrator to identify and designate such land for rapid development. The second chapter arises out of the repeal of the Black Communities Development Act of 1984. A shortened township establishment procedure is prescribed. This includes the removal of certain servitudes and restrictions, subject to the payment of compensation, in order to accelerate the procedure. The third main provision of the Act concerns an acknowledgement of the need for communal residential settlement. This refers to the traditional custom of certain tribes to settle in such a manner. However there is a proviso that such land must be deemed suitable for such use and cannot be used more beneficially for some other purpose. Even under these circumstances the proposed settlement must be properly surveyed and laid out in an orderly manner, with the opening of a township register being a requirement.

The Act is the key statute governing informal township development. It provides for two types of establishment procedures: the first and simpler procedure is for the establishment

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<sup>28</sup> Of particular importance, in this regard, is the repeal of section 6A of the Prevention of Illegal Squatting Act 52 of 1951.

of 'less formal settlements'<sup>29</sup> and the second is for the establishment of 'less formal townships'.

### **Less Formal Settlements**

In terms of section 3(1) of the Act a provincial administrator may designate land for informal settlement 'when he is satisfied that persons have an urgent need to obtain land on which to settle.' Section 3(5) provides that rules relating to town planning including zoning, physical planning, building standards and subdivision of land shall not apply to the informal settlement and it empowers the administrator to suspend any other law which may have a dilatory effect on the development of the settlement. The act also empowers the administrator to suspend restrictive conditions of title and any servitude which is not being used beneficially or which will not be capable of beneficial use once the informal settlement has been established. In terms of the Act the planning and development of the land shall be done by the administrator, in the case of State owned land, or by the owner of the land in other cases; and both the administrator and the landowner are given any ancillary rights necessary to ensure such development and planning. In order to undertake township development the developer is required to prepare a plan for approval by the surveyor-general whereafter it must be lodged with the deeds office, where the registrar of deeds shall open a township register in respect of the land, thereafter a township is deemed to have been established in terms of the ordinary township planning procedures. The only provisions indicating limits on the planning and development process are contained in section 4 of the Act which stipulate firstly that the planning must take place in accordance with the requirements deemed necessary by the administrator to make the 'speedy and orderly settlement of persons in terms of section 8 possible'; and secondly that the administrator shall 'ensure that planning and development ... takes place in such a manner as will make the subsequent upgrading of the services thereon possible.' The Act provides that ownership of the individual plots may be transferred to individual owners through a quick transfer procedure. No transfer duty, stamp duty or other fee shall be payable in respect of the transfer of ownership.

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<sup>29</sup> These procedures replace those contained in s6A of the Prevention of Illegal Squatting Act 52 of 1951 as amended.

### **Less Formal Townships**

The Act provides procedures for the establishment of townships, that are quicker and cheaper than those ordinarily contained in the Town Planning Ordinances or under the Black Communities Development Act of 1984. Section 10(2) provides that an administrator may grant an application to establish such a township only when he is satisfied that the demand for housing in the area of the proposed township justifies the less formal procedure being adopted. In addition, the administrator, himself, may take the initiative in establishing a township. The application for the establishment of a township must contain amongst other documents, a plan of the proposed township, a geotechnical report and a memorandum containing information on how the proposed township will affect and be affected by topography, geotechnical conditions, existing and proposed transportation routes and systems, pollution and environmental factors and existing and proposed sewage disposal works. Furthermore, the memorandum must indicate how the proposed township will accord with the proposed development pattern of the area. Notice of intention to establish a township must be given in the *Gazette* and details as to the time and place where the application may be inspected by interested parties must be given. The administrator must within 60 days of the application either approve it with or without restrictions, or refuse it. Sections 12 and 19 allow the administrator to exclude a proposed township development from the application of any law that he considers will have an unnecessary dilatory effect on the establishment of a township. He may also suspend any servitude or restrictive condition that he considers undesirable or inconsistent with the use of the land as an informal township. Once the application is approved similar procedures to those dealing with the registration of a less formal settlement occur. However ordinary transfer and stamp duties have to be paid in this case.

### **Township Establishment on Communally Owned Land**

The Act makes provision for tribes to settle communally under controlled circumstances on land for occupational purposes. According to the Act these tribes may choose to 'urbanise' under certain conditions. The conditions, inter alia, are that the Administrator has to approve the location of the land on which the tribes choose to settle and urbanise. He has to approve its suitability as well as the number of people who can be accommodated on it.

The administrator also has to approve the purpose for which the land will be used and whether such land is suitable for that purpose. Furthermore the tribe must cause a general plan to be prepared for the land and submitted to the Surveyor-General. The tribe must also be settled in a planned way and the Administrator may withdraw his consent if the people do not comply with the requirements. The tribe may utilise the land in terms of indigenous law or their ownership. If they choose ownership, the registrar of deeds must be provided with a general plan and a certified copy of the tribal decision and the opening of a township register is a further requirement.

It seems clear that, the Less Formal Townships Establishment Act tries to provide for an expeditious process of township establishment which would be less formal than that under the existing legislation. It is submitted that this necessarily requires that a certain degree of transparency is lost and that the usual standards are lowered to meet the exigencies of the situation. The Act relies heavily on the discretion of the administrator and ignores the views of those likely to be most affected by the establishment of such settlements and townships.

It is submitted that the legislative enactments dealing with the squatter problem and informal housing are a mere reflection of the State's policies on urbanisation. Neither the Prevention of Illegal Squatting Act nor the Less Formal Townships Establishment Act adequately addresses the environmental implications of squatting and informal housing. Originally the Prevention of Illegal Squatting Act did consider the environmental impact of squatter settlements on 'the health and safety of the public generally or of any class or classes of persons; it also considered the impact of settlements uncharacteristic of a particular area on the built environment. However these provisions were subsequently removed in the 1988 amendment Act. The Less Formal Townships Establishment Act, by requiring the submission of memoranda containing information about the environmental impacts of townships, represents a step towards environmental conscientiousness. However, it is submitted that even these provisions are inadequate because they do not specify how the administrator, if indeed he should be influenced by such information. Furthermore, the provision relating to future upgrading of the settlement is far too vague to be of any effective use. The processes envisaged in the Act prioritises the need to provide land for people to live on, in cases of urgency and does not build in any environmental constraints. Van der Walt also criticises both the Less Formal Townships Establishment Act and the

Upgrading of Land Tenure Rights Act for focusing on an expansion of private landownership - which according to him cannot possibly facilitate environmental conservation<sup>30</sup>.

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<sup>30</sup>Van der Walt A.J. 'Informal housing and the environment' *South Africa in Transition* Unisa (1993). He suggests that the focus should rather be on the creation and development of a suitable "land use ethic":.

## CHAPTER 3

# THE JUDICIAL APPLICATIONS OF THESE ACTS

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In the cases that have come before the judiciary arising out of the provisions of the Prevention of Illegal Squatting Act 52 of 1951 and the Less Formal Townships Establishment Act 113 of 1991, Judges have attempted to clarify the provisions of these Acts and to apply the provisions, it is submitted, in a manner that reflects the State's general policies on urbanisation. From the cases it is apparent that those policies have ranged from the rigid enforcement of apartheid measures and racial segregation, to more liberal policies designed to ensure controlled urbanisation, and finally to a policy aimed at addressing the urgent need for housing and shelter. These policies are particularly apparent in the manner in which the judiciary has, over the past three decades, dealt with cases arising out of the provisions of the Prevention of Illegal Squatting Act. The cases on the Less Formal Townships Establishment Act are fewer, however it is submitted that they are equally relevant.

### **3.1. The Prevention of Illegal Squatting Act 52 of 1951**

There were many cases in the 50's that appeared before the Courts dealing with the Prevention of Illegal Squatting Act. These cases were not really controversial, dealing mainly with matters of procedure in the implementation of the provisions of the Act.

In *R v Mahlali*,<sup>31</sup> *R v Nompunza*<sup>32</sup> and *R v Matsabe*, *R v Mbalate*<sup>33</sup> the Courts held that it was vitally important for the State to allege and prove that the area in question was one in which the provisions of the Act applied.

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<sup>31</sup> 1953 (1) SA 542 (C)

<sup>32</sup> 1957 (2) SA 184 (E)

<sup>33</sup> 1957 (3) SA 210 (T)

In *Matsabe, Mbalate* Dowling J. quoted *R v Beebee*<sup>34</sup> with approval and held that in absence of an allegation that the premises or land upon which the appellants were alleged to have entered and upon which they were alleged to have remained, was subject to the provisions of the Act, no offence was either disclosed or proved. The Court held ( at pg.211E-F ) that although "the main, if not only, purpose of the Prevention of Illegal Squatting Act was to control squatting by Natives, a state of affairs which was causing considerable congestion and inconvenience in specific parts of the country," since the premises in question were not proclaimed in terms of s11(1) the provisions of the Act could not apply and the convictions were set aside.

The fear expressed in the Parliamentary Debates on the Act, that it would result in much inconvenience and hardship to persons entering and remaining on Native Locations without the required permission, also materialised in the cases.

In *R v Press*<sup>35</sup> in the Court a quo the appellant had been charged with contravening s1(a) and s1(b) of Act 52 of 1951 because he had entered and remained on a location for five hours without getting the required permission from the location superintendent. On appeal the Court first considered the meaning to be attached to the words 'without lawful reason' as used in s1(b). Kuper J. held (at pg.90C-E ) that *prima facie* the words 'without lawful reason' meant only that a person entering the location must have a legitimate reason for entering the location, such as visiting friends or delivering items to residents in the location. He held that once it was conceded by the Crown that the holding of the proposed meeting was not unlawful, entry into the location for the purpose of addressing that meeting was not an entry without lawful reason. On the question of whether the appellant had in this case remained in the location the Court held that the purpose of the Act was to provide for the prevention and control of illegal squatting on private or public land. The mischief (pg.91C-D ) which the act was designed to prevent was not a temporary permanence. The word 'remain' in s1(b) connotes some degree of permanence. It was therefore held that the appellant's stay in the location did not constitute 'remaining' and the previous conviction was set aside.

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<sup>34</sup> 144 AD 333

<sup>35</sup> 1956 (3) SA 89 (T)

The Act also proved to be a source of confusion as regards the number of offences created by section 1.

In *R v Phiri*<sup>36</sup> the question before the Court was whether a person trespassing on privately owned land could be charged with contravening s1(a) of the Prevention of Illegal Squatting Act. Counsel for the accused argued that the Act as a whole was ambiguous in that it was not clear whether it applied to persons who have no intention of remaining on the property defined. In the Court a quo it was held that the object of the Act was to provide for the prevention and control of illegal squatting. Due to the fact that the term squatting is not defined in the Act, the presiding Magistrate took the meaning of squatting to be 'illegal occupation of land'. Furthermore, the Magistrate concluded that s1(a) did not intend to penalise a person who only entered into or on any land with an unlawful reason but without further object. In the appeal Court it was held that there was no ambiguity in the legislation. De Wet J. held( at pg. 709H-710A ) that the section penalises a person, in the first place, who enters upon or into, without lawful reason, any land or building, whether such land is enclosed or not; and in the second place, it penalises a person who remains on any such land or buildings without the permission of the owner or lawful occupier. He held that the word 'and' in the subsection had g.been incorrectly read as to mean 'or', in the Court a quo. On appeal it was also found that the Act went further than the control of squatting. De Wet J. held that in certain instances it was necessary to control entry on to land in order to control squatting. The decision in this case was confirmed in *R v Press*.<sup>37</sup>

In *R v Zulu*,<sup>38</sup> an appeal from the NPD concerning the meaning of s1(a) of the Prevention of Illegal Squatting Act, it was held authoritatively ( at pg. 267F-H ) that the clear meaning of the section was that it is an offence to enter upon or into the land of another without lawful reason and it was also an offence to remain on the land without the permission of the owner. It was held that the section accordingly, applied to a squatter who remained without the required permission on land on which he had his home since his birth. In the appeal it was argued that s1(a) created only one offence which may be committed either

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<sup>36</sup> 1954 (4) SA 708 (T)

<sup>37</sup> op. cit. n33

<sup>38</sup> 1959 (1) SA 263 (A)

by merely entering unlawfully or entering unlawfully and remaining - 'remaining' is not an offence distinct from entering unlawfully but is a prolongation or continuation of the offence of unlawfully entering. Schriener A. C. J. held that the view that s1(a) provides for two offences accords with the use of the alternative form. According to him the reason for making two offences could be found in the fact that the mischief of squatting, though it may have resulted due the movements of large numbers of people and the housing shortage after the War, would to some extent exist even where the squatter had lived all his life on the property or had been there before the Prevention of Illegal Squatting Act came into operation or had previously been allowed to enter and stay there. Schriener A. C. J. did also acknowledge the difficulty in saying when the offence of remaining without permission commenced, where the entry was lawful. *Phiri's* case, it is submitted, was important because De Wet J., in that case explicitly admits that the Act goes further than the control of squatting, thus suggesting a reason for the broad criminal liability in s1. It is submitted that, although the Judge does not actually say so, the purpose of the Act at that stage was to give effect to the National Party policy of influx control. This is emphasized by the fact that the Prevention of Illegal Squatting Act was introduced together with the Natives (abolition of Passes and Co-ordination of Documents) Act 57 of 1952, the Native Laws Amendment Act 54 of 1952 and the Native Services Levy Act 64 of 1952. According to Hindson<sup>39</sup> these Acts were all aimed at implementing the policy of influx control.

Other important cases,<sup>40</sup> in this period were *R v Ndabambi*,<sup>41</sup> *Boothan v Africa*<sup>42</sup> and *R v Mailula*<sup>43</sup>.

In *Ndabambi* it was argued that it could not be proven that the appellant was occupying the land without the owner's permission, since the notice to vacate the land did not identify the

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<sup>39</sup> Hindson D. *Pass Control and the Urban Proletariat* (1978) pg. 72

<sup>40</sup> Less important cases were *Lolwana v Port Elizabeth Divisional Council* 1956 (1) SA 379 (E), *Mabukane v Port Elizabeth Divisional Council and Solicitor General* 1957 (4) SA 295 (E), *R v Malika and Another* 1958 (4) SA 663(T) and *R v Melville* 1959 (3) SA 544 (EC).

<sup>41</sup> 1959 (2) SA 454 (A)

<sup>42</sup> 1975 (3) SA 475(N), 1958 (2) SA 459 (N)

<sup>43</sup> 1959 (1) SA 696 (T)

notice giver as the owner of the land. The appeal did not succeed because Hoexter J. found that there was sufficient evidence to prove ownership and hence the allegation in the charge sheet.

*Boothan* dealt with the establishment of emergency camps in terms of s 6(1) of the Prevention of Illegal Squatting Act. When an interdict was brought preventing Indian traders from trading within a squatter camp, the argument was raised that a squatter camp could be established on privately owned land and hence that regulations made in terms of s6(1), regarding trade within the area were *ultra vires* as far as such private land was concerned. Initially this argument was rejected, but on appeal to the NPD it was accepted and the powers in s6(1) were described as permissive and not directory. It was also held that the Act confers powers to expropriate. In a further appeal the AD confirmed the decision of the NPD that a local authority has no power under s6(1) of the Act to establish an emergency camp which includes land that it does not own. Counsel for the appellant described the Prevention of Illegal Squatting Act as an emergency legislation to deal with a menace to health and safety of the public, Counsel for the respondent argued that the Act was *prima facie* designed, inter alia, to protect the interests of private persons in their ownership of property and that the powers under s6(1) were to be exercised subject to the common law rights of the third person. The Court accepted this argument. The appellant also argued that no private rights were interfered with, because the putting into operation of the powers given by s6(1) effected an expropriation of any private property that might lie within the limits of the emergency camp. Schriener J. (at pg. 462H- 463A ) held that there was no reason to suppose that Parliament, in enacting s6(1), had in mind that private property within the bounds of an emergency camp should be deemed to be expropriated as soon as those bounds were fixed.

In *Mailula* the appellant was found guilty of contravening s1(a) read with s2(1) of the Prevention of Illegal Squatting Act read with Proclamation 260 of 1954, in that he wrongfully and unlawfully entered upon or remained on an area which had in terms of s11(1) of the Prevention of Illegal Squatting Act, been defined as an area to which the provisions of the Act apply. On appeal it was argued Proclamation 206 was *ultra vires* s11(1) of the Act because : 1. it had retrospective effect and s11(1) does not empower the Governor General to apply provisions of the Act retrospectively, 2. the Governor General

in issuing the Proclamation did not comply with s11(1) of the Act because the Act requires that the Proclamation shall only come into force after the date of promulgation of the Proclamation, 3. the Governor General in exercising the powers conferred upon him by s11(1) acted unreasonably in that persons were not given reasonable time, after the promulgation, to vacate the land. The Court held that the wording of the Act did suggest that the Governor General was obliged to set a date in the future for the coming into operation of the provisions of the Act. Galgut A. J. also held that the purpose of the statute and the purpose of defining an area also suggest that immediate effect was desirable. Furthermore it was held that the Proclamation was not invalid for want of reasonableness. In this regard the Judge referred to the case of *R v Mannheim*<sup>44</sup>, where it was held that: 'the regulation was not invalid on the ground that it rendered unlawful a possession [an occupation] which was in its inception lawful inasmuch as the accused would escape conviction where he had not had a reasonable opportunity for discontinuance of the possession [occupation]'. In further appeal to the AD this decision was upheld.

In the 60's and 70's Hindson<sup>45</sup> reports that the direct methods of influx control failed to halt urbanisation. As a result, he says, the State again began to use squatter legislation to control the pace and pattern of urbanisation. Although there were numerous prosecutions and convictions under the Act,<sup>46</sup> many of the cases were unreported.

Cases that were reported dealt mainly with matters of procedure, for example *Thubela v Pretorius NO and Another*,<sup>47</sup> *Zungu v Acting Magistrate Umlazi and Others*,<sup>48</sup> *S v Tofile*<sup>49</sup> and *Ntuli v Van Der Merwe NO and Another*<sup>50</sup>.

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<sup>44</sup> 1943 TPD 169

<sup>45</sup> op. cit. n37

<sup>46</sup> Hindson quotes a figure of at least 1000 between April and August of 1975.

<sup>47</sup> 1961 (3) SA 152 (T), 1961 (4) SA 506 (T)

<sup>48</sup> 1962 (3) SA 782 (D)

<sup>49</sup> 1963 (1) SA 38 (T)

<sup>50</sup> 1963 (2) SA 88 (N)

*Thubela's* case dealt with the procedure referred to in s5(1) of the Prevention of Illegal Squatting Act as amended by s30 of Act 62 of 1957. Notification was issued in terms of Act 62 of 1957, informing squatters on the farm Wonderfontein that they were to be removed because the area was unhygienic and posed a danger to public health. According to the Act when a presiding officer is satisfied on affidavits presented to him that unless the persons living on the land in question are removed the health and safety of the public generally or any class or classes of persons may be endangered, then an order of removal may be granted. In this case two conflicting affidavits were presented and an inspection *in loco* was suggested by counsel for the appellant. This suggestion was refused by the magistrate who granted the order. In an application to set aside the respondent's order the Court held that although s5(1) of the Prevention of Illegal Squatting Act did suggest that proceedings should be conducted by affidavit, Parliament did not intend to prohibit all the concomitants of affidavit proceedings. However in this instance it was held that the holding of an inspection *in loco* was unnecessary; the inspection being of a general nature. The appeal was therefore dismissed and in a further appeal this decision was upheld.

In *Zungu's* case an application was made in terms of s1(b) of the Prevention of Illegal Squatting Act to have squatters removed. In the appeal against the decision of the Magistrate to grant the application, counsel for the appellant argued that the proceedings before the Magistrate were irregular in three respects: 1. the applicant's compliant failed to state the place where the application would take place, as required by the Act, and therefore were never 'competently instituted', 2. having regard to the terms of s5(1)b and inasmuch as neither the 'head of a Government Department or his representative' nor any of the persons specified in s5(1)b, made an affidavit in support of the application, the applicant contended that it was not competent for the Magistrate to make an order, 3. it was contended that although the application was said to be one made on behalf of the Minister, the notice of the application was signed by one who was not the Minister's authorised representative. The Court held, on appeal, that it was not necessary for the Minister or the other specified persons to actually make the affidavits. Nor was it essential that the notice referred to in proviso (aa) of s5(1)b be signed by the Minister or his representative who actually presents the application. Furthermore, it was held that the proviso did require that the notice reasonably inform interested persons of the date and the place of the intended application - however the fact that no place was mentioned merely made the application a

bad one and not a devoid one.

*Ntuli's* case was an application for a declaratory order, the facts appeared that the applicant was charged before a Magistrate with the offence of contravening s1(a) of the Prevention of Illegal Squatting Act read with s2 of the Act and s2 of Proclamation 12 of 1945. The applicant intended appealing this decision, but in this instance he sought a declaratory order suspending the ejection order made against him. Counsel for the applicant argued that s3(1) of the Act entitles a Magistrate who had convicted an accused of illegal squatting in contravention of s1 of the Act to make an order for summary ejection of the accused from the land, and to order the demolition and removal of all buildings erected by him upon it. Counsel argued that read with s2 of Act 64 of 1956 this meant that the Magistrate was precluded from suspending the operation of the order pending the result of an appeal. But, such preclusion, counsel argued, could result in undue inconvenience and disturbance being imposed on the applicant if his application was successful. The Court held that there was nothing in S2 of Act 64 of 1956 which inhibited the Magistrate, when making an order of ejection in terms of section s3(1) of the Prevention of Illegal Squatting Act, from providing that the order shall not come into force until some future date or the happening of some specified event.

There were other cases that merely confirmed the importance of proving that occupation occurred without the owner's consent,<sup>51</sup> ensuring that the area is one in which the provisions of the Act apply<sup>52</sup> and proving that the allegation of remaining is more than a "temporary permanence."<sup>53</sup>

The Appellate Division cases in this period were *S v Shangase*<sup>54</sup> and *S v Mchumu*.<sup>55</sup>

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<sup>51</sup> *S v Mampura and Another* 1964 (3) SA 477 (T), *S v Sikwane* 1976 (2) SA 896 (T) and *S v Peter* 1976 (2) SA513 (C). In *Peter's* case the Court accepted the argument that because the State did not prove who owned the land it was impossible to allege that the appellant's occupation was without the owner's consent. This ruling hence prevented further prosecutions of the almost 7 thousand people, who like Peter had also settled at the Crossroads.

<sup>52</sup> *Mbatha v Additional Magistrate Mahlabitini* 1963 (3) SA 270 (N)

<sup>53</sup> *S v Bhengu* 1968 (3) SA 607 (N)

<sup>54</sup> 1963 (1) SA 132 (A)

The appellant in *Shangase* was charged in the Magistrate's court with contravening s2(1) read with s1(b) and s11 of the Prevention of Illegal Squatting Act and further read with Proclamation 62 of 1957. The initial appeal and review to the NPD were dismissed. In an appeal from this dismissal the appellant submitted that the initial charge was defective. S1(b) of the Prevention of Illegal Squatting Act provides that "save under the authority of any law or in the course of his duty, an employee of the government or any local authority no person shall ... enter upon or into without lawful reason, or remain on or in any native location set aside or demarcated under the law relating to the administration of Native Affairs, without the permission of the local authority or the person having due and legal control of such Native location". S2(1) states that any person who contravenes the provisions of s1 shall be guilty of an offence and liable to the prescribed penalties. The Court agreed with the appellants that an accused cannot be charged with contravening s2(1) in as much as it is only a provision making it an offence to contravene s1. The appellant also argued that the charge was faulty in that it did not allege that the Durban City Council was the owner of the S. J. Smith location. In this regard the Court held that for the purposes of s1(b) it was not necessary that the local authority should be the owner of the location. It was held that reference was made to the 'local authority having due and legal control of such Native location'. This according to the Court was duly alleged and proved. The Court also made mention of the fact that there was no statutory requirement that the notice to vacate, in terms of s3 of the Prevention of Illegal Squatting Act, be served in any particular manner.

*Mchunu's* case set down authoritatively that in order to secure a conviction under s1(a) of the Prevention of Illegal Squatting Act the State must, *ante omnia*, establish that the Act which is alleged to have been contravened is of legal applicability to the area in question. Without that it does not even commence to show that an offence has been committed let alone show whether the accused has committed the offence'. In this instance it was held that because that because the state had failed to show conclusively that the area in question had been proclaimed in terms of s11 of the Act, the provisions of the Act did not apply to this area and hence the conviction was set aside.

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<sup>55</sup> 1976 (1) SA 320 (A)

*Frederick's* case<sup>56</sup> was also an important case in this period. It represented an indirect instance of judicial activism. In 1976 the Prevention of Illegal Squatting Act was amended, by Act 92 of 1976, to allow landowners and local authorities to summarily demolish squatter dwellings once they had given 7 days notice to the occupants of such dwellings. These provisions, it is submitted, extended the powers of landowners and local authorities. *Frederick's* case however, represented a restriction on these powers. The applicant in this case sought an order directing the respondent to restore the applicants' possessions, removed by the respondent, and to re-erect their houses. The respondent, a landowner had demolished the houses, erected by the applicant squatters, on his land. He had not given the seven days notice as required in s3B(2) of the Prevention of Illegal Squatting Act as amended. The applicant argued that this failure made the landowners actions unlawful. The Court held that since the required notice was not given the respondent had acted unlawfully. It therefore granted a spoliation and in addition, also ordered the respondent to re-erect the applicants' houses. The respondent, in opposing the granting of relief, contended that the applicants had acted unlawfully and were not entitled to any relief from the Court. According to him, to permit occupation of the buildings that had been erected, would be a contravention of the Prevention of Illegal Squatting Act as amended. Diemont J. was not impressed by these arguments; referring to the respondent's own conduct as 'not above reproach' (at pg. 116C-118 ). The Squatting Act, ( as he referred to it), he held, ' gave little enough protection to those unfortunate people who are without homes, but it does provide a limited protection,' eg. s3B(2). Diemont J. held that, in the light of *Yeko v Qana*<sup>57</sup> where a litigant seeks a spoliation order, *a mandament van spoile*, the Court will not concern itself with the merits of the dispute. 'The essence of the remedy is to restore the status quo ante and it matters whether the applicant acquired occupation secretly or even fraudulently.' Diemont J. held that the Court was not concerned with the nature of applicant's occupation, instead it sought to prevent the respondent from taking the law into his own hands, and acting without regard for the applicant's rights under the Act. Diemont J. (at pg. 117F-H ) also referred to *Jones v Claremont Municipality*<sup>58</sup> and *Zinman v*

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<sup>56</sup> *Fredericks and Another v Stellenbosch Divisional Council* 1977 (2) SA 641 (C), 1977 (3) SA 113 (C).

<sup>57</sup> 1973 (4) SA 735 (A)

<sup>58</sup> 25 SC 651

*Miller*<sup>59</sup> as authority for the proposition that when a spoliation was granted it could carry an order not only to restore the property but to restore it in its former state, if such was possible. In this regard Diemont J. held that in his view granting an order to re-erect the structures, created no practical problems. The Court in granting the spoliation order together with an order to rebuild the dwellings that were demolished expressed the strong condemnation that was felt for the abuse of the powers conferred by the Act. In response to this the State removed the 7 day notice period and introduced an ouster clause which sought to restrict squatters from obtaining court orders, to prevent their removal, unless they could show title or right to the land.<sup>60</sup>

*Vena's*<sup>61</sup> case reached the Court after the Report of the Committee for Constitutional Affairs<sup>62</sup> and it is submitted that the Court's findings in that case seem to accord with the more liberal view towards as expressed in the report. The applicants in this case were resident in an area, Lawaaikamp, at George on land owned by the respondent Municipality and whom they paid a site rent . The first applicant alleged that after the house which she had occupied since 1970 had been burnt down, she had immediately taken steps to rebuild it on its original concrete floor and foundations. However, the respondent had unlawfully demolished the rebuilt house. The applicant alleged that he had built an extension to the house that he had since 1980, but the respondent had unlawfully demolished this additional room. The applicants applied for a spoliation order directing the respondent to restore their respective homes to the condition in which they had been prior to the demolition. The respondent opposed the application averring that he had been entitled to demolish the applicants' houses in terms of s3b(1)(a) of the Prevention of Illegal Squatting Act, on the grounds that: 1. the applicants' had no right to reside in the area, and 2. the demolished room and the re-built house had been built without consent. Friedman J. held (at pg. 50F-51J ) that on a strictly literal interpretation s3B(1)(a), any building or structure erected on the land without the owner's consent may be demolished by the owner without a court order. However, the Judge held, this interpretation does not accord with the intention of the

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<sup>59</sup> 1956 (3) SA 8 (T)

<sup>60</sup> Act 72 of 1977

<sup>61</sup> *Vena v George Municipality* 1987 (4) SA 29 C, 1989 (2) SA 263 A

<sup>62</sup> op. cit. n27

lawgiver. He held that the Act was aimed at preventing illegal squatting, it was not aimed at persons lawfully occupying land. Quoting the Shorter Oxford English Dictionary where 'squat' means "to settle upon new, uncultivated or unoccupied land without any legal title and without payment of rent", and 'squatter' means "a settler having no normal or legal right to the land occupied by him", Friedman J. held that the mischief which the Act was aimed at was the unlawful occupation of land or buildings; it was not aimed at persons who lawfully occupy land or buildings. It was held therefore that although a person in unlawful occupation may have his building demolished by the landowner without a court order, in terms of s3B(1)(a) *non constat* a person who is lawfully occupying the land on which the building is erected. Regarding the ouster clause in s3b(4) (a) which provides that a Court may not grant an order preventing demolition under the section or grant any other relief unless the applicant satisfies the court that he has 'a title or right to the land ... by virtue of which he may lawfully occupy the land,' the Court held that the applicant had adequately proven that they were lawful occupiers of the land, ( either under the regulations in Provincial Notice 198 of 1979, or in terms of the common law agreement of lease ). The Court also examined the question of what constitutes consent on the part of the landowner. The Judge held that the consent did not have to be formal or written consent, it could be given in any manner whatsoever, either generally or specifically or either expressly or impliedly. Friedman J. therefore held that the respondent had acted unlawfully and granted the spoliation order, including an order that the respondent restore the applicants' homes and an interdict to prevent him from demolishing the homes once they were restored. On appeal the order in favour of the second applicant was set aside because it was held that he failed to prove that he did not fall within the scope of the ouster clause. The Court also rejected the view of the trial Court that s3B(1)(a) was capable of meaning: 1. that the owner's consent might be given before, during or after the erection and in any manner whatsoever, and 2. that the consent may be given in very general terms. Milne J. A. held further that where an owner consented to the erection of a building, the fact that the building was not precisely what the owner envisaged or did not comply with planning regulations did not necessarily mean that the owner had not consented to such an erection. The Court also rejected the argument that the landowner's consent to the original erection of the house did not apply to the house as re-erected. Accordingly the Court held that the landowner was not justified in demolishing the first applicant's house. The Court therefore confirmed the decision of the CPD, in part and rejected it in part. The Court's decision

attempts to strike a balance between the owner's property rights and the squatters' need for shelter.

Similar sentiments were expressed in *Ntshwaqela v Western Cape Regional Services Council*,<sup>63</sup> *Kayamandi Town Council v Mkhwase and Others*<sup>64</sup> and *Mpisi v Trebble*.<sup>65</sup>

In *Ntshwaqela* the applicant applied for a spoliation order, directing the respondents to restore to them, undisturbed possession of the sites occupied by them, on land belonging to some of the respondents and over which they had a right to occupy. The applicant had occupied part of a farm, however the respondents had now moved him to another area. The respondents were the landowners and the Administrator of the Cape and the Minister of Law and Order both of whom opposed the order. The second and third respondents contended that: 1. no dispossession had occurred since the possession was surrendered by consent, and 2. the second and third respondents did not have possession and therefore they could not restore possession. In deciding the matter Howie J. drew attention to the fact that he did have to decide whether the applicants had any legal right to occupy, since the relief sought was a spoliation order. He held (at pg. 221C-D) that an applicant for a spoliation order must prove that he was in 'peaceful and undisturbed possession' and that he was unlawfully deprived of possession. In addition, in this matter it had to be determined whether the second and third respondents could restore possession. The Judge described the applicant's possession as 'quasi-possession of the incorporeal right to occupy part of the land.' It was held furthermore, that proof of the alleged incorporeal right was not required before a spoliation order could be granted. Howie J. held that on the evidence before him the applicant had been dispossessed against his will and without the authority of any order of court, pursuant to the provisions of s3 of the Prevention of Illegal Squatting Act. He held (at pg. 224I-225J) that 'convincing' squatters to leave the land 'voluntarily' in the face of a huge police presence amounted to forcing them to leave under duress. He held that in acting as they did, the respondents took the law into their own hands, and according to *Fredericks and Another v Stellenbosch Divisional Council* such behaviour could not be

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<sup>63</sup> 1988 (3) SA 218(C), 1990 (1) SA 705 (A)

<sup>64</sup> 1991 (2) SA 630 (C)

<sup>65</sup> 1992 (4) SA 100 (N)

condoned or countenanced. The Court held also, that even if at the time when a spoliation application was brought the spoliator was not in possession of the property, this did not amount to an impossibility on his part to restore possession. If he could reasonably possibly recover and then restore possession, or if it was reasonably possible for him to effect restoration of possession without actually recovering possession himself, then a spoliation order could be granted against him. In this regard the Court referred to *Fredericks and Naidoo v Moodley*.<sup>66</sup> In the matter before the Court it was held the second and third respondents could physically and lawfully, through their servants, effect the return of the applicant to the site in question. In an appeal to the AD the decision *a quo* was confirmed.

The applicant in the *Kayamandi Town Council* case instituted, in terms of s 21(a) of the Black local Authorities Act 102 of 1982, an urgent application against nine named respondents that they vacate and be prohibited from re-occupying certain specified stands under the applicant's control. The applicant alleged that a group of about 150 persons, among them the respondents, had begun erecting squatter shacks on land which had been earmarked for residential development and that such development could not proceed while the squatters were in occupation of the land. The respondents opposed the application on a number of grounds, inter alia, the fact that some of the respondents had permission to occupy the land. In addition two of the respondents brought a counter application for the review of the applicants' decision to launch its application. It was argued that the provisions of the Prevention of Illegal Squatting Act read with Act 102 of 1982 made it obligatory for the applicant, in resolving to institute action for the removal of squatters, to give some thought to what was to become of them. It was common cause that the applicant had not given thought to the question of making alternative land available to the squatters prior to attempting to remove them. In this regard Conradie J. (at pg. 637C-E) held that although the Prevention of Illegal Squatting Act did not explicitly state that the availability of alternative land had to be considered before a decision to eject squatters was taken, the tenor of the Act clearly indicated that such availability had to be considered, eg. s3(1)(c), s5(1) and s6(1). Furthermore, it was held that the failure to consider the relocation of the displaced squatters was material and prevented the fair and reasonable administration of the Act. The application was hence dismissed.

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<sup>66</sup> 1982 (4) SA 82 (T)

In the appeal in *Mpisi* the applicant claimed patrimonial damages, being the value of the materials used to erect a structure and the movables therein which were destroyed when the structure was demolished without a court order in terms of s3B(1)(a) of the Prevention of Illegal Squatting Act. The respondent argued that the relief sought was incompetent by virtue of the provisions of s3B(4)(a) of the Act. Booyesen J. held that s3B(4)(a) was an ouster clause which precluded a person, such as the appellant, from obtaining a judgement or relief if such is founded on the demolition of the structure or the removal from the land of any material used in the construction of the structure. Furthermore, it was held that the demolition permitted by s3B did not contemplate the contents of the structure, so that there is no statutory justification for demolition or burning of the contents of the structure. The Court therefore held that the ouster clause was not applicable where the matter related to the burning of the contents of a structure, and it also granted compensation to the applicant for the loss suffered from the burning.

In all these cases the Court took a very liberal stance on squatting and applied the provisions of the Prevention of Illegal Squatting Act very restrictively.

In *Port Nolloth Municipality v Xhalisa and Others, Luwala and Others v Port Nolloth Municipality*<sup>67</sup> the Court used great ingenuity to provide relief for squatters. In these cases the respondents in the first case and the applicants in the second case were residents of 'tent towns or shanty towns' located within the territorial borders of the Municipality of Port Nolloth. In both of the cases the residents alleged that the Municipality had undertaken to allow them to remain in the temporary homes which they had provided for them until permanent accommodation could be built for them. The Municipality however, contended that the accommodation at all times had been intended to be of a temporary nature and that the residents were aware at all times that their occupation on the land was at the Municipality's pleasure. In the *Xhalisa* application the Municipality sought an order authorising it to eject and/or remove from the municipal area all persons named in its application together with all other persons occupying the 'tent and shanty towns' named in its application. The application was based on the provisions of the Group Areas Act 36 of 1966. The Court held that the claim as it was framed was incapable of being sustained in law and dismissed the application. In the *Luwala* application, for an order preventing the

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<sup>67</sup> 1991 (2) SA 98 (C), 1991 (3) SA 98 (C)

ejectment and the intended demolition of dwellings, the Court held that the only legislation which oust the jurisdiction of the Court to grant relief from the Municipalities's intended spoliation, or to confer upon the Municipality the right to demolish any of the applicant's dwellings, was the Prevention of Illegal Squatting Act, notably s3B(1)(a) and s3B(4)(a). The Court held that s3B(4)(a) did not apply where the dwelling in question was a tent because the section specifically refers to 'demolition' and a tent cannot be demolished it can only be struck or removed. Indeed, the Court held, it was questionable whether a tent was in fact a 'building or structure'. The Court held that s3B(1)(a) could also not be applied because occupation was with the owner's consent and the Legislature could not have intended him, without originally specifying that the consent is for a fixed period, to be able to revoke this consent and then demolish the dwellings without a court order. Berman J. also Held that where consent had previously been given the occupier did not have to satisfy the Court as to his right to lawful occupation.

Against these cases however have been cases like, *Mbangi and Others v Dobsonville City Council*,<sup>68</sup> *Beyers and Others v Mlanjeni and Others*<sup>69</sup> and *Kgosana and Another v Otto*;<sup>70</sup> where squatters have been evicted.

The applicants in *Mbangi* were residents of the 'open veld' and 'erected shacks in the open veld'. Several of these shacks were demolished and when the applicants approached the Soweto Civic Association he was informed that the respondent had decided to demolish the shacks on the property belonging to the respondent. An interdict was now sought against further demolition and in addition an order was sought to restore possession and re-erect the dwellings that had already been demolished. The Court held that "the object of the *mandament van spoile* was to reverse the consequences of an interference with an existing state of affairs relating to possession, otherwise than under the authority of the law". However, Flemming J. (at pg.335H-337A) held, the that the *mandament* was only available where the possession in issue was 'peaceful and undisturbed' possession. The Judge quoted

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<sup>68</sup> 1991 (2) SA 330 (W)

<sup>69</sup> 1991 (2) SA 392 (C)

<sup>70</sup> 1991 (2) SA 113 (W)

*Ness and Another v Greeff*<sup>71</sup> as authority for the fact that the possession which is sought to be protected or restored must be possession which is sufficiently firm or established. Hence where sufficient resistance or counteraction to the possession persists, such possession is not peaceful and undisturbed. Thus the Court concluded that in terms of the common law respondent's conduct was lawful. Flemming J. held that the respondent's conduct was also lawful on statutory grounds, in terms of s3B(1)(a) notwithstanding the fact that the structure demolished was in the possession of some person with whom's possession interference was not authorised.

In *Beyers'* case the Court had to decide whether the owners remedies under the Prevention of Illegal Squatting Act were additional to those existing at common law or whether they operated to destroy such existing rights. The Court also considered whether, in an action for ejectment, it had the discretion to give the wrongful occupier time to vacate. The respondents argued that the applicants were not entitled to apply to Court for relief because the remedies provided in the Act were exhaustive and excluded any other civil remedy. Williamson J. quoting the case of *Kwanobuhle Town Council v Andries and Others*<sup>72</sup>, where a similar argument was raised and rejected, held that there was no merit to the argument. According to him the Act "gave the Court who convicts a person of squatting the discretion to order the ejectment of such person ". This Williamson J. held was a discretionary remedy and the owner of land illegally occupied was not entitled to demand such an ejectment order as of right. The Judge held that if the respondents' argument was right "it would mean that the Legislature has, without directly saying so, taken away the fundamental right of an owner of property, who has been spoliated, to approach the Court urgently for relief and has put in its place a somewhat cumbersome, time-consuming and discretionary procedure which gives the owner no rights". The Court held that it was unthinkable that such a fundamental alteration to existing rights and the common law could ever have been intended by the legislature. The Court therefore found that the Prevention of Illegal Squatting Act provides the owner of land, which squatters have occupied without his consent, remedies and procedures additional to those already existing at common law and does not by word or intent operate so as to destroy existing rights. It was argued by the

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<sup>71</sup> 1985 (4) SA 641 (C)

<sup>72</sup> 1988 (2) SA 796 (SE)

respondents that if an order for ejectment was to be made then time should be given to them to vacate. In this regard (at pg. 397A-E) the Court quoted the case of *E. P. du Toit Transport (Pty) Ltd v Windhoek Municipality*<sup>73</sup> where it was held that the suspension of an order of ejectment was a privilege that should not be extended to an occupier of premises or land who does not establish on a balance of probabilities that his original occupation was by virtue of some agreement with the owner or some other form of lawful occupation. The Court held that since occupation, in this situation, was unlawful it could not suspend execution of the order.

The respondent in *Kgosana's* case was the owner of fixed property on which the applicants squatted and erected shacks. The respondent alleged that they did not have his permission to do so and in this way disturbed his peaceful and undisturbed possession. Immediately upon becoming aware of the applicants' trespass the respondent approached the local authority to terminate the spoliation in terms of the Prevention of Illegal Squatting Act. In an attempt to do so, the local authority, at the request of the respondent, demolished the shacks on nine separate occasions but after every demolition the shacks were rebuilt. The applicants then obtained a *rule nisi* calling upon the respondent to restore the applicants' undisturbed possession of the site occupied by them, to reinstate the homes and dwellings previously occupied by them on the site to the condition they were prior to the demolition, interdicting and restraining the respondent or any of his officials from unlawfully destroying the homes and dwellings when restored and directing the respondent to return or restore to them the property removed or the equivalent of the property destroyed during the demolition. The respondent now sought to resist that rule on the basis that: 1. s3B(1)(a) of the Prevention of Illegal Squatting Act entitles an owner to demolish and remove any structure or building on his land without an order of court where such structure or building had been erected or occupied without his consent, 2. in terms of the common law the applicants were the spoliators and that the respondents actions hence constituted a defensive measure. De Klerk J. (at pg.115F-116C) distinguished this case from *De Jager and Others v Farah and Nestadt*<sup>74</sup> and rejected the view that an ejectment order was required before the demolitions in terms of s3B(1)(a). The Court also rejected the argument that other

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<sup>73</sup> 1976 (3) SA 818 (SWA)

<sup>74</sup> 1947 (4) SA 28 (W)

remedies should have been exhausted before the respondent acted in terms of s3B(1)(a). The Court held further that when the shacks were demolished the applicants were no longer in peaceful and undisturbed possession and therefore could not seek a spoliation order.

Two other recent cases were *S v Lutu*<sup>75</sup> and *Mkama v Administrator of Transvaal*.<sup>76</sup>

It is submitted that these recent cases depict the anomalous situation the judiciary finds itself in. On the one hand it is recognised that squatting is an inevitable characteristic of urban South African life and that squatters should also be afforded redress from the law. On the other hand the owners rights have always been and continue to be pervasive in our law and it is often uncertain to what extent these rights should be sacrificed.

There have been numerous instances of squatting most recently. Of most importance judicially has been the granting of an interdict to squatters in Cato Manor against their threatened removal, and the eviction notice granted against squatters at Claridge Court in Johannesburg.<sup>77</sup> The squatters at Claridge Court were evicted but they reoccupied the building. The police were called in to arrest the squatters and a gunfight ensued. Since then the police have refused to make further arrests and have decided that the Government be brought in to deal with the matter. Another interesting development has been the formation of the South African Homeless Peoples Federation, which represents squatter communities throughout the country. This organisation claims that the invasion of vacant land is the only way in which squatters can express their desire for proper housing and it suggests that squatters occupy land that is owned by the government and not privately owned land.

### 3.2. The Less Formal Townships Establishment Act 113 of 1991

The single case on the Less Formal Townships Establishment Act, *Diepsloot Residents and Landowners Association and Others v Administrator of Transvaal and Others*,<sup>78</sup> also

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<sup>75</sup> 1989 (2) SA 279 (T)

<sup>76</sup> 1992 (2) SA 278 (T)

<sup>77</sup> This information is drawn from various media reports.

<sup>78</sup> 1993 (3) SA 49 (A) 1993 (1) SA 577 (T)

depicts the difficulty of interpreting and implementing new policy and legislation in conjunction with our existing common law, especially as it relates to the concept of ownership. This case was an application for an interim interdict ordering the Administrator not to proceed with the settlement of persons on land designated in terms of the Less Formal Townships Establishment Act, on the ground that such settlement would cause a public nuisance and would interfere with the common law rights of the applicants. The Court held that the enquiry was whether and to what extent the powers conferred on the Administrator by the Act justified an interference with the common law rights of third parties. De Villiers J. held that it could not be said that it was impossible to create a settlement in terms of the Act without an interference with such common law rights. It was also held that there was no indication in the Act that the Legislature intended, in the exercise of the powers conferred by the Act, to justify an interference with the common law rights of third parties where such an interference amounts to a public nuisance. To discharge the onus that such interference had necessarily to occur the Administrator would have to prove that the settlement of any number of persons would inevitably result in the creation of a public nuisance. The interim interdict was granted but the application was referred to evidence in respect of certain issues, inter alia: 1. whether the Administrator's decision to proceed with the settlement was reviewable on certain grounds and 2. whether the Administrator should be interdicted from proceeding with the informal settlement on the ground that it would cause a public nuisance and would interfere with the applicants' common law rights as owners of the land adjoining the proposed settlement site. In its judgement the Appeal Court dealt with other issues that arise from the Act. The Court removed the ambiguity in s3(1) of the Act requiring notice of the designation of land for the establishment of settlements. The Court held (at pg.53H-54A) that such notice was not intended to be given to the local authority that made available the land, but to any other local authority within whose jurisdiction the designated land might fall. The applicants argued that the Administrator's notice in terms of s3(1) was subject to a suspensive condition and that hence the Administrator was not entitled to proceed with the settlement of persons on the site prior to approval of the township plan. The Court (at pg. 55A-B) held that the condition that the final lay-out plan and draft conditions of establishment be approved was of a resolute nature and had the effect that the notice would fall away if the layout plan and draft conditions were not approved. The applicants also raised numerous grounds of review, all of which were dismissed. Regarding the ground of review that the

Administrator's decision ought to be set aside on the basis of gross unreasonableness. The Court held (at pg. 59D-61B) that the applicants had neither alleged nor adduced evidence complying with the test for unreasonableness as defined in *National Transport Commission and Another v Chetty Motor Transport Pty (Ltd)*.<sup>79</sup> As to the granting of a final interdict, McCreath J. held that the requirement for granting an interdict was a clear right, injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy. The first and third requirements had been established, but not the second. The Court held that proof of this requirement did not detract from the onus upon the applicants to establish, on a balance of probabilities the nature and extent of the nuisance complained of. This the applicant failed to do. The Court accepted the respondents defence of statutory authority and held that once such a defence is established the onus shifts to the applicant to show that by the adoption of certain precautions or the adoption of another method the extent of the infringement on his rights can be lessened. Again the applicants failed to discharge this onus. The Court held (at pg. 63C-D) that the Less Formal Townships Establishment Act was intended to satisfy an urgent need. This urgency was emphasized by the provisions of the Act and the Legislature fully envisaged that in given circumstances interference with the private rights of others would ensue and would be inevitable. The Court held further that the applicants had based their case in regard to nuisance on an increase in crime and air pollution and the diminution of their property values, these however were necessary consequences of the powers conferred by the Act (at pg. 65E-F). The Court accordingly refused to grant the interdict.

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<sup>79</sup> 1976 (3) SA 726(A)

## CHAPTER 4

# CONCLUSION

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"Environmental problems are social problems anyway. They begin with people as the cause, and end with people as victims. They are usually born of ignorance or apathy. It is people who create a bad environment - and a bad environment brings out the worst in people. Man and nature need each other. There is so much that needs to be done to halt the destruction of our world environment, so many prejudices and so much self interest to be overcome. How can the situation possibly be changed in the time available?"<sup>80</sup>

When considering the jurisprudential and legislative developments analyzed above the inevitable conclusion is that thus far environmental considerations seem to have a quality and identity that is entirely separate to that of urban development particularly in relation to informal housing. The legislation, both the Prevention of Illegal Squatting Act and the Less Formal Townships establishment Act do not adequately address the environment threat posed by squatting and informal housing. The Prevention of Illegal Squatting Act had a provision that could have been useful in specifically addressing environmental concerns, i.e. the provision that a magistrate could order the removal of squatters where the "health and safety of the public generally was threatened", this provision however was removed in the 1988 amendment to the Act. The Less Formal Townships Establishment Act makes provision for the carrying out of environmental impact assessments but these are sidelined by the need for expediency as prescribed by the Act. The White Paper on Land Reform recognises the need for environmental consideration in the formulation of national policy. However this recognition has not been given adequate identification in any of the Government's action, since then. Indeed the Residential Environment Bill, mentioned in the White Paper, was never even enacted. Perhaps this inadequacy can be partly attributed to the fact that since 1991 we have in South Africa a new African National Congress led Government, and this Party, in its election campaign promised explicitly to eliminate the housing crisis in the country. Environmental considerations do not even arise in the case

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<sup>80</sup> Hillary E. 'The Changing Face of the Earth', *Ecology 2000*, New York . Beaufort Books (1984) pg15

law, indeed in the bid to deal with the housing crisis they have been completely ignored. It is submitted that this attitude represents a serious flaw on the part of both the judiciary and the legislature because environmental problems once they arise cannot be put on a "hold on" until some later date when there are less pressing concerns.

It is conceded that one of the greatest issues facing South Africa is that of meeting the land, shelter and service needs of its rapidly growing predominantly poor population. It is recognised that the establishment of informal or less formal settlements is perhaps the only immediate way of meeting those needs, it is also recognised that a solution to the housing issue will also surely prevent the environmental threat posed by informal settlements. However it is submitted that until the legislature and judiciary actually give greater priority to environmental considerations, development should occur in a manner that is socially and environmentally sustainable. The best way of doing this according to Gawith<sup>81</sup> is to ensure that the complex relationship between communities that are informally housed and the environment be recognised and accommodated in the planning and decision-making processes. However at the same time there are numerous constraints to the incorporation of environmental concerns in the planning and decision-making processes. These include:

1. Land availability and ease of acquisition - the limited availability of undeveloped land may result in less appropriate parcels of land being selected for the development of informal settlements.

2. Financial constraints - much urban land is privately owned and its price is market determined. High acquisition costs may therefore also prevent certain appropriate pieces of land being considered for the establishment of informal settlements. In addition environmentally sensitive development and environmental impact assessments also increase costs.

3. Time pressures - the urgency to identify and complete development may result in the omission of consideration for environmental concerns.

4. Political and social dynamics - these factors may constrain the consideration of environmentally preferred alternatives and sensitive issues.

Gawith recommends that affected communities be given the opportunity to actively participate in the planning process. This according to O' Regan<sup>82</sup> would create a pluralist

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<sup>81</sup> op. cit. n2

<sup>82</sup> op. cit. n11

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democracy as far as urban development is concerned. It is recommended also that the planning process must consider the long term sustainability of the development. Finally it is recommended that people be educated on the importance of being environmentally conscious in order to create an environmental ethic even in the lives of informal settlers. In conclusion it is submitted that the existence of both the environmental right and the right to housing in our Bill of Rights is certainly to be applauded, however in order to be effective both these rights should be given equal status and in fact informal settlements should be regarded as part of the environment.

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