Invasions, evictions and the law in South Africa Marie Huchzermeyer Postgraduate Housing Programme University of the Witwatersrand

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On the theme of land and housing rights in South Africa: the South African Constitution (1996) rejects the status quo, and sets out to transform society into one that has less inequality. Yet it also protects existing rights, making transformation very difficult. In relation to housing, the rights to equality, the qualified right to the progressive realisation of housing, children's unqualified right to shelter, the right to protection of property, and the qualified right to progressive realisation of land reform need to be considered.

Legislation after 1996 has given meaning to the Constitution. The act that applies to the case studies in this paper is the PIE Act of 1998 (note the emphasis on "prevention of illegal eviction", as opposed to the "prevention of illegal squatting, as per the 1951 act it replaced; note also the correct legal term for informal settlements: "unlawful occupation"). This act requires eviction procedures to be followed, and if occupation has extended 6 months, then the rights increase. The act gives differential rights to special needs groups (elderly, etc.). Urgent eviction orders can be granted on the grounds of health or other risks (the right to appeal still applies). In two of the case studies in this paper (Alex and Bredell), urgent eviction orders were granted.

It is important to note that interpretations vary in judgements. As yet, there has been no radical interpretation of the housing right, in a way that would lead to permanent rights to the unlawfully occupied land. Grootboom was a liberal judgement, for temporary rights. Most mainstream judgements are conservative. A further category is the tough judgements, of which the Bredell case is an example. This judgement was heavily weighted in favour of existing property rights and investor confidence.

In the Grootboom case a landmark high court ruling was made on the child's right to shelter, ruling that temporary shelter be provided for some 900 people including children. This was appealed by the municipal and provincial government in Constitutional court, with the argument that this would dilute the

limited resources for the housing delivery programme. The Constitutional court ruled that the government's housing programme should not only provide for medium to long term housing delivery, but also fulfilment of immediate needs, and the management of crises. However, it was not prescribed how and by when. Three years later, a policy adjustment deals with emergency circumstances. However the need for an appropriate response to Grootboom remains a concern.

In the Alexandra Urban Renewal Programme evictions and relocation from the banks of the Jukskei River, a landmark appeal for compensation was made (Mrs Mqokomiso). The eviction in June was based on an urgent eviction order granted three months earlier. The risks to which the urgent eviction related (flooding and cholera), did not exist at the time. The relocation was to unserviced land at a distance of 30km. The appeal to high court was for compensation for loss of property as well as inconvenience. This was settled out of court. However, under pressure from the Human Rights Commission, a relocation package was introduced by the Alex Renewal Programme.

The Bredell case (July 2001) began with the gradual invasion of land, some occupying for longer than 6 months. This was followed by a rapid increase of invasion, up to 10 000 people. At the time there was international media attention on invasions in Zimbabwe, and what South Africa's position was regarding the rule of law in the neighbouring country. When the first arrests were made at Bredell (using the Tresspass Act of 1959, not repealed since 1996 Constitution), the value of the rand dropped against the US\$ considerably. Government's perception was that South Africa needed to demonstrate the rule of law. A journalist however suggested that investor sentiment was affected by the human rights abuses presented in the media, not necessarily the unlawful occupation as such. On the day of the tough ruling, the rand dropped again, possibly confirming the journalist's suggestion.

Bredell too was an urgent eviction order, but taking no consideration of the cold weather that evictees were to suffer from. The ruling did not differentiate between those with special needs, and those that had occupied for more than 6 months. With very limited analysis at the time, the otherwise radical National Land Committee, and the National Council of Churches, agreed with the ruling.

Through the intense media coverage of the Bredell case, a message was brought to all landless citizens (post-Grootboom) that the courts are unlikely to assist in access to urban land for the poor. In conclusion, there is a need for greater civil society mobilisation around the right to housing. Interesting comparisons can be drawn with the subsequent Constitutional court case of the Treatment Action Campaign.

Land invasions, evictions and the law in South Africa

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Introduction

Low-income residents in urban South Africa have made use of the courts to fight for what they perceive as their democratic right to a home in the city. Despite a democratic Constitution since 1996, with a Bill of Rights that includes socio-economic rights such as that to adequate housing (albeit with a proviso), there is little consistency in the outcome of the route of access to the city through the judiciary. Over the past 2 years, several eviction-related cases that involved court applications by illegal occupiers for short periods dominated the news in South Africa, and are frequently referred to in the media.

This paper contrasts two very different outcomes, "Grootboom", which is hailed internationally as groundbreaking, and "Bredell", which is largely ignored by housing and human rights analysts. The Grootboom case was taken to Constitutional Court by a municipality challenging a High Court ruling in favour of evicted squatters. The Constitutional Court then ruled that the South African housing policy must be adjusted to meet the immediate needs of those living under desperate conditions. In the Bredell case, which involved an order for the urgent eviction of illegal land occupiers at a time when the international spotlight was on the land invasion crisis in Zimbabwe, the High Court ruled against appeals by individual squatters with actual rights, and the case was not taken further. These two cases question the role of courts in a democratic, yet unequally developed country like South Africa. Although Grootboom involved some interference by the judiciary in the affairs of the executive arm of government, the judiciary seems reluctant to rule in favour of the poor, when the economy or investor confidence is at stake.

Before discussing the two cases, the paper briefly reviews the current laws applying to land invasions and evictions. It is evident that since the late apartheid years, the legal situation in terms of democratic access to the city has improved. However, it appears that the role of the courts, instead, has become more ambiguous. As primary informer of investor sentiment in a neoliberal dispensation, the media is now in an increasingly delicate position, where reporting on a land invasion may do more harm than leaving it ignored.

Legislation governing invasion and eviction

The Bill of Rights in the South African Constitution if 1996 (Act No. 108 of 1996) defines that "everyone has the right to have access to adequate housing"; that "the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right"; and that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions" (S26, 1-3). It further defines an unqualified right to shelter by children (S27,1).

The Bill of Rights protects existing property rights, providing the basis for land reform, in particular as it relates to past discrimination under apartheid. Beyond this, it states that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis" (S25, 4). "Equality" is defined as including "the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" (S9,2). The latter reflects the transformative nature of the South African constitutional project, which rejects the status quo and aims to achieve a more just and equitable society. The Bill of Rights therefore has the role of both

protecting existing entrenched rights and privileges, and extending "the enjoyment of rights to all" (de Vos, 2001:261). In relation to access to land by the poor, this entails a conflict or contradiction, which is proving difficult to overcome.

New legislation has been enacted since 1996 to give meaning to these sections of the Constitution. Where land outside of a formally declared township has been occupied with the consent of the owner, the Extension of Security of Tenure Act of 1997 (ESTA – Act No. 62 of 1997) applies. The Act prescribes eviction procedures. These include that relevant circumstances should be considered by the court. In the case of the Bredell invasion, the appeal by a longer-term occupier of a government-owned portion of the land, who had rights in terms of that act, was based on these provisions.

In other cases of land occupation and eviction, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (PIE – Act No. 19 of 1998) applies. This Act for the first time criminalises unprocedural evictions. The procedure set out for eviction in PIE differs according to the length of occupation. Where this has exceeded 6 months, it must be considered whether alternative land "can reasonably be made available by a municipality or other organ of the state or another land owner" (p. 829). Where the land has been occupied for less than 6 months, an eviction order may only be granted "after considering all the relevant circumstances". In both cases, "the rights and needs of the elderly, children, disabled persons and households headed by women" must be considered (ibid.).

In the same Act, special procedures are prescribed for urgent eviction. These apply in cases where a) the occupation implies a danger to any person or property, b) where the owner's or any other person's hardship resulting from the occupation exceeds that of the occupier, if evicted, and c) "if there is no effective remedy available" (p. 831). The Act also sets out procedures relating to effective notice for eviction to the unlawful occupier. This includes an explanation of the grounds on which the eviction is required, and a statement that "the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid" (ibid.). In the case of Bredell, an urgent eviction order was granted on the grounds of health. The lawyer representing some of the evictees, challenged the seriousness of the danger/threat to the occupier's health, and challenged the eviction procedure in terms of the notice given. The final High Court judgement in the Bredell case disregarded these rights and remains unchallenged

Reflecting on the ambiguity of judgements within the post-1996 legal framework, Roux (personal communication) notes that there are three types of legal interpretations of the rights discussed here. First of all, there are no radical judgements. The closest a judgement may be to supporting illegal occupiers' rights would be in a liberal sense, as exemplified by the Grootboom case. Even this legal interpretation in South Africa would refrain from requesting the government to give permanent rights to the illegal occupiers of land and to upgrade infrastructure and services as is common practice for instance in Brazil, as this would condone land invasions. As is seen below in the discussion of Grootboom, the state could not be easily bound even by a liberal order of court. The second type of judgement would be informed by the "correct" legal interpretation, which is invariably conservative. The third type of judgement is what Roux refers to as the "tough approach", where competitiveness is taken into account, and the ruling is weighted in favour of property rights and the sentiment of investors. This clearly was the case in the High Court ruling over the illegal occupation at Bredell.

Grootboom: a landmark ruling

In 1998, some 900 residents of the overcrowded Wallacedene settlement in Cape Town had illegally occupied vacant land that was earmarked for low cost housing. The owner made an application for eviction to the Magistrate's Court in late 1998, which was granted. Upon eviction, the residents found that they could not return to their former living space in Wallacedene, as this had been taken by others, and therefore constructed makeshift shelters on a sports field in Wallacedene. These, however, were inadequate to protect their children from the elements. (Davis, 1999)

One of the evicted people, Mrs Grootboom, sought relief on behalf of the group, by appealing to the High Court on the basis that their constitutional right to adequate housing, and their children's right to basic shelter had been denied. After scrutinising the housing programmes of the various levels of government, the High Court judge was convinced that "a rational housing programme had been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources" (Davis, 1999:14). As the constitutional rights had only come into force on 4 February 1997, it could not be expected that the housing crisis already be solved. The judge concluded that in terms of the qualified right to adequate housing (Section 26 of the Constitution), the applicants had no claim on the authorities. (Davies, 1999)

However, in terms of the unqualified right of children to basic shelter, the High Court judge considered whether such shelter should be provided in an institution, or whether the children should be sheltered with their parents, who at this stage were unable to provide shelter. It was felt that it was in the children's best interest to be sheltered with their parents. The provincial and national governments argued that providing shelter on this basis would distract scarce resources from the implementation of the housing programme, and feared a flood of demands from other squatters.

From a previous socio-economic rights case in the medical field, the judge quoted that "[a] court will be slow to interfere with rational decisions taken by good faith by political organs and ... authorities whose responsibility it is to deal with such matters" (Davis, 1999:8). However, in his ruling on 17 December 1999, the judge stated that in terms of Section 28(1)(c) of the Constitution, namely the child's unqualified right to basic shelter, the authorities were obliged to provide as a bare minimum "tents, portable latrines and a regular supply of water (albeit transported)," within a three month period, and until such time as the parents were able to shelter their own children (Davis, 1999:26). This ruling was challenged by the Municipality, in the Constitutional Court.

The attorney of the *amici curae*, Geoff Budlender, prepared a detailed analysis of the case, questioning in particular the governments' argument that meeting the housing needs of those living under the worst conditions would deflect resources from the medium- to long-term housing delivery programme. He argued that the government had not attempted to assess how many people live under such conditions, and therefore had no idea of the actual cost of meeting their immediate housing needs. In contrast to the High Court ruling, Budlender argued that the magnitude of the housing backlog was no excuse for inactivity over the past three years. Instead, Budlender argued, the government should have prioritised meeting the "minimum core obligation," the needs of the most desperate and vulnerable (Budlender, 2001, para 83). Budlender further discarded as unrealistic the argument that government offices would be flooded with people claiming realisation of their progressive right to adequate housing (para 90.2).

The Constitutional Court ruling by Judge Yacoob was based on the arguments put forward by Budlender. In contrast to the earlier High Court ruling by Judge Davis, the Constitutional ruling took issue with the government's stance that meeting these immediate needs would compromise the medium to long-term objectives of the housing programme, in terms of resource allocation. On this basis, Yacoob's ruling prescribes that the housing programme must plan not only for the medium to long term delivery of housing, but also for "the fulfilment of the immediate needs and the management of crises," ensuring that "a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately" (quoted in the Financial Mail, 2000). The judgement does not prescribe to the government, what measures should be taken in extending the housing programme to the most needy.

In legal terms, the Grootboom ruling in the Constitutional Court has implications beyond housing, and applies to the realisation of all socio-economic rights. It is therefore referred to as "the most important judgement to date in South Africa's post-apartheid legal history" (Legal Resources Centre, 2002:2). The implications of the Grootboom case have been widely debated. In terms of

social assistance, the ruling obliges the state the assist those living under intolerable conditions (Liebenberg, 2001). In terms of housing policy, the ruling obliges the government to develop temporary or emergency shelter for those living under the worst conditions. It has been argued that "[t]he ruling could lead to a total overhaul of the government's housing policy," (BBC News Online, 2000). However, only in June 2002, almost 2 years after the Constitutional Court ruling, the national Department of Housing has put out a tender for policy proposals for emergency housing.

The Grootboom case has sparked a debate as to the role of the Bill of Rights and the judiciary in relation to policy-making, resource allocation and implementation. While some argue that socio-economic rights issues are for politicians to adjudicate, judges can now be in a position where they have to prescribe to politicians, particularly since a broad macro-economic policy shift towards neoliberalism, which began in 1996. It has been argued that not all judges feel for the poor, and trusting that their decisions are wiser than those of elected politicians reflects a form of defeatism for democracy (Friedman, 2000). This view has relevance in relation to the second case discussed in this paper, where a conservative High Court ruling regarded the Grootboom precedent as not applicable.

Bredell: a political decision to evict

The invasion of unutilised land near the suburb of Bredell in Kempton Park, Johannesburg in July 2001, was consistent with a trend of land invasion that is remaining largely unreported. The political context within which the Bredell invasion took place drew media attention. Intense debate was underway about South Africa's position on the government-backed occupation of productive farms in neighbouring Zimbabwe. Suddenly, the seemingly massive invasion of 23 hectares of rural land referred to as 'Bredell' (the name of the neighbouring suburb) on the eastern outskirts of Johannesburg dominated the news headlines for over a week. Figures were mentioned of up to 10 000 people. A government-owned portion of the land had already been occupied for more than 6 months. A gradual invasion of the neighbouring private/para-statal owned portions, which was never formally documented, grew in pace and when arrests were made on grounds of the *Trespass Act No. 6 of 1959*, the invasion drew media attention.

The course of events at Bredell was inextricably tied to happenings in Zimbabwe, and to the international interest in President Mbeki's response to Zimbabwean President Mugabe's much criticised position, which was to be debated at the 9 July meeting of the African Organisation of Unity (AOU) (Sunday Times, 2001, 8 July). Although reports were that the invaders had first been asked to pay a small levy to the ANC (BBC News Online, 2001, 12 July), further political attention was attracted to the invasion, when the Pan African Congress (PAC), offered support to the squatters, requesting a small fee. The PAC is an opposition party that has advocated for equitable access to land, and has criticised the ANC-led government for its slow progress on land reform. It is also know to be sympathetic of the land redistribution process in Zimbabwe, and therefore viewed with great suspicion when aligning itself with land invaders.

Land invasions in Zimbabwe and the deliberations of the AOU would not have influenced the course of events at Bredell, had the media not catapulted the Bredell invasion into international awareness. Having already speculated as to whether land grabbing in neighbouring Zimbabwe would spread to South Africa, articles in the international press linked Zimbabwe, the AOU and Bredell (e.g. BBC News Online, 2001, 18 May, 11 July). In South Africa, the national week-end press cast Bredell as a battle field, also with reference to Zimbabwe (e.g. Sunday Independent, 2001, 8 July). A number of reports debated the local and international political dimensions (e.g. Sunday Independent, 2001, 15 July), others were reflective, pointing to causes of invasion and to the rights of the vulnerable, critiquing policy and calling for changes (e.g. Sunday Independent, 22 July). However, the policy debate was framed purely as one of rural land reform, ignoring that the squatters at Bredell were seeking accommodation to maintain their urban livelihood.

The media's concern about the squatters and the infringement of their human rights did not enhance investors' perceptions in relation to the rule of law and levels of development in South

Africa. From 4 to 7 July, the Rand dropped by 23 cents to the US\$, stabilising thereafter, and only dropping again that month (though only of 3 cents) on 13 July, the day of the High Court judgement opposing the squatters' appeal. Prior to this ruling, the minister of Land Affairs had predicted that "[w]hen the foreign investors see a decisive government acting in the way we are acting, it sends the message that the government won't tolerate such acts from whomever" (Sunday Independent, 2001, article by Bulger, 8 July). James Lamont of the London Financial Times, paints a slightly different picture of investor sentiment, one that may be more concerned with levels of development and possibly the respect for human rights, than with the rule of law (SAFM, 2001). This could explain the drop in the value of the Rand on the day of the tough ruling of the High Court

Nevertheless, the perceived vulnerability of the Rand to speculator's confidence appears to have been one factor that pressed the South African government to demonstrate that law and order prevail in South Africa, despite chaos in neighbouring Zimbabwe. The fact that the Pretoria High Court ruling over the squatters' appeal contradicted the law in a number of ways, remained of minor interest to the international and the South African media.

Political sentiment dominated the court's decision. The eviction order had been passed on Thursday evening 5 July. Within a week, the land was forcefully cleared by a court order by the sheriff of the High Court, who hired private security companies. Lawyers representing some of the squatters pointed to a number of inconsistencies relating to the squatters' right to seek legal representation. Many were not made aware of this right. The courts were at a distance of 40km, therefore could only be reached at quite a considerable expense. Further, they were given 48 hours to seek legal representation. However, this effectively amounted to only 9 hours, since most private legal office close over week-ends, as does the Legal Aid Board. Those lawyers that were reached and willing to take the case on, did not have sufficient time to prepare affidavits on the length of occupation of their clients, and to serve and file papers at the court. The invaded land was cordoned off once the eviction notice was handed down, therefore the lawyers were prevented access from their clients. Those that were arrested, mainly the leadership, did not receive their eviction notices. The lawyers further argued that the grounds of the urgent eviction, namely health risks to the occupiers in the absence of water, bore no relation t the actual risk of eviction in the middle of winter. A water sources existed on a neighbouring property, and efforts were underway to ensure access to basic services (Snoyman, personal communication). Government ministers' statements in the media were in support of the eviction order, even arguing that it "reaffirms the democratic principles of this country" (Geomatics, 2001).

After giving the illegal occupiers such little time to seek legal representation, the High Court judge took five days to consider the appeals. In his interim judgement (which in effect was final) on 13 July, he dismissed the opposition to the eviction, and ordered that the land be vacated within 48 hours. Many vowed never to leave, but when face by the private security firms gave little resistance. Though in agreement with the ruling (despite its unconstitutionality), religious and humanitarian organisations offered temporary tent accommodation to the homeless, (South African Council of Churches, 2001).

The lawyers then continued to oppose the interim ruling. With the additional time for this application, other aspects of the irregularity of the eviction order were uncovered. These related firstly to the rights of the landowners who had applied for the eviction – some were only servitude holders who do not have the right to evict. Secondly, the Grootboom ruling had been ignored in that no minimum provisions were made. Thirdly, some of the squatters had stayed on the land for longer than 6 months, and therefore had the right to have alternatives considered. It was found that alternative land had already been purchased by the provincial government for their relocation (the "Bomberg" project), yet through the eviction procedure and their subsequent scattering, their right to this project was effectively lost. (Snoyman, personal communication).

The final ruling several months later took place without media attention. However, the Acting Judge Ginsberg dismissed all the additional evidence, and ruled in support of the interim

judgement. Again, this was clearly a political decision. In contrast to the pending policy adjustment after the Grootboom judgement, the Minister of Housing's response to the Bredell case was to announce the intention to tighten legislation so as to criminalise any instigation of invasions, even if not in return for money.

Conclusion

The two cases discussed in this paper indicate the ambiguous position of the judiciary in relation to access to urban land by the poor. It is evident that courts on their own cannot ensure changes in policy. What is required is consistent political activism. Some government lobbying followed the Bredell case. However, this has been framed exclusively in terms of rural land reform. It must be recognised by activists and lobbying groups, that the housing crisis that leads to land invasion on the urban periphery (be it in a rural district) is one of urban accommodation. This crisis will not be alleviated unless the land reform discourse engages with the inequitable distribution of land in urban areas. This discourse then needs to engage with lawyers and judges, to ensure a consistent and democratic interpretation of the rights that were secured in the 1996 constitution. In the case of Bredell, the government's tough position on land invasions, and its support for forceful evictions, was broadcast through prime media coverage to every inadequately housed resident: the route to adequate housing in South Africa is not through the courts.

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