



**THE ROLE OF LOCAL GOVERNMENT IN ACHIEVING SPATIAL
EQUITY THROUGH THE REALISATION OF THE RIGHT TO
HOUSING IN SOUTH AFRICA**

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Abstract

This Thesis deals with the role of local government in overcoming spatial inequalities in South African cities, with a particular focus on housing and access to well-located urban land. The primary focus is on whether the legal role of local government in housing matches its rights-related responsibilities and its role in achieving spatial equity. Municipalities have limited legal powers, policy scope, and budget for housing. With overstretched programmes and fiscus, certain municipalities are reluctant to assume housing delivery roles. However, numerous court cases bind municipalities by assigning them increased rights-based responsibilities which they may not be adequately equipped or empowered to implement. The problem which therefore unfolds relates to the inevitable need to address the obligations to realise the right of access to adequate housing of the urban poor within the limited legal, institutional, and structural role that local government plays in housing delivery, as well as with the limited resources at its disposal. The challenges associated with the realisation of local government's housing-related powers, functions, and responsibilities become simultaneously more complicated and less insurmountable when viewed together with local government's legal powers and functions pertaining to spatial planning. As a result, this Thesis investigates the articulation between housing and planning-related legal competencies and responsibilities of local government, in seeking to ensure that local government can fulfil its constitutional developmental role and contribute to the achievement of spatial equity. Selected case studies of the metropolitan municipalities of Cape Town, Johannesburg, and eThekweni are utilised to explore the emerging trends, issues, and challenges in practice.

Key words: central business district, city centre, competency, decentralisation, delegation, devolution, functions, location, local government, powers, right to housing, responsibility, role, spatial equity, spatial inequalities, spatial segregation, spatial planning, urban cores.

Cut-Off Date

The research for this study was completed in October 2023. The study reflects the legal position in South Africa as of this date.

Declaration of Originality

I, **Fungai Paul Mudau**, do hereby declare that **‘The role of local government in achieving spatial equity through the realisation of the right to housing in South Africa’** is my original work and has not been submitted for any degree or examination in any university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this Thesis, all the materials and sources used are duly acknowledged and properly referenced.

Signature: 

Date: **20 October 2023**

Dedication

To the loving memory of my late Mother, **Ms Tambu Selinah Sibanda** (06 May 1959 – 09 July 2023), and my daughter, **Thabile Mudau**, who lost a pillar of strength but gained a guiding angel in her late Grandmother.

Mom, with your passing at a moment when I was completing my PhD Thesis, amending the sections of Dedication and Acknowledgements was too painful and difficult for me more than writing the entire Thesis itself. I will always love you, Mom. May your soul rest in peace and may the Almighty God happily receive you in Heaven. **Asante Sana Mama.**

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Publications and Conference Contribution Emanating from Doctoral Studies

Publications

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Mudau P & Mtonga S ‘Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa’ (2020) 14(1) *Pretoria Student Law Review* 44-57.

Papers Under Review

Mudau P ‘A legal analysis of local government’s housing roles, powers, functions and responsibilities in South Africa’, *Journal of Comparative Law in Africa*.

List of Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress
AU	African Union
BNG	Breaking New Ground
CBD	Central Business District
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR Committee	Committee on Economic, Social and Cultural Rights
CoGTA	Department of Cooperative Government and Traditional Affairs
CRC	Convention on the Rights of the Child
DFA	Development Facilitation Act 67 of 1995
DMA	Disaster Management Act 57 of 2002
ECOSOC	United Nations Economic and Social Council
EHSP	eThekweni Housing Sector Plan
EPHP	Enhanced People's Housing Process
GEAR	Growth, Employment and Redistribution Program
HDA	Housing Development Agency
HSDG	Human Settlement Development Grant
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
IGRFA	Intergovernmental Relations Framework Act 13 of 2005
IRDP	Integrated Residential Development Programme
IUDF	Integrated Urban Development Framework
MDGs	Millennium Development Goals
MEC	Member of the Executive Council
MINMEC	Minister and Members of Executive Council
MSDF	Municipal Spatial Development Framework
MTSF	Medium-Term Strategic Framework
NDP	National Development Plan
NHFC	National Housing Finance Corporation
NHSS	National Housing Subsidy Scheme

OHCHR	Office of the High Commissioner for Human Rights
PHSHDA	Priority Human Settlements and Housing Development Areas
PIE ACT	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
RDP	Reconstruction Development Programme
SERAC	Social and Economic Rights Action Centre
SAHRC	South African Human Rights Commission
SDGs	Sustainable Development Goals
SDF	Spatial Development Framework
SERI	Socio-Economic Rights Institute of South Africa
SHIs	Social Housing Institutions
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
UCLG	United Cities and Local Governments
UDHR	Universal Declaration of Human Rights
UISP	Upgrading of Informal Settlements Programme
UN	United Nations
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNDP	United Nations Development Programme
UN-HABITAT	United Nations Human Settlements Programme
USDG	Urban Settlement Development Grant
WHO	World Health Organization

Table of Contents

Abstract.....	i
Cut-Off Date.....	ii
Declaration of Originality	iii
Dedication	iv
Acknowledgements	v
Publications and Conference Contribution Emanating from Doctoral Studies.....	viii
List of Abbreviations and Acronyms	x
Table of Contents	xii
Chapter 1	1
Introduction.....	1
1 Introduction and background to the study	1
2 Defining “spatial equity”	11
3 The challenge of achieving spatial equity in the 1996 Constitution and the role of housing	14
4 Research problem, research questions, research objectives, and research methodology	18
5 Literature review	22
6 Terminological clarifications	24
7 Organisation of chapters	27
Chapter 2	30
The Right to Housing Under International, Regional, and Domestic Human Rights Laws	30
1 Introduction	30
2 International human rights systems	31
2.1 The foundation of the right to adequate housing in international law instruments	31
2.2 The International Covenant on Economic, Social and Cultural Rights	32
2.2.1 Integral components of the right to adequate housing: the CESCR General Comment No 4	33
2.3 Other international human rights treaties	42
2.4 Soft law	45
2.5 The African regional human rights system	48
3 Obligations of local government: Global patterns	52
4 Domestic human rights system in South Africa	56
5 Adjudicating the constitutional right to adequate housing	65
5.1 Legal security of tenure	68
5.2 Availability of services, materials, facilities, and infrastructure	69
5.3 Affordability	70
5.4 Habitability	71

5.5 Accessibility	72
5.6 Location	74
5.7 Cultural adequacy	78
6 Conclusion	80
Chapter 3	82
The Roles, Powers, Functions and Responsibilities of Local Government Pertinent to Housing Provision	82
1 Introduction	82
2 Constitutional framework for multi-level system of government	83
2.1 Centralised federal system of government	83
2.2 Structure of multi-level system of government	84
2.3 Principles of co-operative government and intergovernmental relations	84
2.4 Supervision of local government	86
3 The evolution of local government reform	90
3.1 Status of local government before 1994	90
3.2 Status of local government after 1994	91
4 General powers of local government	92
4.1 Original powers	92
4.2 Assigned powers and subsidiarity	93
4.3 Fiscal powers	95
4.4 Administrative powers	97
5 Local government's housing roles, powers, functions, and responsibilities	98
5.1 Constitutional framework	98
5.2 Legislative framework	101
5.3 Policy framework	111
5.4 Accreditation and Assignment of housing powers and functions	122
5.5 Unfunded mandates	128
6 Reflections	131
Chapter 4	133
The Roles, Powers, Functions, and Responsibilities of Local Government Pertinent to Spatial Planning	133
1 Introduction	133
2 Defining spatial planning and related key concepts	135
3 The evolution of municipal spatial planning	140
4 Constitutional framework	142
5 Judicial delineation of spatial planning powers	145
6 Unpacking the Spatial Planning and Land Use Management Act (SPLUMA)	152
7 Connecting municipal spatial planning and housing	159

8 Conclusion	166
Chapter 5	168
The Challenges of Local Government's Housing-Spatial Planning Powers Pertinent to the Achievement of Spatial Equity	168
1 Introduction	168
2 Case studies	169
2.1 City of Cape Town Metropolitan Municipality	169
2.2 City of Johannesburg Metropolitan Municipality	180
2.3 eThekweni Metropolitan Municipality	187
3 Conclusion	196
Chapter 6	199
Toward the Achievement of Spatial Equity Through the Realisation of the Right to Housing. 199	
1 Introduction	199
2 Summary of findings	200
3 Recommendations	206
3.1 Devolution of housing powers and functions	207
3.2 Viable co-operative governance in rapid release of well-located land	208
3.3 Housing developments in well-located areas	211
3.4 Legal dimensions of spatial equity-based professional development initiatives	212
4 Areas for further research	215
4.1 Legal dimensions of rural-urban interdependency	215
4.2 Integrated public transport	216
4.3 Gender-based spatial discrimination	217
4.4 Countering urban real estate market forces	218
4.5 Enhancing spatial equity through local government's service delivery functions	219
4.6 Cultural adequacy pertaining to housing projects and spatial equity	221
5 Overall Conclusion	222
Bibliography	225

Chapter 1

Introduction

1 Introduction and background to the study

Inequality is increasing worldwide. It also manifests itself spatially. South Africa is, due to its history, one of the notable places where this spatial manifestation of inequality is most distinguishable.¹ Markedly, spatial inequality is discernible in cities and towns, where segregation and inequalities in living standards, access to housing and essential services, etc., abound.² More challenges relate to access to jobs, public space and services, and social capital.³ The apartheid system over-concentrated resources in the hands of the few, predominantly white people.⁴

The consequences of apartheid spatial planning were highlighted by the Constitutional Court in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* when it was held that:

[The] historically “White” areas were characterised by a developed infrastructure, thriving business districts, and valuable rateable property. Those in so-called “Black”, “Coloured”

¹ The Republic of South Africa is considered to be the most unequal country in the world, see Gavin Keeton ‘Inequality in South Africa’ (2014) 74 *The Journal of the Helen Suzman Foundation* at 26; Alison Todes and Ivan Turok ‘Spatial inequalities and policies in South Africa: Place-based or people-centred?’ (2017) *Progress in Planning* at 4. Inequality is recognised as one of the most salient features of the South African society, see Statistics South Africa ‘Inequality trends in South Africa: A multidimensional diagnostic of inequality’ (2019) at 2.

² Tony Binns and Etienne Nel ‘African development: ‘Hopeless Africa, ‘Africa Rising’ or somewhere in between’ in Tony Binns et al (eds) *The Routledge Handbook for African Development* (2018) at 275. United Nations Human Settlements Programme (UN-HABITAT) refers to “socio-spatial exclusion” which denotes an array of processes contributing to the geographic marginalisation of certain individuals and groups owing to their social and economic statuses and locations of residence. The socio-spatial exclusion is characterised by the urban poor’s inability to access or effectively use a good deal of facilities and resources that are necessary to lead a decent life and position people to take advantage of available opportunities. In urban contexts, and due to their identity, these social groups suffer from disproportionate “disadvantage”, See UN-HABITAT ‘Issue Paper on Informal Settlements’ (2015) at 1. The three most familiar forces that shape spatial discrimination are class, race, and gender, see Edward W Soja ‘The city and spatial justice’ (2009) 1 *JSSJ* at 3.

³ The poor continue to struggle to access economic services with high transport costs, and constant use of unreliable public transport while the rich increasingly privatize their lives, enjoying high-quality private health, education, security, and entertainment, see Harlan C.A Cloete *Guide to effectively manage human resource development in South African local government* (2019) 2; Southern Africa Labour and Development Research Unit ‘Spatial poverty and inequality in South Africa: A municipality level analysis’ (2021) at 1.

⁴ Erika de Wet *The Constitutional Enforceability of Economic and Social Rights: The meaning of The German Constitutional Model for South Africa* (1996) at ix.

and “Indian” areas, by contrast, were plagued by underdevelopment, poor services, and vastly inferior rates bases.⁵

This depressing legacy leaves tracks of “profound social polarisation, extreme economic inequalities, and spatially divided cities [which] massively complicates the task of building a new society in which, as their constitutional right, people should have access to adequate housing”.⁶ Accordingly, among 164 countries, South Africa is ranked first by the World Bank in the global poverty database.⁷ Turok captures South Africa’s spatial inequalities as follows:

The twin pillars of spatial development are the distribution of jobs and population. Colonial and apartheid governments tended to force (black) people apart from economic opportunities, at great cost to individuals, families, and communities. More than two decades after apartheid, there continues to be a gulf between where many people live and where jobs and resources are concentrated. This aggravates unemployment and poverty for people living on the periphery and imposes additional costs on their mobility.⁸

The Accelerated and Shared Growth Initiative for South Africa (AsgiSA) identifies three key dimensions of structural inequity that result in economic marginalisation: the economy, spatial inequality, and human capital.⁹ The lack of appropriate interventions may either stimulate segregation, or possibly alleviate it, “depending on the legacies at play and the

⁵ 1999 (1) SA 374 (CC) at paras 1 and 2. See also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) at paras 19 and 46.

⁶ Peter Wilkinson ‘Housing policy in South Africa’ (1998) 22(3) *Habitat International* at 226. See also Xavia S Poswa *Municipal Planning By-laws and the extent to which they give effect to the Spatial Planning and Land Use Management Act 16 of 2013* (unpublished LLM dissertation, University of the Western Cape, 2017) at 4. In post-1994 constitutionalism, political culture and jurisprudence, Modiri interprets spatial injustice as part of constituent elements of colonial conquest, together with racism, dispossession, poverty, and epistemicide, see Joel M Modiri ‘Conquest and constitutionalism: first thoughts on an alternative jurisprudence’ (2018) 34(3) *South African Journal on Human Rights* 300, at 304.

⁷ World Bank ‘Inequality in Southern Africa: An assessment of the Southern African Customs Union’ (2022) at 1 and 9, available at <https://tinyurl.com/4237mkz2> (accessed on 09 August 2022).

⁸ Ivan Turok ‘Worlds Apart: Spatial inequalities in South Africa’ in Michael N Smith (ed) *Confronting Inequality: The South African Crisis* (2018). “The Apartheid (Afrikaans for ‘apartness’) political system of separate development and inequality was broadly based on a racial hierarchy that systematically disadvantaged those who were classified as ‘Coloured’, ‘Indian/Asian’ or ‘Black’”. Zander S Venter et al ‘Green Apartheid: Urban green infrastructure remains unequally distributed across income and race geographies in South Africa’ (2020) 203 *Landscape and Urban Planning* at 1. The archetypal “Apartheid city” spatially segregated these race groups and forcibly removed from “group areas”.

⁹ The Presidency of the Republic of South Africa ‘Accelerated and Shared Growth Initiative for South Africa (AsgiSA): 2008 Annual Report’ (2008) at 9.

willingness to intervene, the kinds of interventions used, the urban economic past and present, and the type of welfare state in which the city is embedded”.¹⁰

The disparities apply at both the regional scale (between cities and isolated rural areas) and the metropolitan scale (between the Central Business Districts (CBDs) and the main townships).¹¹ A lack of mobility restricts the urban poor from accessing possible income and employment opportunities found in the CBDs.¹² The inherited circumstances such as low inter-generational mobility, inequality of opportunity, inequitable access to essential services, the geography of economic inequality, and spatial patterns prevent most people from achieving economic and social “success”.¹³

Cities’ drawbacks in managing the soaring population growth are exacerbated by inequitable economic growth patterns.¹⁴ Peripheral areas exhibit structural spatial inequalities stemming from urbanisation processes with “small towns on the edge, large peri-urban and commercial farming areas, sprawling dormitory townships, huge swathes of displaced urbanisation in ex-Bantustans, and remote industrial and mining areas”.¹⁵ Hence, uneven development perpetuates inequality, unemployment, and poverty.

The rapid urbanisation process is predominately occurring in metropolitan municipalities.¹⁶ It also has the prospects to accelerate socio-economic development,¹⁷ provided it is managed

¹⁰ Ibid.

¹¹ J Budlender and L Royston ‘Edged Out: Spatial mismatch and spatial justice in South Africa’s main urban centres’ (2016).

¹² Kgaogelo Kgatjepe and Aurobindo Ogra ‘Sustainable transport for urban poor: A case of Johannesburg’ (2016) at 365; Juaneé Cilliers and Hestia Victor ‘Considering spatial planning for the South African poor: An argument for ‘planning with’ (2018) 72 *Town and Regional Planning* at 30.

¹³ The World Bank ‘Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities’ (2018); Thomas Piketty ‘Theories of Persistent Inequality and Intergenerational Mobility’ in Anthony Atkinson and Francois Bourguignon (eds) *Handbook of Income Distribution* (2000) 429; Gustavo Marrero and Juan Rodríguez ‘Inequality of opportunity and growth’ (2013) 104 *Journal of Development Economics* at 107

¹⁴ According to the World Bank, “at the same time, inequality and poverty in urban areas is a growing challenge as urban populations expand”, see the World Bank ‘Sustainable Development Goal 10 – Reduced inequalities: Progress and prospects’ (2019) at 4, available at <https://tinyurl.com/2fd9dj3p> (accessed on 08 August 2022).

¹⁵ Stuart P Denoon-Stevens et al ‘Unpacking planners’ views of the success and failure of planning in post-apartheid South Africa’ (2022) 130 *Cities* at 2.

¹⁶ Section 2 of the Local Government: Municipal Structures Act 117 of 1998 provides guidelines on the establishment of metropolitan councils, and states as follows:

“(a) a conurbation featuring-

(i) areas of high population density;

(ii) an intense movement of people, goods, and services;

effectively.¹⁸ Cities are increasingly the ideal sites for the actualisation of socio-economic rights.¹⁹ In South Africa, by 2017, over 67 per cent of the entire population was already residing in urban areas, including cities.²⁰ An estimation of the United Nations indicates that, by 2030, 71.3 per cent of the country's population will be living in urban areas, reaching nearly 80 per cent by 2050.²¹ "The 40 million people that will live in urban areas will mostly be concentrated in Gauteng, eThekweni and Cape Town".²²

Against this backdrop, the mere repealing of apartheid's segregation laws in a constitutional democratic South Africa cannot abruptly reverse the repercussions of the erstwhile spatial planning laws.²³ Many years are required to redress this sordid legacy.²⁴ Other factors contributing to the persistence of these patterns include "concentrated economic power, inertia in the built environment, and continuing unevenness in institutional capabilities across

(iii) extensive development; and

(iv) multiple business districts and industrial areas;

(b) a centre of economic activity with a complex and diverse economy;

(c) a single area for which integrated development planning is desirable; and

(d) having strong interdependent social and economic linkages between its

constituent units." South Africa has eight metropolitan (Category A) municipalities which are: City of Cape Town Metropolitan Municipality; Nelson Mandela Metropolitan Municipality (Port Elizabeth); eThekweni Metropolitan Municipality (Durban); City of Johannesburg Metropolitan Municipality; Ekurhuleni Metropolitan Municipality (East Rand); City of Tshwane Metropolitan Municipality (Pretoria); Buffalo City Metropolitan Municipality (East London); and Mangaung Metropolitan Municipality (Bloemfontein).

¹⁷ The gradual but significant demographic shift towards an increasingly urban population causes cities to face a multitude of rising inequality, exclusion, poverty, and proliferation of informal settlements, see Hangwelani Hope Magidimisa-Chipungu and Lovemore Chipungu *Urban Inclusivity in Southern Africa* (2021) 12. See also Thomas Coggin and Marius Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* at 257.

¹⁸ Andreas Scheba et al 'The role of social housing in reducing inequality in South African cities' (2021) at 3. South African cities drive national economic growth. "The eight metropolitan municipalities contribute 57 percent to the national economy", see National Treasury 'Managing urbanisation to achieve inclusive growth: A review of trends in South African urbanisation and suggestions for improved management of urbanisation' (2018) at 8.

¹⁹ Marius Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2004) 131 *The South African Law Journal* at 149.

²⁰ Statistics South Africa 'South Africa: Urbanization from 2009 to 2019' (2020) available at <https://tinyurl.com/4xtzr4v2> (accessed on 20 August 2022).

²¹ Department of Cooperative Governance and Traditional Affairs 'South Africa's national urban development policy – the IUDF: An overview' (2020) at 2.

²² David Gardner and Nick Graham 'Analysis of the Human Settlement Programme and the Subsidy Instruments' (2017) at 46.

²³ Qhamani N Tshazi 'Why a blanket approach to redressing spatial inequity is flawed' (2020) available at <https://tinyurl.com/5enft9e6> (accessed on 09 August 2022); Paul Hendler 'the history of spatial planning and land use in South Africa' (2015) at 9.

²⁴ Maxim Bolt and Tshenolo Masha 'Recognising the family house: a problem of urban custom in South Africa' (2019) 35(2) *South African Journal on Human Rights* (2019) 147 at 148; Saleem Badat 'Redressing the Colonial/Apartheid Legacy: social equity, redress and Higher Education admissions in democratic South Africa' (2008) at 1.

the country”.²⁵ When the African National Congress (ANC) ascended to power in 1994, it encountered major obstacles in terms of redressing the legacy of apartheid.²⁶ Subject to the prescripts of the 1996 Constitution,²⁷ the ANC government adopted a variety of transformation interventions.

These interventions, including the Reconstruction Development Programme (RDP),²⁸ have produced a mixture of successes and failures, including the legacy of the apartheid spatial landscape that largely remain intact almost 30 years after the end of the apartheid system.²⁹ Thus far, within South African towns and cities, there are limited signs of diminished spatial inequalities.³⁰ In contrast, there are ever-growing housing shortages and a paucity of well-located urban areas conducive to new housing developments, which therefore reproduce divisions of the past spatial segregation.³¹

Unfortunately, the post-apartheid government lacked efficient and effective visions and plans for managing urbanisation.³² The rapid urbanisation process produces the growth of backyard informal rental housing among diverse urban populations.³³ Informality “appears to have taken the form of backyard shacks in established townships rather than free-standing shacks in squatter settlements”.³⁴ In the absence of decent housing, Foster observes that informal

²⁵ See Turok op cit note 8 at 5.

²⁶ Tinashe Chigwata ‘The system of local government in South Africa’ in Michelle R Maziwisa and Jaap de Visser *Local Government in South Africa: Responses to Urban-Rural Challenges* (2021) at 3.

²⁷ The Constitution of the Republic of South Africa, 1996.

²⁸ The White Paper on Reconstruction and Development of 1994, at 7. Six principles of RDP were: (1) an integrated and sustainable programme; (2) a people-driven process; (3) peace and security for all; (4) nation-building; (5) link reconstruction and development; and (6) democratisation of South Africa.

²⁹ Muna Shifa et al ‘Spatial inequality through the prism of a pandemic: Covid-19 in South Africa’ (2021) 13 *Scientific African* at 2; Remigius C Nnadozie ‘Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis’ (2013) 16 *The African Statistical Journal* at 81.

³⁰ Isolde de Villiers *Law, Spaciality and the Tshwane Urban Space* (unpublished LLD thesis, University of Pretoria, 2017) at 5; Ivan Turok et al ‘Reducing spatial inequalities through better regulation: Report to the High Level Panel on the assessment of key legislation and the acceleration of fundamental change’ (2017) at 60; Calvin Nengomashe ‘Post-Apartheid Cities in South Africa: A Mirage of Inclusivity’ in Hangwelani Hope Magidimisa-Chipungu and Lovemore Chipungu *Urban Inclusivity in Southern Africa* (2021) at 163.

³¹ Ibid.

³² Leslie J Bank et al ‘Introduction: Migrant labour after apartheid’ in Leslie J Bank et al *Migrant Labour After Apartheid: Inside Story* (2020) 1.

³³ Sarah Charlton ‘Housing for the nation, the city and the household: competing rationalities as a constraint to reform?’ (2009) 26(2) *Development Southern Africa* at 301-315; Andreas Scheba and Ivan Turok ‘Informal rental housing in the South: dynamic but neglected’ (2020) 32(1) *Environment & Urbanization* at 109; Andreas Scheba ‘Backyard rental housing: Dynamic but neglected’ (2019) at iv.

³⁴ Ivan Turok and Jackie Borel-Saladin ‘Backyard shacks, informality and the urban housing crisis in South Africa: stopgap or prototype solution?’ (2016) 31(4) *Housing Studies* at 384; Philip Harrison et al (eds)

settlements epitomises a form of “self-help” for the urban poor.³⁵ Resorting to urban “self-help” is seen as a solution to the failure by the government and urban real estate markets to provide affordable housing and essential services.³⁶ Therefore, housing type refers to the structure of a dwelling that is occupied by households as their home. The three main categories of housing types are (1) formal permanent structures, (2) traditional structures, and (3) informal non-permanent structures. Housing and the services people receive are indicators of socio-economic peripherality, disadvantage, and marginality.³⁷

Since 1994, the nature of housing developments has encouraged urban sprawl “through extending existing housing areas to the urban periphery and achieving limited integration with the rest of the city”.³⁸ Millions of low-cost houses have been built by the government. However, a common choice is to place these houses on cheaper land in urban peripheries.³⁹ The aggravation of housing inadequacies is manifested by squalid living conditions. Inhabitants of these informal settlements such as shantytowns, slums, and ghettos struggle to receive basic services and sufficient water.⁴⁰ Their lives are beset by poor sanitation and piling solid waste,⁴¹ frequent shack-gutting fires,⁴² safety and security risks, and a variety of other health hazards.⁴³

Confronting fragmentation: Housing and urban development in a democratizing society (2003). The process of rural-to-urban migration leads to the transfer of rural poverty to urban areas, Moipone Rakolojane ‘Rural and Urban Development Issues’ in Frik de Beer and Hennie Swanepoel *Introduction to Development Studies* (2004) at 21.

³⁵ Sheila R Foster ‘Urban informality as a commons dilemma’ (2009) 40(2) *Inter-American Law Review* at 304. The UN-HABITAT states that the following as part of the causes of informal settlements in urban areas: “population growth and rural-urban migration, lack of affordable housing for the urban poor, weak governance (particularly in the areas of policy, planning, land and urban management resulting in land speculation and grabbing), economic vulnerability and underpaid work, discrimination and marginalization, and displacement caused by conflict, natural disasters and climate change”, see UN-HABITAT op cit note 2 (2015) at 2.

³⁶ Ibid.

³⁷ Ibid 18.

³⁸ Ibid.

³⁹ Kedibone Phago ‘The development of housing policy in South Africa’ (2010) 29(3) *Politeia* at 88.

⁴⁰ Section 27(1)(b) of the Constitution entitles everyone with the right to have access to sufficient water. Moyo indicates that “access to safe water is essential to sustain human life and indispensable to ensure a healthy and dignified life”, see Khulekani Moyo *Water as a human right under international human rights law: Implications for the privatisation of water services* (unpublished PhD thesis, Stellenbosch University, 2013) at 1.

⁴¹ The Constitution in Section 24(a) provides that “everyone has the right to an environment that is not harmful to their health or wellbeing”.

⁴² On a yearly basis, informal settlements are regularly ravaged by fire, rendering many people homeless. See Richard Walls et al ‘Informal settlement fires in South Africa: Fire engineering overview and full-scale tests on “shacks”’ (2017) 91 *Fire Safety Journal* at 997.

⁴³ See Phago op cit note 39 at 88.

Another source of considerable contestation is that, from the beginning, the implementation of the housing programmes faced some structural hindrances. Among the predicaments is restrictions from the urban real estate market which makes well-located land in urban areas to be very expensive. Thus, hampering the affordability of housing construction at scale. The government's housing programmes constantly face criticism for minimal commitment to redressing the end results of spatial apartheid.⁴⁴ Instead, the implementation of these programmes has contributed to the problem by constructing most of the new housing developments in the urban peripheries. The implementation process merely concentrates on the number of housing units delivered rather than the creation of sustainable integrated human settlements. While engaging on issues of socio-spatial inequality and racial segregation, Abrahams et al,⁴⁵ reveal that:

Informal housing continues to grow in inhospitable locations as population growth outpaces housing production. A relatively passive policy in relation to the urban land market has meant limited provision of affordable housing in good locations.⁴⁶

The goal of achieving spatial integration through social housing programmes gets slimmer as the market forces controlled by business interests continue to exclude the majority of poor black people from being placed in well-located land that is close to opportunities found in the CBDs.⁴⁷ Furthermore, issues about access to land focus mainly on rural land, instead of equally addressing access and use of urban land.⁴⁸ Owing to various reasons, the land reform and land restitution programmes are mainly restricted to rural areas, while the social housing programme is used as an alternative measure for land redistribution in cities.⁴⁹ This form of planning reinforces under-development and aggravates regional disparities in terms of access

⁴⁴ See Tshazi op cit note 23.

⁴⁵ Caryn Abrahams et al 'South Africa: National urban policies and city profiles for Johannesburg and Cape Town' (2018) at 1; M Kamrul Islam et al 'Social capital and health: does egalitarianism matter? A literature review' (2006) 5(3) *International Journal for Equity in Health* at 1.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ See Bolt and Masha op cit note 24 at 2; H Mostert et al *Land Law and Governance: African Perspectives on Land Tenure and Title* (2017).

⁴⁹ Marius Pieterse 'Towards a right to the city? The slow convergence of rights to housing and land in South African Constitutional jurisprudence' (2022) 11 *International Human Rights Law Review* 36, at 41. The Labour Tenants (Land Reform) Act 3 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, and the Extension of Security of Tenure Act 62 of 1996 enhanced rural tenure security in South Africa but their application in urban had no or limited effect.

to land and resources.⁵⁰ If housing stands for land reform in cities then housing programmes must have a redistributive aim at least in terms of access to urban land.

Certainly, spatial segregation is incensed by the lack of well-located social housing developments.⁵¹ In turn, land paucity intensifies housing inadequacies, lack of shelter, and poverty.⁵² Revelations from the 2017 Land Audit illustrate the margins of individual landowners by racial groups.⁵³ Historically, the Natives Land Act⁵⁴ set the fixed foundation of spatial segregation by confining the black African majority to only 13 per cent of the land in South Africa.⁵⁵ Additionally, the country is facing massive contestations over land use and ownership as well as tensions and conflicts over space and resources.⁵⁶

Rural communities are also not spared the legacy of apartheid spatial planning. They encounter spatial fragmentation, inequality, widespread poverty, and deprivation.⁵⁷ These areas are mainly found in Limpopo, North-West, Mpumalanga, Eastern Cape, and KwaZulu-Natal - the provinces that during the apartheid era contained the “native” reserves of self-

⁵⁰ Hangwelani H Magidimisa and Lovemore Chipungu *Spatial Planning in Service Delivery: Towards Distributive Justice in South Africa* (2019) 3.

⁵¹ The Fuller Centre for Housing ‘Housing delivery in South Africa - Draft Report: Housing delivery 2014’ (2014) at 2. For instance, while facing the mushrooming of informal backyard dwellings, the Musina Local Municipality similarly has stumbling blocks arising from the unavailability of land for future social housing development, see Musina Local Municipality ‘Draft Spatial Development Framework: Full Report - 2014/15 Review’ (2015) at 129.

⁵² Noah K Marutlulle ‘A critical analysis of housing inadequacy in South Africa and its ramifications’ (2021) 9(1) *Africa’s Public Service Delivery & Performance Review* at 1.

⁵³ Department of Rural Development and Land Reform ‘Land Audit Report: Phase II: private land ownership by race, gender and nationality’ (2017) at 2. The erven ownership by race by provinces depicts a clear picture of varying demographic racial dominance by races in different provinces as follows: “Whites own the largest extent of erven land among racial groups at 152 624 ha or 83% in NC; Africans own the largest erven land among racial groups in EC at 93 868 ha or 67%; Coloureds in the WC own the largest size of erven land at 15 119 ha or 11%, but less extent than Whites; similarly, Indians own their highest racial group erven land in KZN at 15 232 ha or 20%, but less than Africans at 39% and Whites at 25% respectively” at 12.

⁵⁴ The Natives Land Act 27 of 1913.

⁵⁵ See Magidimisa and Chipungu op cit note 50 at 20.

⁵⁶ Sarah Charlton ‘The state of land use management in South Africa’ (2008) at 16; Margot Rubin ‘Land management and democratic governance in the city of Johannesburg’ (2008) at 22.

⁵⁷ “Outside the cities this may be because poorer municipalities are more desperate for development, needs-driven government grants fund housing and social infrastructure in lagging regions, and housing is one of the few tangible benefits that politicians can deliver to hard-pressed communities”, see Turok et al op cit note 8 at 2. See also Samuel Kariuki ‘Spatial defragmentation in rural South Africa: A prognosis of agrarian reforms’ in Gilbert M Khadiagala et al (eds) *New South African Review 6: The Crisis of Inequality* (2018) at 218.

governing homelands based on ethnic federalism.⁵⁸ Virtually, none of these provinces are in the two richest provinces: the Western Cape and Gauteng.⁵⁹

As a result, the quest for even development has placed “substantial responsibility on cities to effectively plan and implement strategies that will both address the historical apartheid spatial legacy and shape the future city”.⁶⁰ Cities efficiently and effectively contribute towards the country’s wider development goals of poverty eradication, reduction of inter-regional inequalities, and stimulation of economic growth.⁶¹

This Thesis deals with the role of law and governance in overcoming a particular facet of spatial inequality in South African cities, with housing and access to urban land at the intersection of law, policy, and urban governance. While supporting housing rights and improved quality of life, the laws, policies, and institutional frameworks for government-subsidised housing developments provide poor, marginalised, and historically disadvantaged South Africans with prospects for accessing adequate housing and essential services.⁶² In this fashion, the necessary legal reforms are aimed at providing access to adequate housing and creating human settlements that foster social, economic, and spatial integration and inclusion.⁶³ This desirable transformation can transpire in the achievement of aligned and integrated human settlements, transportation, resilient infrastructure networks, and land

⁵⁸ There were ten (10) homelands comprising of Venda, Lebowa, Gazankulu, KwaNdebele, Bophuthatswana, Ciskei, KaNgwane, Qwaqwa, Transkei and KwaZulu. The homelands were designed for specific ethnic groups, see Laura Evans ‘South Africa’s bantustans and the dynamics of “Decolonisation”: reflections on writing histories of the homelands’ (2012) 64(1) *South African Historical Journal* at 117. See also Nico Steytler and Johan Mettler ‘Federal arrangements as a peacemaking device during South Africa’s transition to democracy’ (2001) 31(4) *Publius: The Journal of Federalism* at 93. More details are made as follows: “spatial disaggregation of social data, such as income and water access, is particularly useful in South Africa as spatial inequality was entrenched in the 1900s by the very limited service delivery to the ‘homelands’ (territories set aside for black inhabitants as part of the apartheid agenda of racial segregation) and low-income urban and peri-urban areas”, see Megan J Colea et al ‘Spatial inequality in water access and water use in South Africa’ (2018) 20 *Water Policy* at 37. During the apartheid system, few Africans had the rights to live in the cities, and all other Africans linked to a “homeland” area which was meant to be a permanent, rural home. See Mark Napier ‘Making urban land markets work better in South African cities and towns: Arguing the basis for access by the poor’ in SV Lall et al (eds) *Urban Land Markets* (2007) at 5.

⁵⁹ Neva Makgetla ‘Inequality in South Africa’ in Gilbert M Khadiagala et al (eds) *New South African Review 6: The Crisis of Inequality* (2018) at 17-18.

⁶⁰ South African Cities Network ‘SPLUMA as a tool for spatial transformation’ (2015) at 7.

⁶¹ Pundy Pillay ‘Decentralisation and Service Delivery’ in Anne Mc Lenna and Barry Munslow (eds) *The Politics of Service Delivery* (2009) at 140.

⁶² Andreas Matzarakis et al ‘Introduction’ in Andreas Matzarakis and Beta Paramita *Equity, Equality and Justice in Urban Housing Development* (2018) at 2; Neil Klug et al ‘Inclusionary housing policy: A tool for reshaping South Africa’s spatial legacy?’ (2013) 28 *Housing and the Built Environment* at 667.

⁶³ South African Cities Network ‘State of South African Cities Report 2016: The People’s Guide’ (2016) at 3.

governance that maximises cities' requisite power and capacity in driving inclusive urban development.⁶⁴ With meaningful engagement between the government and the people, municipalities, especially those operating in cities, can lead the nation's development projects.⁶⁵

At the centre of this study is the critical analysis of the role of local government in achieving spatial equity through the realisation of the right to housing in South Africa. Generally, the term local government may refer to any local or sub-national government in a country, including districts, villages, cities, provinces, municipalities, and towns.⁶⁶ The powers of urban local governments in relation to land developments for housing are determined by domestic legal systems. In sequence, the applicable laws set the legal status of city governments and the boundaries of city life and practice.⁶⁷ At the outset, the precise goals and structure of a decentralisation (of housing) programme and the strengthening of local government must be clearly articulated and matched to available resources.⁶⁸

At best, the quest for achieving spatial equity and the provision of access to adequate housing can be implemented effectively by local governments that may have constitutional recognition or be established by statute. They are designed to perform several functions, encompassing the provision of essential services to local communities,⁶⁹ and the performance of functions delegated by the national government "under the latter's control, direction, and review".⁷⁰ When performing the delegated functions, they account to the national government.

⁶⁴ Karina Landman and Nana Ntombela 'Opening up spaces for the poor in the urban form: trends, challenges and their implications for access to urban land' (2006) at 2.

⁶⁵ OS Madumo and SB Koma 'Local government reform in South Africa: The quest for review and repositioning of municipal administration' (2019) 8 *Journal of Reviews on Global Economics* at 581.

⁶⁶ Office of the United Nations High Commissioner for Human Rights 'Implementing the right to adequate housing: A guide for local governments and civil society (2021) at 4. See also Nico Steytler 'The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts and Hypothesis' in Charles Manga Fombad and Nico Steytler (eds) *Decentralisation and Constitutionalism in Africa* (2019) at 34.

⁶⁷ Gerald E Frug and David J Barron 'International Local Government Law' (2006) 38(1) *The Urban Lawyer* at 1.

⁶⁸ Graham Sansom 'Principles for effective local government legislation: Lessons from the Commonwealth Pacific' (2013) at 6.

⁶⁹ Melissa N.S Ziswa *An analysis of the decentralisation framework provided for in the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*, 2014 (unpublished LLM dissertation, University of the Western Cape, 2017) at 18.

⁷⁰ Ibid.

2 Defining “spatial equity”

The ramifications of obstinate spatial inequalities invoke the necessity to formulate and implement policies and programmes targeted at attaining “spatial equity”. The term “spatial equity” has numerous definitions and measurements. Scholarly interest in the correlation between spatial equity and the location of housing is not novel. For some researchers, spatial equity is the concept of fairness and justice that simply involves the provision of equal access to and distribution of basic public service goods, opportunities, resources, services, materials, facilities, and infrastructure across different geographic areas or regions (e.g., a city, region or a country) as measured by distance.⁷¹ The distribution process takes into account people who live in different places in relation to their special needs and preferences.⁷²

Spatial equity is concerned with ensuring that all people, regardless of their location, have access to an equitable share of resources and opportunities. In essence, this distribution largely considers factors such as needs, fairness, justice, population density, distance to services and amenities, and the availability of transportation options, to ensure that individuals and communities have equal access to the needed opportunities and resources. The bedrock of spatial equity is the service level difference among a city or region’s public facilities.⁷³ Public policy and urban planning utilise spatial equity to address poverty and inequality and to promote social and economic justice.

Moreover, with a substantive understanding of equality, measures to achieve spatial equity in the long term should differentiate and disproportionately favour those who were disadvantaged. The purpose is to elevate the “socially disadvantaged groups or highly needed

⁷¹ Yanhua Yuan et al ‘Spatial equity measure on urban ecological space layout based on accessibility of socially vulnerable groups - A case study of Changting, China’ (2017) 9 *Sustainability* at 2; M Truelove ‘Measurement of spatial equity’ (1993) 11(1) *Environment and Planning C: Government and Policy* at 19; Ko-Wan Tsou et al ‘An accessibility-based integrated measure of relative spatial equity in urban facilities’ (2005) 22(6) *Cities* at 424; Mashrur Rahman and Meher Nigar Neema ‘A GIS based integrated approach to measure the spatial equity of community facilities of Bangladesh’ (2015) 1(1) *AIMS Geosciences* at 21.

⁷² Emily Talen and Luc Anselin ‘Assessing spatial equity: an evaluation of measures of accessibility to public playgrounds’ (1998) 30 *Environment and Planning A: Economy and Space* at 595.

⁷³ Ibid. See also Paul Mudau ‘Western Cape High Court sets a new benchmark for promoting spatial equity, access to land and housing’ (2020) 15(3) *Local Government Bulletin*. The physical sense of spatial equity is about the equitable development of land use while the socio-economic sense concerns the equitable flow of goods and services from one spatial area to another, see Joselito Buhangin ‘Spatial equity: A parameter for sustainable development in indigenous regions’ (2013) 719(2) *The Sustainable City* at 1343.

areas resulting in inequality but equity in access to such facilities”.⁷⁴ In this vein, inequalities in terms of facility allocation are distributed in a manner that best serves the most disadvantaged socially deprived groups.⁷⁵ According to Lucy,⁷⁶ equality is one concept of equity.⁷⁷ In the context of local government services, equality requires that everyone should receive the same service from the municipality. Currie and De Waal define equality as follows:

At its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should be treated dissimilarly.⁷⁸

Bulto submits that “equality dictates the distribution of public resources for the protection and promotion of, several rights and other prized social goods and services to everyone at equal measure.”⁷⁹ Meanwhile, a distinction can be drawn between formal and substantive equality. Formal equality adopts a neutral norm or standard of measurement in seeking to eliminate inequality as it extends the same rights and entitlements to all. Under formal equality, the group’s physical circumstances are immaterial in the determination of whether the group is entitled to some social benefit or gain.

Contrastingly, with substantive equality, the actual conditions of a disadvantaged group are taken into consideration in order to ensure that equality is finally realised.⁸⁰ “The focus of

⁷⁴ Fajle R Ashik et al ‘Towards vertical spatial equity of urban facilities: An integration of spatial and aspatial accessibility’ (2020) 9 *Journal of Urban Management* at 78; Kasturi Mukherjee and Debika Mondal ‘Spatial equity in urban facility versus residents’ satisfaction: Challenge for the unplanned cities—a case study of Barasat city, India’ (2022) 87 *GeoJournal* at 931.

⁷⁵ Spatial equity means discrimination or preference and privilege accruing to the socially disadvantaged areas in the distribution of facilities. Consequently, equity strives to redress spatial equality which may indirectly reinforce and perpetuate the patterns of geographical or physical inequalities. Thus, spatial equity is founded on the dissimilar abilities and demands of various social groups and their relatively needy areas, whereby these specific groups receive disproportionately more benefits, see Fajle R Ashik et al op cit note 74 at 78. See also Yuan et al op cit note 71 at 2.

⁷⁶ William Lucy ‘Equity and planning for local services’ (1981) 47(4) *Journal of the American Planning Association* at 448.

⁷⁷ Lucy has defined five conceptions of equity: (1) ‘equality’ - equal services for all residents; (2) ‘need’ (consumption level on the basis of need of residents); (3) ‘demand’ - residents having an active enjoyment to a facility should get more allocation; (4) ‘preferences’ - services equal to the preferences of residents; and (5) ‘willingness to pay’ - consumption level depends upon the willingness to pay, Ibid 448- 450.

⁷⁸ Ian Currie and Johan De Waal *The Bill of Rights Handbook* (2016) 210.

⁷⁹ Takele S Bulto ‘The utility of cross-cutting rights in enhancing justiciability of socioeconomic rights in the African Charter on Human and Peoples’ Rights’ (2010) 29 *University of Tasmania Law Review* at 142.

⁸⁰ See Currie and De Waal op cit note 78 at 213.

this approach is to reduce inequities in the distribution of facilities by ensuring an unequal treatment with inequalities”.⁸¹ In this regard, the pursuit is on the equality of outcomes through breaking and remedying the cycle of disadvantage or marginalisation.⁸²

The notion of spatial justice is closely associated with spatial equity. Spatial justice is about the equitable spatial distribution of socially valued resources and the opportunities to utilise them.⁸³ Spatial justice resonates with the right to the city.⁸⁴ The right to the city is a concept that goes beyond simply having a place to live. It is about ensuring that all residents have the ability to participate in shaping the city and benefit from its resources. The right to the city emphasises that everyone, regardless of socio-economic background, ethnicity, or origin, should have access to affordable housing, public spaces, and essential services within the city. It requires that citizens should have a say in how their city develops. This includes involvement in urban planning decisions, community projects such as housing developments, and holding local government accountable. While access to housing is crucial, the right to the city encompasses more. It includes the right to a healthy environment, cultural expression, and economic opportunities within the city.

This Thesis contemplates spatial equity as the most apposite term to use when dealing with the obligations of local government in relation to the ultimate accomplishment of substantive spatial equality. Spatial equity, in this Thesis, is employed as the catch-all term that espouses spatial manifestations of substantive equality and spatial justice.

⁸¹ See Ashik et al op cit note 74 at 79.

⁸² Cathi Albertyn ‘Equality’ in Elsje Bonthuys and Cathi Albertyn (eds) *Gender, Law and Justice* (2007) at 90.

⁸³ See Soja op cit note 3 at 3.

⁸⁴ Other commentators allude to a “good city” which is synonymous with the “sustainable city”, see Nisa Mammon ‘Urban Land Use Regulation in the Context of Developmental Local Government’ in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 406. The fundamental characteristics of “good city”, included are a socially just city – where there is a direct focus on prioritising the basic needs of the poor in order to provide fair and equal distribution of justice, food, shelter, education, health, and hope; and an integrated, compact city - where access and proximity to essential goods and services, including emergency services, information, and people, are gained with ease and safety, especially for those moving on foot, see Dmitry Sivaev ‘What makes a good city strategy?’ (2015) at 9; Edgar Pieterse ‘Alternative futures of the South African city’ (2005) *Digest of South African Architecture* at 52; John Friedmann ‘The good city: In defence of utopian thinking’ (2000) 24(2) *International Journal of Urban and Regional Research* at 460; Richard Rogers ‘Cities for a small planet’ in Philip Gumuchdjian (ed) *Cities for a Small Planet* (1997).

3 The challenge of achieving spatial equity in the 1996 Constitution and the role of housing

Section 9(2) of the Constitution stipulates that: “Equality includes 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”. To such a degree, South Africa’s Constitution which is the supreme law of the country,⁸⁵ envisages a society that moves away from inequalities and injustices of the past and can transform into a substantively equal society - where there is “full and equal enjoyment of all rights and freedoms”.⁸⁶

Fuo is of the view that South Africa’s transformation is based on two visions:⁸⁷ transformative constitutionalism,⁸⁸ and the government’s constitutional obligation to promote sustainable development.⁸⁹ All three spheres of government have a role to play in striving for the achievement of spatial equity through their housing responsibilities.⁹⁰ The right of access to adequate housing which is guaranteed by Section 26(1) of the Constitution imposes legally

⁸⁵ See Section 2 of the Constitution. The provision states that “this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”. See also Koos Malan ‘Deliberating the rule of law and constitutional supremacy from the perspective of the factual dimension of law’ 2015 (18) 4 *Potchefstroom Electronic Law Journal* at 1206; Graziella Romeo ‘The conceptualization of constitutional supremacy: global discourse and legal tradition’ (2020) 21 *German Law Journal* at 904. The Bill of Rights contained in Chapter Two of the 1996 South African Constitution “is widely celebrated for its inclusion of justiciable socio-economic rights, its embrace of substantive equality, and its fostering of a ‘culture of justification’ for all exercises of public power”, see Edgar Pieterse ‘Urban governance and spatial transformation ambitions in Johannesburg’ (2019) 41(1) *Journal of Urban Affairs* at 34.

⁸⁶ See Section 9(2) of the Constitution. Equally important, the 1996 Constitution also envisages the establishment of a society based on democratic values, social justice, and fundamental rights, see its Preamble.

⁸⁷ Oliver Fuo ‘Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser’ (2014) 25 *Stellenbosch Law Review* at 187.

⁸⁸ Mashele Rapatsa ‘South Africa’s transformative Constitution: from civil and political rights doctrines to socio-economic rights promises’ (2015) 5 *Juridical Tribune* at 208; Oliver Fuo ‘The transformative potential of the constitutional environmental right overlooked in *Grootboom*’ (2013) 34 *Obiter* at 77.

⁸⁹ Penny Urquhart and Doreen Atkinson *A Pathway to Sustainability: Local Agenda 21 in South Africa* (2002) 20-21; Jaap de Visser ‘Institutional framework for developmental local government: Making good on the promise of development’ (2001) at 2-3.

⁹⁰ Housing is a concurrent competency of national and provincial governments as provided in Schedule 4A of the 1996 Constitution; provinces facilitate and promote the provision of adequate housing within the province and within the framework of national policy; and municipalities implement the process of integrated development planning within the framework of national and provincial housing legislation and policy. See Financial and Fiscal Commission ‘The impact of unfunded mandates in South African intergovernmental relations’ (2011).

binding duties on the State.⁹¹ To varying degrees, these duties are shared by the three spheres of government and other organs of the State.⁹²

Although spatial equity is not explicitly ensconced in the Bill of Rights contained in Chapter Two of the Constitution,⁹³ the spatial inequalities that are shown by poor living conditions, continuous struggles for basic amenities, severe shortages of housing stock, and an infrastructure backlog,⁹⁴ can amount to indirect racial discrimination under Section 9(3).⁹⁵ These inequalities implicate Section 9(2) of the Constitution.

The transformative character of the Constitution bears three features that may be advanced to remedy existing spatial inequalities. These three features do not merely reflect the Constitution as preserving the status quo in post-apartheid South Africa “but anticipated and mandated the large-scale material transformation of post-apartheid society in an egalitarian direction”.⁹⁶ Borrowing from the descriptive precision of le Roux, these features are summed up as follows:

The first is the equality provision (section 9) which defines equality as the full and equal enjoyment of all rights and freedoms, thus mandating a holistic or integrated approach to the advancement of rights. The second is the inclusion of social justice as a fundamental value of the constitutional order and thus an anticipated redirection of state resources in terms of section 7(2) over and above the protection of individual freedoms. The third is the inclusion of a series of specific socio-economic rights, ... and a positive obligation on the state to take reasonable measures to progressively realise these rights.⁹⁷

⁹¹ See Section 26(2) of the Constitution. In addition, Section 8(1) of the Constitution provides that the Bill of Rights binds all organs of the State.

⁹² Oliver Fuo ‘Nativism in South African municipal indigent policies through a human rights lens’ (2020) 24 *Law, Democracy & Development* at 282.

⁹³ The Constitution does not contain an express and clear-cut provision that refers to spatial equity.

⁹⁴ Devan Pillay ‘Introduction: The global crisis of inequality and its South African manifestations’ in Gilbert M Khadiagala et al (eds) *New South African Review 6: The Crisis of Inequality* (ed) (2018) 1 at 2. See also Neva op cit note 59 at 17-18; Claudia Basta ‘From justice in planning towards planning for justice: A capability approach’ (2016) 15(2) *Planning Theory* at 190.

⁹⁵ See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 105.

⁹⁶ Wessel le Roux ‘Advancing domestic workers’ rights in a context of transformative constitutionalism’ in Darcy du Toit (ed) *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (2013) at 46.

⁹⁷ Ibid.

South Africa is informed by the values of justice, equality, and equity. Significantly, Albertyn argues that the idea of substantive equality can address diverse forms of social and economic inequality and that the legal form of substantive equality as adopted by the Constitutional Court has some potential for achieving meaningful social and economic changes.⁹⁸ Recall that the Constitution in Section 25(5), provides 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”. In the same vein, within the national and provincial legislative, regulatory, and policy framework, Section 5(b)(i) of the Social Housing Act,⁹⁹ states that a municipality must provide access to land and buildings for social housing development in designated restructuring zones. Hence, the intertwining relationship between spatial planning, land reform, and housing is central to the pursuit of addressing embedded spatial inequalities and inadequate housing predicaments in South Africa.

The Socio-Economic Rights Institute of South Africa (SERI) captures the plight of the urban poor without adequate housing as follows:

Despite constitutionally mandated land reform measures, the post-apartheid state has not yet been able to address the legacy of apartheid spatial planning. Black South Africans are disproportionately confined to urban peripheries in dense and poorly serviced settlements, have very low rates of home ownership, and sometimes live in extremely peripheral peri-urban areas which, without the apartheid context, makes no sense at all.¹⁰⁰

The fundamental pursuit of spatial transformation in South Africa is also aligned with the United Nations Sustainable Development Goals (SDG) Agenda 2030. SDGs 10 and 11

⁹⁸ See Cathi Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23(2) *South African Journal on Human Rights* at 253. Albertyn and Goldblatt critically engage with the development of equality jurisprudence by the Constitutional Court in order to assess the extent to which the conceptualisation, interpretation and application of the right meets the lofty objectives of substantive equality as envisioned by the transformative Constitution, see Cathi Albertyn and Beth Goldblatt (1998) 14(2) ‘Facing the Challenge of Transformation: Difficulties in the development of an indigenous jurisprudence of equality’ *South African Journal on Human Rights* at 247.

⁹⁹ The Social Housing Act 16 of 2008.

¹⁰⁰ Socio-Economic Rights Institute of South Africa (SERI) ‘Informal settlements and human rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living’ (2018) at 14. See also Charlotte Lemanski ‘Citizens in the middle class: The interstitial policy spaces of South Africa’s housing gap’ (2017) 79 *Geoforum* at 101.

provide for the reduction of inequalities,¹⁰¹ and the creation of sustainable cities and communities.¹⁰² The 2030 Agenda calls for a “just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met.”¹⁰³ The achievement of all these essential variables will lead to equal access to public infrastructure, basic amenities, and essential services and ensure that through social inclusion and cohesion, socially vulnerable groups have increased opportunities to enjoy their livelihoods too.

The United Nations Human Settlements Programme (UN-HABITAT) submits that SDG 11 of the 2030 Agenda includes a dedicated goal on human settlements that sets out to make cities inclusive, safe, resilient, and sustainable. The international community reached a consensus on endorsing a stand-alone goal for cities (Goal 11). This goal is referred to as the “urban SDG” and is treated as an explicit recognition that urbanisation and city growth are transformative forces for development.¹⁰⁴ Goal 11 adds to the inroads made by the Millennium Development Goal (MDG) 7 on the reduction of slums and improvement of basic services.¹⁰⁵

As the engines of development, metropolitan cities are given the task of driving spatial transformation. The promotion of inclusive cities that simultaneously accommodate the socio-economic well-being of the urban poor population should be a basic tenet for urban planning. In this regard, the UN-HABITAT professes a bold account of the constructive impact of cities in transforming the fortunes of human welfare:

Cities have become a positive and potent force for addressing sustainable economic growth, development and prosperity. They drive innovation, consumption and investment in both developed and developing countries. Cities are productive systems through which most of

¹⁰¹ The United Nation’s Sustainable Development Goals (SDG) 10: reduce inequalities within and among countries.

¹⁰² The UN’s SDG 11: Make cities and human settlements inclusive, safe, resilient and sustainable.

¹⁰³ World Bank ‘Sustainable Development Goal 10 – Reduced inequalities: Progress and prospects’ (2019) at 2, available at <https://tinyurl.com/2fd9dj3p> (accessed on 08 August 2022).

¹⁰⁴ The United Nations Human Settlements Programme (UN-HABITAT) ‘Sustainable Development Goals - Monitoring Human Settlements Indicators: A short guide to human settlements indicators goal 11+’ (n.d) at 5.

¹⁰⁵ The official slogan for MDG 7 - Target 11 is ‘Cities Without Slums’. It implies that cities should not have ‘slums’.

the 21st century challenges such as poverty, inequality, unemployment, environmental degradation, and climate change can be addressed.¹⁰⁶

Certainly, there is an objective need to effectively manage spatial planning while efficiently monitoring and evaluating the relevant policy formulations and implementations on the ground. Common concerns arise from the lack of congruence between these plans and the actual reality of cities.¹⁰⁷ There are shortcomings in the State's ability to scrutinise and control urban development in cities.¹⁰⁸ This results in low compliance with planning laws and policies, as well as the perpetuation of marginalising the urban poor. The poor struggle to lead decent city lives and to afford decent housing as well as access to basic amenities and essential services. Almost three decades into a constitutional democracy, the country is still trapped by the artifacts of apartheid geography which is a spatial manifestation of race, class, and inequality.¹⁰⁹

4 Research problem, research questions, research objectives, and research methodology

Post-apartheid, the South African State is struggling to address spatial segregation.¹¹⁰ Metropolitan municipalities are hounded by "large deficiencies and inadequacies in terms of fulfilling their constitutional and legislative obligations".¹¹¹ The pragmatic shift of the Spatial Development Frameworks (SDFs) of the three spheres of government promotes a more compact and connected urban development, with higher residential densities in the inner city.¹¹² Nonetheless, flaws in government policy and its sluggish implementation militate against the progressive spatial transformation. More problematically, the current spatial

¹⁰⁶ UN-HABITAT 'What is a city?' (2020) at 2. See also Richard de Satgé and Vanessa Watson 'African cities: Planning ambitions and planning realities' in Richard de Satgé and Vanessa Watson (eds) *Urban planning in the global south: Conflicting rationalities in contested urban space* (2018) at 35.

¹⁰⁷ See Denoon-Stevens et al op cit note 15 at 2; Eunice Fontão 'The reality of spatial plans is delaying the growth of sustainable buildings' (2020) 6(1) *Energy Reports* at 38.

¹⁰⁸ Kwasi G Baffour Awuah and Felix N Hammond 'Determinants of low land use planning regulation compliance rate in Ghana' (2014) 41 *Habitat International* at 17; Wilfred Ochieng Omollo 'Compliance with planning standards related to the setbacks around domestic buildings: Empirical evidence from Kenya' (2020) 4(2) *Journal of Contemporary Urban Affairs* at 95.

¹⁰⁹ Jo-Ansie van Wyk 'The geography of nuclear power, class and inequality' in Gilbert M Khadiagala et al (eds) *New South African Review 6: The Crisis of Inequality* (ed) (2018) at 269. The Bill of Rights contained in Chapter Two of the 1996 South African Constitution "is widely celebrated for its inclusion of justiciable socio-economic rights, its embrace of substantive equality, and its fostering of a 'culture of justification' for all exercises of public power", see Pieterse op cit note 85 at 34.

¹¹⁰ Nomalanga Mkhize 'The Politics of Urban Land and Ownership: Locating spatial transformation in the urban land question' (2015) 1 *The Urban Land Paper Series* at 2.

¹¹¹ See Madumo and Koma op cit note 65 at 583.

¹¹² Ibid 18-19.

patterns in urban areas bear an inclination toward reinforcing the past spatial and social divisions.

Mkhize ponders if the local government is a “regulator, participant or bystander” in the quest for spatial transformation.¹¹³ Municipalities downplay their housing role. They limit themselves to the enforcement of building regulations and health and safety by-laws,¹¹⁴ and as lacking “substantive housing provision obligations”.¹¹⁵ Both spatially and legally, South Africa’s transition has impacted intensely on the functioning of cities. The reconfiguration of the local governance system requires it to directly address the socio-economic challenges and to strive to achieve spatial transformation of urban life.¹¹⁶ The practical provision of access to housing in well-located land can elevate socially disadvantaged groups. The requisite legal, institutional and structural commitment from the government in terms of directing sufficient resources can ensure that everyone has access to adequate housing.¹¹⁷

This Thesis, hence, looks at the role of the local government in pursuing the achievement of spatial equity through its involvement in the progressive realisation of the right to access adequate housing. The quest to give effect to the right to housing is evidently about meeting local government’s developmental obligations, objectives of the Spatial Planning and Land Use Management Act (SPLUMA),¹¹⁸ and constitutional aspirations. At face value, it appears that between its housing and spatial planning powers, there are challenges in the current role and responsibilities of local government in the context of achieving spatial equity. When it comes to its role in housing, there is seemingly a further disconnect between its responsibilities emerging from court judgments on the right to housing, and its powers, functions, resources, and responsibilities in terms of the Constitution and applicable legislation.

Most socio-economic rights cases that were adjudicated by the Constitutional Court have elaborated on the justiciability of the right to housing against the local government. Cases

¹¹³ See Mkhize op cit note 110 at 5.

¹¹⁴ See Pieterse op cit note 19 at 168-169.

¹¹⁵ Ibid 169.

¹¹⁶ Ibid 150. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA (CC) para 10.

¹¹⁷ T Manomano ‘Inadequate housing and homelessness, with specific reference to South Africa and Australia’ (2022) 12(4) *African Journal of Development Studies* at 93.

¹¹⁸ 16 of 2013. See also Jeannie van Wyk ‘Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?’ (2015) 30 *Southern African Public Law* at 27.

such as *Blue Moonlight*¹¹⁹ and *Joe Slovo*¹²⁰ illustrate the bind in which municipalities find themselves – they have limited power, policy scope, and budget for housing. Yet, the courts appear to be assigning them increased housing responsibilities which, arguably, they are not adequately legally equipped nor empowered to fully comply. The problem which therefore unfolds relates to the inevitable need to reconcile the obligations to realise the right of access to adequate housing with the limited (and quite complex, contradictory, subservient, and uneven) role that local government plays in housing delivery,¹²¹ as well as with the limited resources at its disposal.¹²² The challenges associated with the realisation of local government's housing-related powers, functions, and responsibilities become more complicated when viewed through the lens of SDFs.¹²³

The primary research question of the study is as follows: How should the role, powers, functions, and responsibilities of local government in relation to the realisation of the right of access to adequate housing be reconfigured considering constitutional, legal, and policy goals pertaining to the achievement of spatial equity?

Secondary questions which are also addressed with the view of developing the primary research question, are as follows:

- (a) How does the current role of local government in relation to the right to housing relate to its role in relation to achieving spatial equity?
- (b) Based on constitutional, legislative, and policy frameworks as well as the courts' jurisprudence, what are the local government's responsibilities, powers, and functions regarding housing?

¹¹⁹ See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

¹²⁰ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC).

¹²¹ Louis G Lategan *A study of the current South African housing environment with specific reference to possible alternative approaches to improve living conditions* (unpublished master's dissertation, North-West University, 2012) 52.

¹²² S M Binza 'The evolution of South African local governments: The politics of memory' (2005) 30(2) *Journal for Contemporary History* at 81. See also Parliamentary Monitoring Group 'Local Government issues: Financial and Fiscal Commission recommendations & research' (2010), available at <<https://pmg.org.za/committee-meeting/12315/>> (accessed on 06 May 2020).

¹²³ To local government, the process of identifying and designating land for housing development is cumbersome due to the disjuncture between spatial plans and housing strategies, see Thembi Mabhula 'Red tape and its effects on the housing process' (2011), available at <<http://www.ngopulse.org/article/red-tape-and-its-effects-housing-process>> (accessed on 10 June 2020). See also Marius Pieterse 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy & Development* at 1.

- (c) Based on constitutional, legislative, and policy frameworks as well as the courts' jurisprudence, what are the local government's responsibilities, powers, and functions regarding spatial planning?
- (d) Between its housing and spatial planning powers, what are the challenges in the current role and responsibilities of local government in the context of achieving spatial equity and how could these be remedied?
- (e) How should the role of local government in housing be reconceptualised to match its rights-related responsibilities and its role in achieving spatial equity?

The primary objective of the study is to investigate the role and obligations of local government in the realisation of the right of access to adequate housing, and the interdependence of this with its role in the achievement of spatial equity in South Africa. Thus, from the interplay of local government law and human rights law, the focal point is the reconciliation of the enormous constitutional, legislative, policy, and judicial obligations imposed on local government with its actual limited financial resources, institutional capacity, and structural role in the realisation of the right of access to adequate housing and spatial equity. Accordingly, the Thesis aims at identifying and elaborating on the disconnects alluded to above and considering ways in which they could be remedied. The study also critically engages with the applicable laws in this context and proposes appropriate reforms.

To comprehend and analyse the broad spectrum of the status quo relating to the correlation, between spatial inequalities and housing inadequacies in South Africa, the study is desk-based. The Thesis also draws on literature from different disciplines or fields of study: law, urban governance, planning, landscape ecology, human health, environmental management, and transportation. Both primary and secondary sources are used to compile the literature. The primary materials include international and regional legal instruments, the 1996 Constitution, legislation, policy frameworks, case laws, and official documents of different spheres of government and those of the selected case studies of the metropolitan municipalities of Cape Town, Johannesburg, and eThekweni. The secondary materials comprise textbooks, journal articles, working and conference papers as well as reliable sources from the internet.

5 Literature review

A vast literature exists about the roles, powers, functions, and responsibilities of local government in the new constitutional dispensation. This literature engages the division of responsibilities in Schedules 4 and 5 of the Constitution and bemoans the fuzzy delegation of housing powers.¹²⁴ There is significant literature that interrogates the content and implications of the right to have access to adequate housing. This literature tends to focus on the judgments of the Constitutional Court that have vindicated this right.¹²⁵ It mostly focuses on the strengths and weaknesses of the Court's adjudicative approach and is not concerned with the practical implications of the judgments for the duty-bearers. Specifically, there is little or no engagement with the impact of the judgments and their effects on local government.¹²⁶

While significantly dealing with the implementation of the right of access to housing, with a precise focus on local government,¹²⁷ some works predate the promulgation of the relevant legal frameworks and the subsequent housing-related court judgments that profoundly implicate the local government in terms of realising the right of access to adequate housing.¹²⁸ For instance, Strauss and Liebenberg evaluate the contribution of the Constitutional Court's jurisprudence on the right to housing regarding the evictions of the poor from their homes in heavily populated urban areas, to the transformation of South Africa's urban housing landscape.¹²⁹

¹²⁴ Jaap de Visser 'A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment' (2004) 7 *Law, Democracy & Development* at 201; David Pottie 'Local government and housing in South Africa: managing demand and enabling markets' (2004) 14(5) *Development in Practice* at 61; Lategan op cit note 121 at 49.

¹²⁵ For example, see de Visser op cit note 124 at 201; see de Wet op cit note 4 at 118; Pierre de Vos and Warren Freedman *South Africa Constitutional Law in Context* (2014) 802; see Currie and De Waal op cit note 78 at 584-589.

¹²⁶ For example, see Lilian Chenwi 'A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' in Stuart Woolman et al (eds) *Constitutional Court Review* (2009) 2; Sandra Liebenberg *Socio-economic Rights: Adjudication Under Transformative Constitution* (2010).

¹²⁷ For example, see de Visser op cit note 124; see Pottie op cit note 124 at 32.

¹²⁸ For example, the Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (BNG) and Spatial Planning and Land Use Management Act 16 of 2013 as well as the *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) 208 (CC); *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017]; 2018 (2) SA 327 (CC), *Joe Slovo*, and *Blue Moonlight*, cases.

¹²⁹ They view local government's responsibilities flowing from the constitutional right to housing as related to the local government's role in the achievement of spatial justice, but they do not address the disconnect with which this thesis is concerned, nor do they begin to contemplate the appropriate role for local government pursuing spatial equity through/in tandem with the right of access to adequate housing, see Margot Strauss and

The work of Pieterse¹³⁰ provides a comprehensive description of arguments relating to the overlap between legal and social and spatial justice in the particular context of the City of Johannesburg.¹³¹ From the interplay between the disciplines of law, urban geography, and urban planning as well as from case law concerning the invocation of constitutional rights in Johannesburg and other cities, the work critically examines the extent of the invocation of legal rights through adjudication in the advancement of social justice in the city. Pieterse also explores the powers and capacity of the city of Johannesburg in restructuring urban governance through the lens of spatial transformation.¹³²

The literature on substantive equality is largely disconnected from the literature on the right to housing, however, with a few exceptions. Some works¹³³ provide the links between substantive equality and socio-economic rights – and these exceptions deal with socio-economic rights generally and not with housing specifically, and they do not engage spatial inequality at all. The commitment to equality as envisaged by Section 9 of the Constitution entails recognising the shifting patterns of inequality.¹³⁴ For spatial planning, this means eradicating racial discrimination in relation to, among others, access to land, housing, and urban real estate markets.¹³⁵

In the literature review, it appears that there are challenges in terms of intertwining the role of local government in realising the right to housing and its role in achieving spatial equity. The challenges arise between its limited role, powers, and functions in the provision of housing,

Sandra Liebenberg ‘Contested spaces: Housing rights and eviction law in post-apartheid South Africa’ (2014) 13(3) *Planning Theory* 428, at 151 at 431.

¹³⁰ Marius Pieterse *Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017) 50.

¹³¹ Including ‘the location of alternative accommodation, the need for permanent inner city housing solutions and the parameters and minimum requirements for meaningful engagement’, Ibid 70.

¹³² See Pieterse op cit note 85 at 20. Furthermore, Madlalate explores the powers and capacity of the city of Johannesburg in restructuring urban governance through the lens of spatial transformation, see Ralph Madlalate ‘(In)Equality at the intersection of race and space in Johannesburg’ (2017) 33(3) *South African Journal on Human Rights* at 472.

¹³³ Pierre de Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ (2001) 17(2) *South Africa Journal on Human Rights* at 258. See also Sandra Fredman ‘Engendering socio-economic rights’ (2009) 25(3) *South Africa Journal on Human Rights* at 410. Sandra Liebenberg and Beth Goldblatt ‘The interrelation ship between equality and socio-economic under South Africa’s transformative constitution’ (2007) 23(3) *South Africa Journal on Human Rights* at 335.

¹³⁴ See Currie and De Waal op cit note 78 at 212.

¹³⁵ Jeannie van Wyk and Mark Oranje ‘The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?’ (2014) 13(4) *Planning Theory* at 362.

on the one hand, and its responsibilities emerging from court judgments on the right to access adequate housing, on the other. The numerous missing links and gaps in the literature overlap precisely with the challenges highlighted above as the socio-economic rights literature does not focus on the local government's role, while the local government literature does not deal with how this intersects with rights. The spatial planning and equity literature refrains from engaging with any of the above and, in a limited manner, the right to equality literature deals with some of these issues superficially. Accordingly, there is limited literature that focuses on the local government's role in realising the right to housing through the achievement of spatial equity. This Thesis therefore serves to fill these gaps in the literature.

6 Terminological clarifications

The purpose of this section is to succinctly define key concepts that outline and clarify the nature and standards of how local government powers, responsibilities, functions, and roles are allocated in terms of law. The applicable terms include decentralisation, delegation, and devolution.

The term “decentralisation” is a multi-faceted concept.¹³⁶ Scholars offer varying degrees and conflicting definitions and conceptions as to its meaning.¹³⁷ Both the narrow and broad meaning of decentralisation are contained in the literature,¹³⁸ and are used interchangeably, resulting in disorientation.¹³⁹ In the narrow sense, the decentralisation process involves the non-compulsory and non-permanent transfer of power by the national government to the sub-national levels of government.¹⁴⁰ Its typical structure has a hierarchy that denotes “a pyramid of governments with gradations of power flowing down from the top”.¹⁴¹ Accordingly, “if there was no centre, there would be no decentralisation but rather two or more completely

¹³⁶ Charles M Fombad ‘Constitutional entrenchment of decentralisation in Africa: An overview of trends and tendencies’ (2018) (62)2 *Journal for African Law* at 178.

¹³⁷ Roberta Ryan and Ronald Woods ‘Decentralization and Subnational Governance: Theory and Praxis’ in Eris Schoburgh and Roberta Ryan (eds) *Handbook of Research on Sub-National Governance and Development* (2017) at 1.

¹³⁸ Nico Steytler ‘The Relationship between Decentralisation and Constitutionalism in Africa: Concepts, Conflicts and Hypothesis’ in Charles Manga Fombad and Nico Steytler (eds) *Decentralisation and Constitutionalism in Africa* (2019) at 31.

¹³⁹ Jaap de Visser *Developmental Local Government: A Case Study of South Africa* (2005) 13.

¹⁴⁰ Daniel J Elazar ‘Federalism vs decentralization: The drift from authenticity’ in John Kincaid (ed) *Federalism* (2011) at 79-88.

¹⁴¹ Ibid 83; Conrad Bosire ‘The Constitutional and Legal Framework of Devolved Government and its Relevance to Development in Kenya’ in Morris K Mbondenyei et al (eds) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) at 214.

separate entities”.¹⁴² In the South African context, a provincial government may also be regarded as a centre in relation to local government.

In terms of the African Charter on the Values and Principles of Decentralisation, Local Governance, and Local Development¹⁴³ decentralisation is “the transfer of power, responsibilities, capacities, and resources from national to all sub-national levels of government to strengthen the ability of the latter to both foster people’s participation and delivery of quality services”.¹⁴⁴ The Charter’s broad reference of “all sub-national levels of government” includes regional (provincial) and local governments.¹⁴⁵ In this study, the usage of the term decentralisation is principally in reference to local government. This encompasses the transfer of political, administrative, and fiscal powers, functions, and resources from the national or provincial government or both to local governments through the constitution or enabling national legislation where local government institutions can make final decisions. The objectives of decentralisation are to promote democracy; to promote development; to promote peace; and limit State power at the centre.

Decentralisation has three various forms: devolution, delegation, and deconcentration. In addition, decentralisation’s topology includes various types such as political decentralisation, administrative decentralisation, and fiscal decentralisation.¹⁴⁶ Devolution, as a more extensive form, disperses power territorially to sub-national governments. The centre completely transfers political, administrative, and fiscal powers to the elected local governments, which generally operate outside the direct control and regulation of the national government.¹⁴⁷ The local government enjoys discretion of legislative and executive powers “devolved” by the constitution or national legislation.¹⁴⁸ On the contrary, local governments may implement a range of national laws, policies, and programmes. Generally, local

¹⁴² Jaap de Visser ‘Institutional subsidiarity in the South African Constitution’ (2010) 1 *Stellenbosch Law Review* at 14.

¹⁴³ See the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, 2014.

¹⁴⁴ See Article 1 of the African Charter on Decentralisation.

¹⁴⁵ See Articles 5(4), 6(2), 7(5), 11(a), 16(4)(a) and 18(1)(a)(ii) of the African Charter on Decentralisation.

¹⁴⁶ Every type of decentralisation has “its own different characteristics, policy implications, and conditions for success”, see Jennie Litvack and Jessica Seddon ‘Decentralization briefing notes’ (1999) at 2.

¹⁴⁷ Tinashe C Chigwata *A critical analysis of decentralization in Zimbabwe: Focus on the position and role of a provincial governor* (unpublished masters research paper, University of the Western Cape, 2010) 16.

¹⁴⁸ Paul Mudau and Hoolo ‘Nyane ‘A critical analysis of Zimbabwe’s non-implementation of constitutional injunctions on devolution’ (2022) 37(2) *Southern African Public Law Journal* at 4.

government exercises the devolved powers with a considerable degree of autonomy under the supervision of the national government, within the confines of an established legal framework.¹⁴⁹

With delegation, local government is given more extensive authority not directly controlled by the centre, although it is accountable to the latter.¹⁵⁰ The process transfers responsibility for specifically defined functions to local government while indirectly controlled by the centre.¹⁵¹ These powers are delegated by national legislation and can be withdrawn by the centre at any time.

The weakest form of decentralisation is de-concentration.¹⁵² It is regarded as an administrative decentralisation. Without transferring substantive powers, it merely hands over certain administrative responsibilities to local administrative offices.¹⁵³ The centre retains administrative authority and directly appoints, manages, and controls officials of the subordinate units.¹⁵⁴

With political decentralisation, the elected sub-national governments, both regional and local authorities, exercise political power and authority dispersed by the national government.¹⁵⁵ Thus, decision-making of elected representatives and citizens is strengthened.¹⁵⁶ Under administrative decentralisation, the centre transfers to sub-national governments, field offices, etc, the decision-making authority, resources, and responsibility in relation to specified public services and activities.¹⁵⁷ Within this scope, local government is conferred with the powers to recruit, discipline, dismiss, and remunerate its staff.¹⁵⁸

¹⁴⁹ Yonatan Fessha and Coel Kirkby 'A critical survey of subnational autonomy in African states' (2008) 38(2) *The Journal of Federalism* at 249.

¹⁵⁰ See Fombad op cit note 136 at 182.

¹⁵¹ See Dennis A Rondinelli et al *Decentralization in Developing Countries: A Review of Recent Experiences* (1984) at 19.

¹⁵² Ibid 12.

¹⁵³ Lídia Cabral 'Decentralisation in Africa: Scope, motivations and impact on service delivery and poverty' (2011) at 2.

¹⁵⁴ See Fombad op cit note 136 at 176.

¹⁵⁵ Ibid 181.

¹⁵⁶ Vikas Nath 'Political decentralisation – a complementary rather than a substitution approach' (2001) 1.

¹⁵⁷ Wilson K Muna *Towards decentralisation: a critical analysis of decentralising governance in Kenya* (unpublished master's dissertation, University of KwaZulu-Natal, 2012) at 17.

¹⁵⁸ Ignatius M Naha *Full decentralisation of powers, resources and functions in the Kingdom of Lesotho: An evaluation from a developmental local government perspective* (unpublished master's dissertation, Stellenbosch University, 2015) at 48.

Fiscal decentralisation is about allocating revenue-generating authority and financial resources to sub-national governments. It is also concerned with the characteristic of fiscal autonomy, entailing the local government's right and ability to manage its own revenue collection measures, modulation of local budgets, and expenditure choices.¹⁵⁹ As part of the indigent policy to meet the needs of the poor community members, fiscal decentralisation relates to how local service delivery is subsidised to their advantage.¹⁶⁰ Both political and administrative decentralisations are contingent on the nature and availability of financial resources.¹⁶¹

7 Organisation of chapters

This introductory Chapter provided the background on the linkage between spatial inequalities and inadequate housing in South Africa. The Chapter also sets out the research problem, presents the literature review, poses the research questions, highlights the research objectives of the study as well as explains the research methodology. From the lens of international literature and through the definition of key concepts, Chapter One also presented a theoretical framework for the decentralisation of powers to local government.

Chapter Two first establishes the legal status of the right to housing under the auspices of international human rights law and within the African human rights system by ascertaining its scope and normative content. After articulating the normative constructions of the content and implications of the right to housing under international and regional human rights laws, the Chapter critically analyses the explicit way the right is recognised in the 1996 South African Constitution. This analysis assists in exploring the extent to which the right to housing has been incorporated into legislation and executive policy, and how it has been translated through adjudication, particularly, the way the Constitutional Court jurisprudence has reshaped the role and obligation of local government in the realisation of the right to housing.

¹⁵⁹ Krisztina Beer-Tóth *Local financial autonomy in theory and practice: The impact of fiscal decentralisation in Hungary* (unpublished PhD thesis, University of Fribourg Switzerland, 2009) at 4.

¹⁶⁰ Wallace E Oates 'An essay on fiscal federalism' (1999) 37(3) *Journal of Economic Literature* at 1121.

¹⁶¹ See Fombad op cit note 136 at 183.

Chapter Three deals with the constitutional, legislative, and policy powers, functions, and responsibilities of local government regarding housing provisions. Importantly, it outlines the place and role of local government in South Africa's constitutional framework of multi-level governance and the decentralisation of housing powers to local government. Thus, since South Africa is a multi-sphere system of government that operates through a highly centralised federal State structure, the local government's housing role is thoroughly assessed. This assessment is implemented through the lens of co-operative government and intergovernmental relations, especially when considering the exercise of the decentralised housing powers of local government.

Chapter Four provides a clear exposition of the local government's constitutional powers and responsibilities pertinent to spatial planning. This Chapter also examines the extent to which local government's role, powers, and functions of spatial planning are elaborated within legislation and executive policy. The Chapter further assesses if local government is sufficiently empowered to propel efficient municipal SDFs.

Chapter Five investigates the challenges that complicate local government's attempts at bringing about spatial equity through housing provision. The metropolitan municipalities of Cape Town (in the Western Cape), Johannesburg (in Gauteng), and eThekweni (in KwaZulu-Natal) are used as case studies to investigate the nature and extent of their unique spatial inequality and housing inadequacy issues about the selected three case studies of the Thesis. The Chapter proves the need for local government to exercise its spatial and housing powers in concert and illustrates the practical significance of the argument advanced in Chapter Four.

South Africa has 257 municipalities of varying sizes divided into three categories: 205 local municipalities, 44 district municipalities, and 8 metropolitan municipalities.¹⁶² Thus, instead of embracing a generalised approach regarding data collection, the selected metropolitan municipalities have been chosen as case studies. The ethos for utilising large, and urban metropolitan municipalities, is to maintain a coherent focus on the decentralisation of housing and spatial planning powers. This is informed by the fact that these large metropolitan municipalities possess the requisite administrative and financial power and capacity to

¹⁶² See South African Government 'Local government' (undated) available at <https://www.gov.za/about-government/government-system/local-government> (accessed on 13 August 2020).

contribute to the acceleration of housing delivery housing as well as the envisioned spatial transformation in South African cities. Smaller towns and rural municipalities are equally conferred with substantial spatial planning powers. Nonetheless, they do not meet the enormous and various housing demands, economies of scale, and financial capacity that would render them competent to be accredited to administer national housing programmes and subsequently assigned housing functions and powers as required by the Constitution and the applicable legislation.

Chapter Six concludes the study. Having set the benchmarks of the desired outcomes of spatial equity and the illumination of the role, powers, functions, and responsibilities of local government pertinent to both housing and spatial planning, as well as the divulging of the challenges faced. The Chapter provides useful recommendations that could guide the role of local government in attaining spatial equity through the realisation of the right to housing; and provides for the areas for further research.

Chapter 2

The Right to Housing Under International, Regional, and Domestic Human Rights Laws

1 Introduction

The purpose of Chapter Two is to discuss the content of the right of access to adequate housing in the realm of international human rights law, the African human rights system, and the domestic legal system in South Africa. Given the research objectives of the Thesis, the Chapter specifically aims to distil the elements of the right to adequate housing pertaining to spatial equity and its implications for local government's obligations. The Chapter also discusses how the relevant United Nations human rights bodies interpret and elaborate the human rights norms and standards in so far as the right to adequate housing is concerned. It is structured as follows: the international human rights systems, including the unpacking of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966,¹ soft law and the African regional human rights system; the global patterns of local government's housing obligations; the domestic human rights system in South Africa; the adjudication of the constitutional right to adequate housing in South Africa; and the concluding section.

The primary objective is to ascertain the scope and normative content of the right. After articulating the normative constructions of the content and implications of the right to adequate housing under international and regional human rights systems, the Chapter then critically analyses the explicit manner in which the right is entrenched in the Bill of Rights of the 1996 South African Constitution.² This analysis meaningfully explores the nature and extent to which the right to adequate housing has been embellished into legislation and executive policy, and how it has been translated through adjudication, particularly, the manner in which the Constitutional Court jurisprudence has reshaped the role and obligation of local government in the realisation of the right to adequate housing. Of particular importance for the purposes of this Thesis is the indispensability of location as an integral part of meeting the adequacy standards of housing which also emanates from court rulings.

¹ The International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, came into force from 3 January 1976.

² The Constitution of the Republic of South Africa, 1996.

This Chapter answers the question: based on constitutional, legislative, and policy frameworks as well as Constitutional Court jurisprudence, what are the local government's responsibilities, powers, and functions regarding housing?

2 International human rights systems

2.1 The foundation of the right to adequate housing in international law instruments

“Housing is defined as a necessity and is recognized as a basic human need and right”.³ The enjoyment of all socio-economic rights depends on the right to adequate housing.⁴ Indeed, its significance in upholding all individual's fundamental human rights and freedoms is demonstrated by its growing universal recognition, reference, and entrenchment. Even so, “roughly one-half of the world's population does not enjoy the full spectrum of entitlements necessary for housing to be considered adequate”.⁵

Although universally, the United Nations Universal Declaration of Human Rights (UDHR) of 1948,⁶ is not an enforceable treaty, it is ordinarily acknowledged as a cradle instrument that sets the foundation for human rights recognition and protection and the “common standard of achievement for all peoples and all nations”.⁷ In Article 25(1), the UDHR declares that, in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond their control, everyone has the right to adequate housing. The UDHR ensconces the right to housing as part of the right to an adequate standard of living. This entrenchment has opened the floodgates of additional definitions and elaborations with the intent to establish functional legal frameworks at international, regional, and domestic levels that aim for the full recognition and realisation of the right to adequate housing.

³ NZD Mhlongo et al ‘Inefficiencies in the delivery of low-income housing in South Africa: is governance the missing link? A review of literature’ (2022) 1101 *IOP Conf. Ser.: Earth Environ. Sci.* at 1. See also Hannu Ruonavaara ‘Theory of housing, from housing, about housing’ (2018) 35(2) *Housing, Theory and Society* at 178.

⁴ The United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, at para 1.

⁵ Arturs Kucs et al ‘The right to housing: International, European and National Perspectives’ (2008) 64(65) *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* at 101.

⁶ The United Nations Universal Declaration of Human Rights was adopted on 10 December 1948. It is the first international human rights instrument to recognise the right to adequate housing.

⁷ See the preamble of the UDHR. It is regarded as an essential cornerstone in the modern history of human rights, see Fengyu Duan ‘The Universal Declaration of Human Rights and the modern history of human rights’ (2017) at 1; Hurst Hannum ‘The status of the Universal Declaration of Human Rights in national and international law’ (1996) 25 *Georgia Journal of International & Comparative Law* at 290.

2.2 The International Covenant on Economic, Social and Cultural Rights

The ICESCR⁸ is deemed to be the most important international legal source relating to socio-economic rights, in general,⁹ and particularly, the right to adequate housing.¹⁰ South Africa is a State party to the ICESCR.¹¹ The ICESCR imposes obligations on South Africa that cast “an increasingly significant impact on the development of South Africa’s socio-economic rights jurisprudence”.¹²

Article 11(1) of the ICESCR enshrines the right to adequate housing as “the most comprehensive and perhaps the most important of the relevant provisions”.¹³ The clause stipulates as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

A narrow or restrictive interpretation of the right to housing equates its ambit to merely the provision of a roof over one’s head, or by exclusively viewing shelter as a commodity.¹⁴ In contrast, the appropriate lens to view the right to housing involves the right to live somewhere “in security, peace, and dignity”.¹⁵ In this respect, the UN CESCR General Comment No 4 advances two arguments for this approach. First, the right to housing is integrally associated to other fundamental human rights and principles contained in the ICESCR. The interpretation of the term “housing” requires the full consideration of a

⁸ The purpose of the ICESCR is to give legal effect to the UDHR. The United Nations Committee on Economic, Social and Cultural Rights (the UN CESCR Committee) is entrusted with the primary responsibility to oversee the effective implementation of the ICESCR. In accordance with Articles 21 and 22 of the ICESCR, the Committee’s mandate is assigned by the United Nations Economic and Social Council (ECOSOC). The ECOSOC monitors the reporting obligations of States under Part IV of the ICESCR.

⁹ Ian Currie and Johan De Waal *The Bill of Rights Handbook* (2016) 570.

¹⁰ Office of the United Nations High Commissioner on Human Rights (OHCHR) ‘Women and the right to adequate housing’ (2012) at 6.

¹¹ In October 1994, South Africa signed the ICESCR and only acceded to the instrument twenty years after the signature on 15 January 2015.

¹² The ratification means that, under international law, the ICESCR is legally binding on South Africa. See Currie and De Waal op cit note 9 at 570.

¹³ See UN CESCR General Comment No 4 at para 3.

¹⁴ Ibid para 7.

¹⁵ Ibid.

confluence of factors that epitomise “the inherent dignity of the human person”, irrespective of income or access to economic resources. Secondly, the right to housing conferred by Article 11(1) of the ICESCR should not merely be confined to housing per se but the reference should encompass “adequate housing”.

Moreso, under Article 2(1) of the ICESCR, with a view to achieving progressively the full realisation of the right to adequate housing, a State party is obligated to undertake steps to the maximum of its available resources. In the same ICESCR proviso, one of the germane actions is the “adoption of legislative measures”. Such entails enacting an apt legal framework that guarantees individuals the legal status, rights, and privileges to claim the right to adequate housing from the State. The terms “progressive realisation” and “available resources” are qualification benchmarks that States may ascertain their means for achieving socio-economic rights and the right to adequate housing.¹⁶

Apart from adopting legislative measures,¹⁷ a State party has the discretion to adopt other “appropriate” measures and programmes with the intention of realising the right to adequate housing. These includes educational, administrative, social, financial, and educational measures.¹⁸ Moreover, the UN General Comment No 3 underscores the value of contemplating as part of the appropriate measures,¹⁹ the stipulation of judicial remedies in order to secure the full realisation of the right to adequate housing. Nevertheless, the justiciability of the right to adequate housing must be compatible with the applicable domestic legal system and the adjudication of the constitutional right to adequate housing.

2.2.1 Integral components of the right to adequate housing: the CESCR General Comment No 4

According to the UN CESCR General Comment No 4, the significance of the “adequacy” concept regarding the right to housing underlines baseline factors that determine if a certain form of shelter amount to “adequate housing” as per the ICESCR.²⁰ In part, the determination

¹⁶ See Currie and De Waal op cit note 9 at 572.

¹⁷ The United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para 4.

¹⁸ Ibid para 7.

¹⁹ Ibid para 5.

²⁰ See the CESCR General Comment No 4 at para 8. The purpose of the UN CESCR General Comment No. 4 can be explained as follows: (a) Authoritative interpretation: It provides an authoritative interpretation of the

of adequacy may be based on economic, social, cultural, ecological, climatic, and other factors. Yet, paragraphs 8(a)-(g) of the UN General Comment lists seven aspects that form integral components of the right: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

These baseline factors provide a universal framework that State parties may use to develop their housing laws, policies, and practices that at best aim to promote and attain adequacy in relation to the right to housing. These baseline factors are later compared with the South African housing laws, policies, programmes, practices, and jurisprudence. The comparison is contained in sections 4 and 5 of Chapter Two of the Thesis which deals with the domestic legal system, and adjudication of the constitutional right to adequate housing, respectively. In the context of the UN CESCR, the recognition of the right to an “adequate” standard of living provided in Article 11(1) of the ICESCR is not limited to the matters explicitly enumerated in General Comment No 4. Thus, the “adequate” standard of living further extends to incorporate other rights, including the right to water.²¹

(a) Legal security of tenure

First, legal security of tenure, which is an essential component of the right to adequate housing, confers on every individual the right to effective protection by the State against forced evictions or demolition of their home. International practice validates that in the housing arena, security of tenure is especially vital to poor households.²²

right to adequate housing as outlined in the ICESCR. This clarifies the scope and content of this right for States that have ratified the Covenant; (b) Guidance for States: It offers guidance to States on how to fulfill their obligations regarding the right to adequate housing for their citizens. This includes defining what constitutes “adequate housing” and outlining the steps States should take to progressively realise this right; (c) Accountability framework: It establishes a framework for holding States accountable for upholding the right to adequate housing. This can be used by individuals, Non-Governmental Organisations, and other stakeholders to advocate for and enforce this right; (d) Identifying key issues: It identifies key issues related to the right to adequate housing, such as forced evictions, discrimination in housing, and the specific needs of vulnerable groups; (e) Promoting implementation: It aims to promote the implementation of the right to adequate housing at the national level by providing clear expectations and best practices for States.

²¹ The United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009.

²² Suzanne Fitzpatrick and Hal Pawson ‘Security of Tenure in Social Housing: An International Review’ (2011) at 3.

In 2014, under the then Special Rapporteur on adequate housing, Raquel Rolnik, the Guiding Principles on the security of tenure for the urban poor²³ were produced. These principles are premised on the legal conviction that security of tenure pronounces respect to housing and land. Fitzpatrick and Pawson define legal security of tenure as “the legal arrangements which offer tenants indefinite tenure to their housing, subject to the proven breaches of their lease agreement that provide ground for termination action by the landlord”.²⁴ Security of tenure is derived from the fact that the law protects the basic individual rights to access and use the land and property in accordance with the law and fair procedures and that these rights are justiciable.

There are various forms of security of tenure. The UN CESCR General Comment No 4 includes emergency housing, lease, public and private rental accommodation, co-operative housing, owner-occupation, informal settlements, and occupation of land or property. Apart from these types of tenure, every individual must have a security of tenure that assures legal protection against forced eviction and other threats. Owing to meaningful engagement, State parties should consult with affected persons and groups, and implement immediately, measures that confer legal security of tenure upon persons and households without such protection.²⁵

(b) Availability of services, materials, facilities, and infrastructure

The availability and quality of facilities, infrastructure, materials, and services substantially impact the effective functioning of human settlements and the nature of social reproduction for inhabitants.²⁶ For the house to meet the adequacy requirement it must contain facilities that are indispensable for human health, security, comfort, and nutrition.²⁷ To this end, the CESCR General Comment No 4 provides that:

All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting,

²³ The Guiding principles on security of tenure for the urban poor (2014).

²⁴ See Fitzpatrick and Pawson op cit note 22 at 1.

²⁵ See the CESCR General Comment No 4 at para 8(a).

²⁶ K Mchunu and S Nkambule ‘An evaluation of access to adequate housing: A case study of eZamokuhle township, Mpumalanga; South Africa’ (2019) 5 *Cogent Social Sciences* 1, at 5. See also Dumitru Sandu ‘Housing as a social reproduction system’ in Ola Siksio (ed) *Housing Sociology in times of Change* (1990) at 135.

²⁷ See the CESCR General Comment No 4 at para 8(b).

sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²⁸

The absence of these amenities would amount to an infringement of the beneficiary's right to adequate housing. As reflected by the proliferation of scholarship on urban amenities, the spatial locational pattern analysis reveals that the level of concentration of facilities, infrastructure, materials, and services varies significantly across different areas (e.g., a city, region, or country).²⁹ For the right to adequate housing to be realised, this imbalance that leads to spatial disparities in accessing these basic amenities needs to be remedied accordingly.

(c) Affordability

As a human rights criterion, the principle of affordability requires that housing, either for rental or purchase, should be accessible at a price that is affordable to all people. The correlation between the components of affordability and accessibility offers a durable solution to the dynamics of urban real estate markets which do not often address the housing needs of diverse social groups, particularly poor households who intend either to rent or purchase a house.³⁰

Spatial segregation is also intensified by systemic barriers to accessing social housing programmes.³¹ The imposition of stringent eligibility requirements to qualify for housing prohibits or limits the ability of certain social groups that cannot meet the minimum incomes, credit scores, formal employment, and residency permits.

Housing is deemed affordable when the dwelling is of an acceptable standard and its associated financial costs permit households to satisfy other basic needs or meet essential

²⁸ Ibid.

²⁹ Jahangeer A Parry et al 'Spatial analysis on the provision of urban amenities and their deficiencies - A case study of Srinagar City, Jammu and Kashmir, India' (2012) 2(6) *Research on Humanities and Social Sciences* at 192-193.

³⁰ Wendy Wilson and Cassie Barton 'What is affordable housing?' (2019) at 7. See also Isolde de Villiers 'Spatial practices in Lowliebenhof: The case of *Maphango V Aengus Lifestyle Properties (PTY) LTD* (2014) (17)5 *Potchefstroom Electronic Law Journal* at 2165; John Ratcliffe et al *Urban Planning and Real Estate Development* 4th ed (2021).

³¹ United Nations Human Rights Council 'Spatial segregation and the right to adequate housing' A/HRC/49/48 (2022) at 12.

non-housing expenditures.³² As eloquently stated by Cavicchia, when local planning is more market-oriented, housing accessibility becomes largely dependent on household finances.³³ “As a consequence, generating inequalities based on income and wealth differences and on intergenerational justice issues”.³⁴

The CESCR General Comment No 4 obliges State parties to ensure that the general percentage of housing costs is proportionate to various income levels. A key measure for promoting affordable housing for all is housing subsidies. This entails that those who are unable to qualify for affordable housing can be able to succeed owing to various forms of housing finance which satisfactorily reflect their housing needs. Thus, it is important to ensure that tenants are appropriately protected against unreasonable rent increases.

(d) Habitability

The fourth element that the CESCR General Comment No 4 articulates as a constituent component of the normative content of the right to access adequate housing is habitability. This aspect simply advances that adequate housing includes habitable dwellings. The premises must be appropriate for human occupation and without any grave defects that might pose risks to human health and safety. Therefore, this means inhabitants should be provided with adequate living space and be guaranteed protection “from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors”.³⁵

A central constituent of the built environment, for housing to be adequate, it must assure inhabitants of their physical safety. Thus, there are strong links between housing, planning,

³² See the CESCR General Comment No 4 at para 8(c). See also Katrin B Anacker ‘Introduction: housing affordability and affordable housing’ (2019) 19(1) *International Journal of Housing Policy* at 1.

³³ Rebecca Cavicchia ‘Housing accessibility in densifying cities: Entangled housing and land use policy limitations and insights from Oslo’ (2023) 127 *Land Use Policy* at 1, at 2.

³⁴ Ibid.

³⁵ See the CESCR General Comment No 4 at para 8(d). Housing challenges for part of the broad array of social problems such as the high mortality of children. Housing without clean water and sanitation, sufficient living areas, and finished building materials gravely tampers children’s health living in sub-Saharan Africa. See Lucy S Tusting et al ‘Housing and child health in sub-Saharan Africa: A cross-sectional analysis’ (2020) 17(3) *PLOS Medicine* at 1; Andy Haines et al ‘Promoting health and advancing development through improved housing in low-income settings’ (2013) 90 *Journal of Urban Health* at 810; A Hjelmkog and I Deas ‘The equity implications of an expanded health and wellbeing role for housing associations’ (2023) 5 *Public Health in Practice* at 1.

and health.³⁶ Normally, the inadequacy and deficiency of housing and living conditions relate to higher mortality and morbidity rates. As a result, State parties are urged to expansively apply the Health Principles of Housing.³⁷ These principles, prepared by the World Health Organization (WHO), “view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses”.³⁸

(e) Accessibility

The understanding of accessibility in this section is quite central to spatial equity. Accessibility is about the accomplishment of a barrier-free design of housing and related public services, materials, facilities, and infrastructure. It refers to the degree to which residents can easily reach certain areas and their interaction with social services³⁹ For example, (land uses and densities in) urban structures must be compatible with people’s social well-being and provide everyone with a full range of urban functions such as housing, employment, and services.⁴⁰ Such a spatial pattern reduces the travelling distances to work or shop etc.

In this manner, appropriate measures are implemented to ensure that all people have equal access to the physical environment, transportation, and other public facilities and services available in both urban and rural areas. The right measures, usually identify and eliminate any obstacles and barriers to accessibility which disconnect marginalised social groups from accessing adequate urban infrastructure. The physical obstructions of the built-up environment in urban areas often affect people with physical impairment, such as persons with disabilities or older persons with frail physiques. So, “accessibility leads to independence, increased mobility, access to the labour market and consequently a better quality of life”.⁴¹

³⁶ Job Gbadegesin et al ‘Housing, planning and urban health: Historical and current perspectives from South Africa’ (2020) 48(48) *Bulletin of Geography. Socio-economic Series* at 23.

³⁷ World Health Organization ‘Health Principles of Housing’ (1989).

³⁸ Ibid. The principles related to health deals with the following: protection against communicable disease; protection against injuries, poisonings and chronic; reducing psychological and social stresses to a minimum; improving the housing environment; making informed use of housing; and protecting populations at special risk.

³⁹ Danie J Du Plessis ‘Land-use mix in South African cities and the influence of spatial planning: Innovation or following the trend?’ (2015) 97(3) *South African Geographical Journal* at 220.

⁴⁰ Economic Commission for Europe ‘Spatial Planning: Key Instrument for Development and Effective Governance with Special Reference to Countries in Transition’ (2008) at 9.

⁴¹ United Nations Human Settlements Programme (UN-HABITAT) ‘Accessibility of Housing: A Handbook of Inclusive Affordable Housing Solutions for Persons with Disabilities and Older Persons’ (2014) at 4.

Interestingly, the CESCR General Comment No 4 specifically enumerates an array of disadvantaged groups,⁴² without clearly mentioning the landless and economically poor persons in the list. Nevertheless, the General Comment's wording of "and other groups" could loosely be extended or translated as encompassing both the landless and the poor. At least the General Comment compensates the omission by stating that "within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal".⁴³

All things considered; these groups should be prioritised in the housing sphere. One of the major obligations of State parties is that their housing laws and policies should fully consider the special housing needs of these groups. Lastly, the General Comment requires that "discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement".⁴⁴ A key method for improving accessibility is the adoption of an integrated approach to housing standards in the contexts of affordable and social housing programmes, as well as sustainable upgrading and reconstruction of human settlements.

(f) Location

The location of land to which government-subsidised housing are developed is central to the Thesis' pursuit of establishing how spatial equity can be achieved through the realisation of the right to housing. This is the most fundamental aspect of adequacy because it pertains to whether housing developments are in either urban peripheries or inner-city areas or places closer to essential public amenities. A specific location gives poor households the opportunity to receive the same marginal benefit from the "locational amenities".⁴⁵ The theoretical perspectives on urban service delivery involve "locational amenities" which plainly relate to easy access to basic amenities based on the geographic relationship between area and service

⁴² Disadvantaged groups listed in the UN CESCR General Comment No 4 encompass older persons, children, persons with disabilities, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas.

⁴³ See the UN CESCR General Comment No 4 at para 8(e). See also Anna G Hansson and Björn Lundgren 'Defining social housing: A discussion on the suitable criteria' (2019) 36(2) *Housing, Theory and Society* at 149.

⁴⁴ Ibid.

⁴⁵ William H Hoyt and Stuart S Rosenthal 'Household location and Tiebout: Do families sort according to preferences for locational amenities?' (1997) 42(2) *Journal of Urban Economics* at 159.

provision.⁴⁶ “The essence of urban planning is to provide adequate and equitable services to all groups”.⁴⁷ Location is closely linked to other housing adequacy elements such as legal security of tenure, availability of services, and affordability.⁴⁸ Thus, there is a close link between location and accessibility.

In overlapping with the criterion of accessibility, the location must allow beneficiaries of low-income housing to have “access to employment options, health-care services, schools, childcare centres, and other social facilities”.⁴⁹ Due to expensive public transport fares, locational peripheries force poor households to persistently encounter challenges in terms of accessing economic opportunities found in the far-distanced inner cities. Nonetheless, this largely depends on the spatial form of a particular city - where the “inner city” and “periphery” are not always clear-cut. Accordingly, amenities and opportunities must equally be accessible from where people are located.⁵⁰

The Special Rapporteur on the right to housing contends that the advancement of the right to housing hinges on the linkage between land policies and housing policies.⁵¹ Cognisant of the location aspect, this entails spatial equity-based land use planning and mechanisms such as zoning and urban planning that implements housing programmes in well-located areas to address spatial discrimination and to realise the right to adequate housing.

(g) Cultural adequacy

In the list of baseline factors that determine if certain forms of shelter can constitute “adequate housing” (as enumerated in the CESCR General Comment No 4), the aspect of cultural adequacy is also included. Article 15(a) of the ICESCR recognises everyone’s right to participate in cultural life. Cultural rights are part of the corpus of human rights and concern many areas of life.⁵² The aspect of cultural adequacy in relation to the right to

⁴⁶ Ibid; Parry op cit note 29 at 193; Adekunle J Aderamo and OA Aina ‘Spatial Inequalities in Accessibility to Social Amenities in Developing Countries: A case from Nigeria’ (2011) 5(6) *Australian Journal of Basic and Applied Sciences* at 316; Mark van Duijn et al ‘Models of household location and urban amenities’ (2014) at 4.

⁴⁷ Ibid 192-193.

⁴⁸ Kali Marnane and Kelly Greenop ‘Housing adequacy in an informal built environment: case studies from Ahmedabad’ (2023) 38 *Journal of Housing and the Built Environment* at 2062.

⁴⁹ See UN CESCR General Comment No 4 at para 8(f).

⁵⁰ Yongling Li et al ‘Accessibility-based equity of public facilities: a case study in Xiamen, China’ (2021) 14 *Applied Spatial Analysis and Policy* at 947.

⁵¹ See United Nations Human Rights Council op cit note 31 at 12.

⁵² Melik Özden and Simon Brunschwig ‘Cultural Rights’ (2013) at 3.

housing does not receive substantial attention in international, regional, and domestic legal frameworks. In literature, scant consideration is similarly observed. According to Sukhwani, although most human rights instruments recognise the significance of adequate housing, the aspect of cultural adequacy often gets sidetracked in matters dealing with the in-built environment.⁵³

For the CESCR, in General Comment No 21, culture encompasses, *inter alia*, natural, and man-made environments as well as a shelter through which individuals and communities may express their humanity and meaning to their existence.⁵⁴ The CESCR General Comment No 4 alludes that “the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing”.⁵⁵

Cultural adequacy forms part of the core principles of sustainable housing⁵⁶ as outlined by the Geneva UN Charter on Sustainable Housing.⁵⁷ The principle of cultural adequacy requires that “housing policy should take into consideration questions of cultural identity, value, and emotional wellbeing”.⁵⁸ Accordingly, this should be addressed through:

- i. National housing policies that take into account social and territorial peculiarities and support the protection and enhancement of: landscapes; historical heritage; and cultural heritage;
- ii. Emphasizing the development of public spaces for cultural and social activities;
- iii. Housing that takes into consideration the background and culture of inhabitants;
- iv. Houses and neighbourhoods designed and actively maintained in order to enhance the emotional wellbeing of people, including by involving local communities in this process.

⁵³ Vibhas Sukhwani et al ‘Enhancing cultural adequacy in post-disaster temporary housing’ (2021) 11 *Progress in Disaster Science* at 2.

⁵⁴ The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity, see the United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 21: The Right of Everyone to Take Part in Cultural Life*, 21 December 2009, at para 13.

⁵⁵ See UN CESCR General Comment No 4 at para 8(g).

⁵⁶ The other principles are (1) social inclusion and participation; (2) economic effectiveness; and (3) environmental protection.

⁵⁷ The Geneva UN Charter on Sustainable Housing: Ensure access to decent, adequate, affordable and healthy housing for all (2015).

⁵⁸ *Ibid* para 16.

Accordingly, cultural identity and diversity must be mainstreamed in housing projects.⁵⁹ All spheres of government are expected to integrate cultural rights into their housing policies.⁶⁰ Development or modernisation activities should preserve the cultural dimensions of housing through the usage of the appropriate technological facilities.⁶¹ Nawa states that “local government has been identified as a locus where culture-led development best finds expression”.⁶² Therefore, the infusion of cultural rights and practices in local government housing policies should express cultural identity and diversity in the housing processes and products.

2.3 Other international human rights treaties

Certain binding international human rights treaties also entrench the right to adequate housing. Included in the treaties are the International Convention on the Rights of People with Disabilities of 2006 (ICRPD),⁶³ the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW),⁶⁴ the United Nations Convention on the Rights of the Child of 1989 (CRC),⁶⁵ and the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD).⁶⁶ These instruments oblige State parties to realise the right to adequate housing pertaining to specific target groups in society, namely, persons with disabilities, women, children, and racial minority groups. At present, rife discrimination which infringes housing rights of

⁵⁹ Farida Shaheed ‘Human rights are essential tools for an effective intercultural dialogue’ (2010) available at <https://www.ohchr.org/Documents/Issues/CulturalRights/Statement_cultural_diversity21052010.doc> (accessed on 14 May 2023).

⁶⁰ Dimitrina Petrova ‘Diverse cultural identities: The challenges of integrating cultural rights in policies and practices’ (2010) at 2.

⁶¹ See UN CESCR General Comment No 4 at para 8(g).

⁶² Lebogang L Nawa *Municipal cultural policy and development in South Africa: A study of the City of Tshwane Metropolitan Municipality* (unpublished PhD thesis, University of South Africa, 2012) at 2.

⁶³ See the United Nations Convention on the Rights of Persons with Disabilities, adopted 30 March 2007, and entered into force 3 May 2008.

⁶⁴ The United Convention on the Elimination of All Forms of Discrimination Against Women, was adopted on 18 December 1979 and came into force on 3 September 1981.

⁶⁵ The United Nations Convention on the Rights of the Child was adopted on 20 November 1989 and came into force on 2 September 1990. The monitoring of the CRC is conducted by the Committee on the Rights of the Child.

⁶⁶ The United Nations International Convention on the Elimination of All Forms of Racial Discrimination, was adopted on 21 December 1965 and entered into force on 4 January 1969. The ICERD is monitored by the Committee on the Elimination of Racial Discrimination (CERD). See also Connie De La Vega et al ‘The promotion of economic, social, and cultural rights of vulnerable groups in Africa pursuant to treaty obligations: CRC, CEDAW, CERD, & CRPD’ (2014) 14(2) *Washington University Global Studies Law Review* at 213.

women, children, persons with disabilities, and various groups of foreigners, is observed.⁶⁷ By explicitly providing for the right to adequate housing, these treaties seek to expressly address discrimination while promoting and protecting the rights of these segments of society that are historically and contemporarily marginalised.

Persons with disabilities are one of the most marginalised and disadvantaged social groups. In South Africa, they mostly reside in informal settlements.⁶⁸ With the objective to eliminate their exclusion from accessing housing, Article 28(1) of the United Nations International Covenant on Civil and Political Rights of 1966 (ICCPR)⁶⁹ specifically recognises the right of persons with disabilities to an adequate standard of living, including adequate housing. Disability is one of the conditions unambiguously cited in Article 25(1) of the UDHR that would grant an individual the legal status, right, and privilege to evoke the State's intervention to end the lack of adequate housing.

Women's perpetual vulnerability due to stigmatisation and deep-rooted discriminatory social practices is evidenced through their lack of enjoyment of the right to adequate housing on equal footing with men. Their access to housing, land, and property, is usually jeopardised by the dissolution of marriage or the death of a spouse.⁷⁰ Poverty and lack of other housing options cause women to remain in violent family situations.⁷¹ As a result, Article 14(2)(h) of the CEDAW,⁷² recognises women's rights "to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications". At face value, Article 14(2)(h) of CEDAW also encompasses basic facilities and services that are generally accepted to be critical components for an adequate standard of living. In addition, Article 14(2)(g) guarantees women accessibility to land and agrarian reform in land resettlement schemes.

⁶⁷ Bogumil Terminski 'The right to adequate housing in international human rights law: Polish transformation experiences' (2011) 22(2) *Revista Latinoamericana de Derechos Humanos* at 221. See also Jace Pillay 'The relationship between housing and children's literacy achievement: Implications for supporting vulnerable children' (2017) 37(2) *Southern African Journal of Education* at 1.

⁶⁸ The United Nations ICESCR Committee 'Committee on the Rights of Persons with Disabilities Consideration of reports submitted by States parties under article 35 of the Convention: South Africa (2015) at para 328.

⁶⁹ The United Nations International Covenant on Civil and Political Rights, adopted on 16 December 1966, entered into force on 23 March 1976. See Article 9(1) of CRPD states that to enable persons with disabilities to live independently, States Parties must ensure that persons with disabilities have access to the physical environment, and to the necessary facilities and services.

⁷⁰ Guidelines for the Implementation of the Right to Adequate Housing (2020) at 12.

⁷¹ See OHCHR op cit note 9 at 6.

⁷² See Article 14(2) of the CEDAW.

Article 5 of the ICERD enjoins State parties to prohibit and eliminate racial discrimination and to guarantee to everyone without distinction the right to housing. The same clause also accords every individual with the right of access to any place or service intended for use by the public. In addition, the recognition or reference to the right to adequate housing is also manifested in other key international instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD);⁷³ the ICCPR;⁷⁴ the CRC,⁷⁵ the United Nations Convention Relating to the Status of Refugees of 1951;⁷⁶ the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;⁷⁷ and the International Convention Relating to the Status of Refugees.⁷⁸ Moreover, the right to housing is also enshrined by Recommendation No. 115 on Workers' Housing of the International Labour Organization of 1961,⁷⁹ and the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.⁸⁰ The concerted objectives and implications of all treaties and conventions promote the realisation of everyone's right to adequate housing.

⁷³ See Article 5(e)(iii) of the ICERD. State Parties are required to prohibit and eliminate discrimination in all its forms and to guarantee everyone the right to housing.

⁷⁴ See Article 17(1) of the ICCPR. This provision guarantees protection to privacy and homes. The protection is necessary for the enjoyment and fulfilment of the right to housing.

⁷⁵ Under the CRC, the primary responsibility to provide adequate housing to a child is first imposed on the parent(s) or guardian of the child (see Article 16(2) of the CRC). Where conditions disorient them from realising the child's right to adequate housing, a States Party must take the appropriate measures to assist the primary holders of the responsibility to implement this right (see Article 16(3) of the CRC). The CRC also precludes unlawful interference against a child's rights to privacy, family, and home (see Article 16(1) of the CRC).

⁷⁶ See Article 21 of the United Nations Convention Relating to the Status of Refugees of 1951.

⁷⁷ See article 43(1) of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It provides that: "Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to [...] (d) access to housing, including social housing schemes, and protection against exploitation in respect of rents".

⁷⁸ Article 21 of the International Convention Relating to the Status of Refugees states: "As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances".

⁷⁹ Under General Principles II: Objectives of National Housing Policy, the Recommendation No. 115 on Workers' Housing of the International Labour Organization of 1961 provides that workers are entitled to an adequate and decent housing accommodation.

⁸⁰ See Article 20(2)(c) of the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. It provides that "Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards...housing".

2.4 Soft law

In contrast to binding international human rights treaties, the right to adequate housing is equally enshrined by other non-binding international conventions and declarations on related fields,⁸¹ commonly referred to as soft law. In 2018, the Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City was adopted by more than forty local authorities from the United Cities and Local Governments (UCLG) in conjunction with the UN Special Rapporteur on the right to housing, Leilani Farha, and the Office of the High Commissioner for Human Rights.⁸²

South Africa's cities of Durban and Johannesburg form part of the UCLG. The Declaration contains five action plans that serve as guidelines for cities' quest to achieve spatial equity through the realisation of the right to housing.⁸³ The Declaration's fourth demand is for urban planning to combine adequate housing with quality, inclusive and sustainable neighbourhoods.

The Global Strategy for Shelter to the Year 2000⁸⁴ then provides a comprehensive framework for addressing the needs of people living in poverty. It declares that:

All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them.⁸⁵

⁸¹ United Nations Human Settlements Programme (UN-HABITAT) and Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Housing rights legislation Review of international and national legal instruments' (2002).

⁸² Cities for Adequate Housing 'Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City' (2018).

⁸³ To guarantee the social function of the city, the first action plan calls for revitalised legal and fiscal powers to regulate the real estate market to protect tenants against tenure insecurities. The second demand is to improve public housing stocks to "guarantee a balanced distribution of affordable housing in the city, in order to promote fair housing, combat socio-spatial segregation, and alleviate the tension between centres and peripheries". The third call is for more tools to co-produce public-private community-driven alternative housing. The fourth action plan is that there must be a combination of adequate housing with quality, inclusive, and sustainable neighbourhoods produced from urban planning. The last call of action is cooperation with both national and international supra-municipal bodies and demand for more municipal resources and powers. See the Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City.

⁸⁴ The Global Strategy for Shelter to the Year 2000, which was adopted by the General Assembly of the United Nations at its forty-third session in resolution 43/181 on 20 December 1988.

⁸⁵ See paragraph 13 of the Global Strategy for Shelter to the Year 2000, which was adopted by the General Assembly of the United Nations at its forty-third session in resolution 43/181 on 20 December 1988.

The Global Strategy for Shelter to the Year 2000 identifies key strategies for addressing needs, including the promotion of affordable and decent housing; the development of policies and programmes that support the construction and improvement of housing for low-income households; the development of community-based housing initiatives that involve communities in the planning and construction of housing projects; the involvement of private sector in the provision of affordable housing; and the promotion of appropriate technologies and materials in housing construction to ensure the sustainability of housing projects. The Global Strategy for Shelter to the Year 2000 states that:

Adequate shelter means more than a roof over one's head: It means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost. Conditions of adequacy may vary from country to country, and their attainment will not take place overnight.⁸⁶

The Yogyakarta Principles⁸⁷ outlines the principles of the application of international human rights law in relation to sexual orientation and gender identity. Principle 15 states that: “everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity”.⁸⁸

The Habitat I: Vancouver Declaration on Human Settlements⁸⁹ recognises the importance of human settlements and calls for the promotion of adequate housing, basic services, and sustainable development. It provides a framework for addressing the challenges of urbanisation and emphasised the need for integrated planning and management of human settlements. In terms of Habitat I, adequate shelter means:

more than a roof over one's head. It also means adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and reliability;

⁸⁶ See paragraph 5 of the Global Strategy for Shelter to the Year 2000.

⁸⁷ The Yogyakarta Principles: Principles on The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, adopted in November 2006, Yogyakarta, Indonesia.

⁸⁸ In addition, Principle 15A provides that states shall: “Take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status”.

⁸⁹ United Nations Conference on Human Settlements - Habitat I, Vancouver, Canada, from 31 May - 11 June 1976

adequate lighting, heating and ventilation; adequate basic infrastructure, such as water-supply, sanitation and waste-management facilities; suitable environmental quality and health-related factors; and adequate and accessible location with regard to work and basic facilities: all of which should be available at an affordable cost.⁹⁰

The Habitat Agenda II: Istanbul Declaration on Human Settlements⁹¹ sets new goals and guidance for urban development initiatives and programmes. It constitutes a significant milestone in the promotion of sustainable urban development. The Habitat Agenda II pushes for two main themes: “adequate shelter for all” and “sustainable human settlements development in an urbanizing world”. The Habitat Agenda II recognises that the entitlement to adequate shelter and services is a basic human right for all.⁹² It also asserts that: “of special importance is the elimination of social and racial segregation, *inter alia*, through the creation of better-balanced communities, which blend different social groups, occupation, housing and amenities”.⁹³ The Habitat Agenda II commits to the progressive realisation of the right to adequate housing.

Agenda 21⁹⁴ is an action plan of the UN that provides a comprehensive blueprint of sustainable development that addresses environmental, social, and economic issues, including challenges for the provision of adequate housing. Agenda 21 is the document that formulates and contains the Sustainable Development Goals (SDGs). For both the deprived urban and rural poor, Agenda 21 recognises their right to adequate housing which is achievable through an enabling approach to shelter development and improvement. It also notes that “the rising costs of urban land prevent the poor from gaining access to suitable land”.⁹⁵ As an expedient measure and pragmatic solution to the urban shelter deficit, all countries are called upon to facilitate the urban and rural poor’s access to land, low-cost housing, and the regularisation and upgrading of informal settlements and urban slums. Other measures include the acceleration of credit schemes that allow for land purchase acquisition of safe and healthy shelter and infrastructure services.

⁹⁰ Ibid para 60.

⁹¹ United Nations Conference on Human Settlements - Habitat II, Istanbul, Turkey, from 3 - 14 June 1996. See also United Nations Centre for Human Settlements ‘Cities and Homes for All: The Habitat Agenda’ (1996).

⁹² See paragraph 8 under III: Guidelines for Action.

⁹³ Ibid.

⁹⁴ The Agenda 21: Programme of Action for Sustainable Development, adopted by the United Nations Conference on Environment and Development (UNCED), from 3-14 June 1992, Rio de Janeiro, Brazil.

⁹⁵ Ibid para 7.27.

The New Urban Agenda adopted by Habitat Agenda III⁹⁶ envisages cities that fulfil social functions by progressively achieving the full realisation of the right to adequate housing.⁹⁷ It calls for the provision of affordable and adequate housing, basic services, and infrastructure for all urban dwellers, including the poor and marginalised. It also highlights the importance of cities in addressing global challenges such as poverty, inequality, and social exclusion. It recognises the local government's role in implementing sustainable urban development policies and initiatives. The United Nations General Assembly pushes for the New Urban Agenda to promote human rights and inclusivity in urban development.⁹⁸ The General Assembly further holds that:

. . . cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all.⁹⁹

Hence, the New Urban Agenda emphasises the significance of capacity development and tools for local governments in designing, planning, and managing sustainable urban development.

2.5 The African regional human rights system

The African Charter on the Values and Principles of Decentralisation, Local Governance, and Local Development¹⁰⁰ espouses the values of justice, equality, and equity in Article 4(e), which are generally acknowledged as major imperatives in the pursuit to eliminate obstinate spatial inequalities. Whereas the African Charter on Human and Peoples' Rights (the African Charter)¹⁰¹ is the most authoritative regional human rights instrument that recognises and

⁹⁶ The United Nations Conference on Housing and Sustainable Urban Development - Habitat III- 'New Urban Agenda' (2016).

⁹⁷ Ibid 5.

⁹⁸ See United Nations General Assembly 'Res. 71/256, annex, New Urban Agenda' (2016) at 23.

⁹⁹ Ibid.

¹⁰⁰ The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, was adopted on 24 June 2014.

¹⁰¹ Also called the 'Banjul Charter', the African Charter was adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986. The Charter is the pivotal human rights instrument of the OAU/AU.

enforces fundamental human rights and freedoms in Africa. The African Charter enshrines several socio-economic rights. In Article 24, the instrument stipulates that “all peoples shall have the right to a general satisfactory environment favourable to their development”. Still, the African Charter does not provide for an explicit right to adequate housing.

Despite the lack of a clear-cut clause for the right to housing, the African Commission on Human and Peoples’ Rights (ACHPR),¹⁰² a quasi-judicial body at the African regional level, has issued several resolutions and decisions recognising the right to housing. The ACHPR ruled in *Social and Economic Rights Action Centre v Nigeria*, that the African Charter does confer the right to housing.¹⁰³ The ACHPR implied that three interlinked rights: the right to property,¹⁰⁴ the right to physical and mental health,¹⁰⁵ and the right to protection against forced evictions,¹⁰⁶ amount to the right to adequate housing. Thus, the ACHPR pointed out moreover that:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.¹⁰⁷

Similarly, in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan Communication*,¹⁰⁸ the ACHPR affirmed the interdependence between the right to adequate housing and the right to health and ruled that the destruction of homes, amongst

¹⁰² The Commission was established under Article 30 of the African Charter, and was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. is given the mandate to promote human and peoples’ rights and ensure their protection in the continent.

¹⁰³ See *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 60 (ACHPR 2001) [60].

¹⁰⁴ See Article 14 of the African Charter.

¹⁰⁵ Ibid Article 16.

¹⁰⁶ Ibid Article 18(1).

¹⁰⁷ See *SERAC v Nigeria* at para 60. Citing the *SERAC v Nigeria* matter, Wolf similarly supports the argument of the Commission and asserts that the combined effect of Articles 14, 16, and 18(1) of the Charter create the right to housing. This, therefore, demonstrates their indivisibility and interdependency as mutually reinforcing rights, see also Ralph Wolf ‘Participation in the right of access to adequate housing’ (2006) 14 *Tulsa Journal of Comparative and International Law* at 274.

¹⁰⁸ 279/03 & 296/05 (2009) AHRLR 153 (ACHPR 2009).

others, exposes victims to serious health risks.¹⁰⁹ Additionally, the ACHPR held that the destruction of public facilities, properties, and disruption of life in densely populated areas of indigenous black African tribes in the Darfur region (Western Sudan),¹¹⁰ amounts to gross, massive, and systematic violations of human rights.¹¹¹ Importantly, the ACHPR reflected as follows: “the forced evictions and destruction of housing and property in the Darfur region violated the right to property enshrined in of the Charter.”¹¹² This case also highlights the widespread nature in which black African people struggle towards the realisation of the right to have access to adequate housing in Africa, generally. By virtue of ruling against the forced evictions and destruction of housing and property and actions that exposes victims to serious health risks, the ACHPR has amplified the regional affirmation of the right of access to adequate housing in Africa.

Soft law consolidates the call for the realisation of the right to adequate housing in Africa. The Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights¹¹³ serve as a yardstick for the Commission’s interpretation of State parties’ obligations in relation to socio-economic rights contained in the African Charter. In the Guidelines and Principles, the ACHPR defines the right to adequate housing as “the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity”, which “includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services”.¹¹⁴

¹⁰⁹ Ibid para 212. See also Lilian Chenwi ‘The right to adequate housing in the African regional human rights system: Convergence or divergence between the African Commission and South African approaches’ (2013) 17 *Law, Democracy and Development* at 344.

¹¹⁰ In particular, members of the Fur, Marsalit and Zaghawa tribes.

¹¹¹ See *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v Sudan* at para 2.

¹¹² Ibid at para 115.

¹¹³ The Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (the African Commission Principles and Guidelines), adopted in 2010 and formally launched in 2011. This is a ‘soft law’ instrument akin to the General Comments of UN treaty-monitoring bodies.

¹¹⁴ Guidelines and Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (African Commission Principles and Guidelines), adopted in 2010 and formally launched in 2011.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,¹¹⁵ commonly referred to as the Maputo Protocol was adopted in 2003. It constitutes a "pioneering and legally binding instrument, which marks a new beginning in the promotion and protection of women's human rights on the African continent".¹¹⁶ Accordingly, Article 16 of the Maputo Protocol explicitly recognises women's right to adequate housing. The article stipulates that:

Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, states parties shall grant to women, whatever their marital status, access to adequate housing.

In addition, women have the right to freely acquire, manage and administer their own properties;¹¹⁷ the right to a healthy and sustainable environment;¹¹⁸ and the right of access to clean drinking water, sources of domestic fuel, and land.¹¹⁹ Importantly, Article 19 of the Maputo Protocol enjoins State parties to introduce the gender perspective in national development planning.

In Article 18, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (African Protocol on the Rights of Older Persons)¹²⁰ requires that State parties must ensure that older persons have access to infrastructure, counting buildings, and public transport, and are accorded seating, which is necessary for older persons to lead dignified and fulfilled lives.

¹¹⁵ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005. Article 66 of the African Charter provides for special protocols or agreements that would supplement the provisions of the African Charter. On 16 March 2004, South Africa signed the Maputo Protocol and ratified it on 17 December 2004.

¹¹⁶ Christine Ocran 'Recent Developments-Actualities: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2007) 15(1) *African Journal of International and Comparative Law* at 147.

¹¹⁷ See Article 6(j) of the Maputo Protocol.

¹¹⁸ Ibid Article 18(1).

¹¹⁹ Ibid Article 15(a).

¹²⁰ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 2016. On the protection of older women only, Article 9(2) of the African Protocol on the Rights of Older Persons guarantees them the right to protection of property and land rights, in accordance with the applicable legislation and other measures.

3 Obligations of local government: Global patterns

“The real effect of human rights is experienced locally”.¹²¹ The typical nature of local government functions amplifies the exercise and enjoyment of fundamental rights.¹²² Vormittag submits that “the rise of decentralised paradigms of governance and a shift in the international human rights agenda from codification towards realisation was already bestowing upon cities the burden of realising human rights”.¹²³ The discourse for human rights orientation at local government level has also propelled the emergence of the phrase “human rights city”.¹²⁴

The national government may set uniform national housing laws, policies, standards, and programmes. However, the local governments decide on the location for new housing developments and who benefits from housing subsidies or programmes, subject to the uniform frameworks established at the national level. For these reasons, as compared to national governments, local governments assume more immediate responsibilities that directly impact the housing rights of residents.¹²⁵

Hence, city governments are well-placed to the extent that the pursuit of the rights to equality, human dignity, and the right to adequate housing is given effective expression through their involvement. Local governments are generally viewed as the front line for enabling the realisation of equal access to low-income and affordable housing. A universal benchmark for measuring human rights progress equally reflects local contexts. “Human rights, therefore, are not only realized locally—local implementation gives meaning to human rights. Human rights treaties are intended to be implemented at the local level”.¹²⁶ Global

¹²¹ Columbia Law School Human Rights Institute ‘Bringing Human Rights Home: How state and local governments can use human rights to advance local policy’ (2012) at 5.

¹²² Conrad M Bosire ‘Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa’ (2011) 11 *African Human Rights Law Journal* at 151.

¹²³ Pedro Vormittag ‘Human rights mobilisation in São Paulo’s policy response to COVID-19’ in Janne E Nijman et al (eds) *Cities and Global Governance: Urban Politics of Human Rights* (2023) at 5.

¹²⁴ Martha F Davis ‘Introduction’ in Martha F Davis et al (eds) *Human Rights Cities and Regions: Swedish and International Perspectives* (2017) at 4; Barbara Oomen et al (eds) *Global Urban Justice. The Rise of Human Rights Cities* (2016); Peris S Jones ‘Economic and Social Rights and the City’ in Malcolm Langford and Katharine Young (eds) *Oxford Hand Book of Economic and Social Rights* (2022).

¹²⁵ OHCHR ‘Implementing the right to adequate housing: A guide for local governments and civil society’ (2021) at 4.

¹²⁶ Ibid.

patterns demonstrate that local governments can incorporate international human rights standards in their programmes of action.¹²⁷

As emboldened by the Special Rapporteur on adequate housing, the endeavour to address and reverse the detrimental consequences of spatial segregation is linked to facilitating the realisation of the right to adequate housing.¹²⁸ Fittingly, the Special Rapporteur cites South Africa as a typical case study where long-lasting consequences of spatial segregation are shown by informal settlements, resettlement sites, gated communities, and residential institutions. Thus, invoking an effective response from local government to use, among other apparatuses, international human rights frameworks, housing policies, urban and territorial planning, and programmes for upgrading informal settlements to address and reverse the consequences of spatial segregation.

Most of all, for the purposes of enhancing decision-making and directly responding to local needs, local governments can integrate human rights housing standards into local law, policy, and practice. Therefore, joining “a global community of local governments worldwide that have increasingly drawn from the human rights framework to benefit their work and their communities”.¹²⁹ For instance, through the UCLG, a collaborative global group of cities representing their local governments adopted the Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City. By grounding concerted efforts in human rights terms, local governments greatly benefit from the positive influence of globalisation.¹³⁰ Aust and Du Plessis submit that “SDG 11 proves that local governance is recognised as an autonomous yet interrelated part of the global pursuit of sustainable development”.¹³¹

All things considered; international human rights treaties seldom provide specific obligations that would directly apply to local governments. Local governments’ human rights obligations are indirectly bound as part of the State. However, in the absence of binding legal norms, soft

¹²⁷ See Columbia Law School Human Rights Institute op cit note 121 at 1.

¹²⁸ See United Nations Human Rights Council op cit note 31.

¹²⁹ Ibid 5.

¹³⁰ For instance, through the United Cities and Local Governments (UCLG), various local government structures from contracting State parties can collaborate to address a wide array of human rights issues.

¹³¹ Helmut P Aust and Anél Du Plessis ‘Introduction: The globalisation of urban governance – legal perspectives on Sustainable Development Goal 11’ in Helmut P Aust and Anél Du Plessis (eds) *The Globalisation of Urban Governance: Legal Perspectives on Sustainable Development Goal 11* (2019) at 5.

laws, which operate as gap-fillers, at least, directly give local governments housing as well as spatial equity-related obligations. This consolidation of directly and indirectly imposed human rights obligations may require local governments to fulfil the right of access to adequate housing.

Between the State and local government, the Human Rights Council alludes to the notion of “shared and complementary duties to respect, protect and fulfil human rights”.¹³² After ratification, the State is bound to comply with obligations imposed by international human rights treaties. Hence, local governments form part of the State, and are obliged to fulfil human rights obligations at the grass-roots level. In its General Comment No 16, the CESCR Committee emphasises that “violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels”.¹³³

The UN Special Rapporteur on adequate housing provides a comprehensive framework on the role of local government in the realisation of the right to access adequate housing. The Special Rapporteur acknowledges the significance of assigning crucial responsibilities relating to the right to adequate housing to local governments.¹³⁴ Among other things, the responsibilities consist of the production and management of social housing and infrastructure, land-use planning, the upgrading of informal settlements, and the regulation of investor-driven markets.¹³⁵ Local governments enjoy close proximity to affected communities, may be able to promote participatory decision-making as opposed to other spheres of government, and are best capable of developing innovative solutions that adapt to local circumstances. The UN-HABITAT states that the role governments should be playing involves...

¹³² United Nations Human Rights Council ‘Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee’ AHRC/30/49 (2015) at 5

¹³³ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, at para 42.

¹³⁴ Ibid para 59.

¹³⁵ Ibid.

providing supportive institutional, legislative, regulatory and financial environments, within which other actors can operate more effectively, and also intervening in land, housing and financial markets that so far are incompatible with the needs of the poor.¹³⁶

Local government's obligations to realise the right to housing must be through clearly delineated responsibilities established by national legislation. Consistent with norms and standards established at the national level, local governments should implement human rights-based housing strategies, with the goal of fully realising the right of access to adequate housing. The UN CESCR General Comment No 4 implies that, for the purposes of accountability in relation to the realisation of the right to housing, there must be clear processes that outline co-ordination among national, regional, and local authorities.¹³⁷ The national government must empower local governments with housing strategies and adequate resources to ensure that they have the capacity to effectively implement the assigned housing functions. The Special Rapporteur bemoans that local governments are assigned the obligation to realise the right to housing without the commensurate allocation of resources, knowledge, capacity, and accountability mechanisms.¹³⁸

Local governments must ensure that there is an adequate supply of housing that meets the needs of all who require it. This includes taking measures to address homelessness and ensuring that there are affordable housing options for low- and middle-income households. Indeed, the nature to which local government may aim to realise the right to adequate housing hinges on the standards for local government and human rights. Bosire states that:

Local government and human rights practice vary from one African country to another as a result of different factors. Factors such as the political culture, legal system, the level of economic development influence the practice of local government in the area of human rights. While there are varied standards and practices, there is a need for a common approach to local government based on a common agreement.¹³⁹

¹³⁶ UN-HABITAT 'Enabling shelter strategies: Review of experience from two decades of experience' (2006) at 28.

¹³⁷ See CESCR General Comment No 4 at para 12.

¹³⁸ See United Nations Human Rights Council op cit note 31 at para 60.

¹³⁹ See Bosire op cit note 122 at 156.

Local governments may integrate human rights into their by-laws, policy, and practice through several strategies.¹⁴⁰ First, they may adopt resolutions that affirm local commitments to the realisation of human rights. Secondly, as reflected in these resolutions, local governments can reframe local concerns to inform their responses to issues such as the lack of adequate housing. Thirdly, through greater public participation, local government can address the identified local concerns by aligning, formulating, and implementing the appropriate policies and programmes.¹⁴¹ Fourthly, to ascertain the impact and effectiveness of their policies and programme to identify barriers to reaching intended beneficiaries, local governments may conduct human rights-based audits and impact assessments. Finally, the Columbia Law School Human Rights Institute indicates that, with the intent for self-assessment regarding compliance with human rights standards, local government can engage in the periodic human rights treaty reporting process.¹⁴² In the same vein, the fifth action plan of the Municipalist Declaration of Local Governments for the Right to Housing and the Right to the City calls for city governments to effectively co-operate with both national and international supra-municipal bodies to share knowledge and the best practices in urban and residential policies.

4 Domestic human rights system in South Africa

South Africa is acclaimed for its robust and progressive housing laws, policies, programmes, and jurisprudence.¹⁴³ This acclamation emanates from its transformative Constitution which is at the intersection of the country's legal, social, and political life.¹⁴⁴ "The quality of the South African Constitution, enhanced by the jurisprudence from its Constitutional Court provides better material adapted to the African condition for African constitutionalists to learn from...".¹⁴⁵ The Constitution advances social justice, inclusive economic growth, and

¹⁴⁰ See Columbia Law School Human Rights Institute op cit note 121 at 7.

¹⁴¹ This aspect requires local governments to constantly evaluate their abilities to respond to local housing issues by collecting quantitative and qualitative data. Thus, this practice helps them to ensure that their policies and programmes are achieving intended results.

¹⁴² Columbia Law School Human Rights Institute 'Human Rights Recommendations to the United States: A Desk Reference for State and Local Human Rights Agencies' (2016) at 5.

¹⁴³ Lilian Chenwi 'Implementation of housing rights in South Africa: Approaches and strategies' (2015) 24 *Journal of Law and Social Policy* at 68.

¹⁴⁴ Catherine Albertyn '(In)equality and the South African Constitution' (2019) 36(6) *Development Southern Africa* 751, at 752.

¹⁴⁵ Charles Fombad 'An intra-African dialogue in the new era of constitutionalism' (12 April 2012) available at <https://tinyurl.com/23474rfx> *AfricLaw* (accessed on 13 April 2023).

substantive equality to produce an egalitarian society.¹⁴⁶ Predominantly, conversations on human rights and social development are related to housing delivery.¹⁴⁷

The courts are required by the Constitution to consider international law when interpreting the Bill of Rights.¹⁴⁸ Hence, the ICESCR, the interpretations and General Comments of the UN CESCR Committee, and its reports have influenced the framing of norms and standards of socio-economic rights contained in South Africa's Constitution and they also serve as invaluable guidelines to South African courts during the adjudication of socio-economic rights cases.¹⁴⁹ Even prior to the ratification of the ICESCR, South Africa already adopted legislative, administrative, and policy measures aimed at the realisation of socio-economic rights consistent with the obligations imposed by the Constitution.¹⁵⁰

The Constitution contains an expansive Bill of Rights which is the cornerstone of the country's democracy. The Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom".¹⁵¹ The constitutional recognition and protection of fundamental rights and freedoms has also heralded the insertion of fully justiciable socio-economic rights.¹⁵² In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,¹⁵³ the Constitutional Court held that socio-economic rights evince "a deep concern for the material inequality closely associated with the past exclusion and poverty".¹⁵⁴ In this regard, the Constitution guarantees that everyone is entitled to "inherent dignity and the right to have their dignity respected and protected".¹⁵⁵ Hence, human dignity expresses the right to dignity, human physical integrity, and favourable conditions that

¹⁴⁶ See Albertyn op cit note 144; Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* at 150. Substantive equality aims to address the socio-economic disparities of persons, see *President of the Republic of South Africa v Hugo* (1997) 4 SALR 1 (CC) at para 41; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

¹⁴⁷ Mziwandile Sobantu and Ndangwa Noyoo 'Housing, human rights and social development in South Africa' (2022) 12(3) *African Journal of Development Studies* at 233.

¹⁴⁸ See Section 39(1)(b) of the Constitution.

¹⁴⁹ See Currie and De Waal op cit note 9 at 571.

¹⁵⁰ The UN ICESCR Committee 'Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa (2017) at 4.

¹⁵¹ See Section 7(1) of the Constitution.

¹⁵² See Section 38 of the Constitution. In terms of this provision, where a right listed in the Bill of Rights is violated, a competent court may grant appropriate relief. In *Fose v Minister of Safety and Security* (CCT14/96)1997 (3) SA 786 (CC), the Constitutional Court stated that, in essence, "appropriate relief" will effectively vindicate the Constitution in order to protect and enforce, see paras 18 and 19.

¹⁵³ 2010 (3) SA 545 (CC).

¹⁵⁴ Ibid para 142.

¹⁵⁵ See Section 10 of the Constitution.

preserve the enjoyment of dignity.¹⁵⁶ In *Dadla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and Another*,¹⁵⁷ the Constitutional Court found that the applicable rule of a shelter violated residents' rights to dignity, freedom and security of the person, and privacy.¹⁵⁸

Moreover, the South African pursuit of the right to adequate housing "has established an important duty on the state to ensure universal access to decent accommodation".¹⁵⁹ Although socio-economic rights (which require positive action and resources) may be binding to natural persons and corporate entities, the State bears the primary responsibility. These obligations bind the State and all its organs, made up of the legislature, the executive, and the judiciary.¹⁶⁰

These obligations pertain to both civil and political rights, and economic, social, and cultural rights (which include the right of access to adequate housing as provided by Section 26(1) of the Constitution).¹⁶¹ Accordingly, the rights in the Bill of Rights, including the right to have access to adequate housing, impose duties on "the State", a notion that includes local government.¹⁶²

¹⁵⁶ Deryck Beylerveld and Roger Brownsword 'Human Dignity, Human Rights, and Human Genetics' (1998) 61(5) *Modern Law Review* at 661, at 670-671; Gregory S Alexander 'Property, dignity, and human flourishing' (2019) 104 *Cornell Law Review* at 991; Aharon Barak *Human dignity. The constitutional value and the constitutional right* (2015); Ömer Gedik 'The right to live in a house worthy of human dignity of apartment attendants' (2016) 6(12) *Human Rights Review* at 85; Benjamin Davy 'Human dignity: Is there a place for it in planning?' (2020) 4 *Transactions of the Association of European Schools of Planning* at 7; P Simons 'Human dignity central to economic development' (2013) 78(1) *Koers – Bulletin for Christian Scholarship* at 1-2. "Human dignity as a relational concept requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation", see Sandra Liebenberg 'The value of human dignity in interpreting socioeconomic rights' (2005) 21 *South African Journal on Human Rights* at 1.

¹⁵⁷ South Gauteng High Court, Case No 39502/2012.

¹⁵⁸ The lockout rule required that the applicants be out of the Shelter between 08h00 and 17h30 every day and return by 20h00 or face the prospect of not being allowed to enter the Shelter. The family separation rule prohibited men and women from living together through the provision of single-sex dormitories, see *Dadla* at para 3.

¹⁵⁹ Ivan Turok and Andreas Scheba "Right to the city" and the New Urban Agenda: learning from the right to housing' (2019) 7(4) *Territory, Politics, Governance* at 494.

¹⁶⁰ See Section 8(1) of the Constitution.

¹⁶¹ Jaap de Visser 'A perspective on local government's role in realising the right to housing and the answer of the Grootboom judgment' (2004) 7 *Law, Democracy and Development* at 201.

¹⁶² Ninad S Nag 'Government, governance and good governance' (2010) 36(6) *Indian Journal of Public Administration* at 123.

Where housing is a constitutional right, the provision of housing is one of the fundamental duties of the State.¹⁶³ Section 7(2) of the 1996 Constitution imposes four different types of duties on the State: the obligation to *respect*, *protect*, *promote*, and *fulfil* the fundamental rights enshrined in the Bill of Rights. The duties to respect and protect are viewed as imposing negative duties on the State, whereas the duties to promote and fulfil are regarded as placing positive duties on the State.¹⁶⁴ The duty to “respect” requires the state to desist from directly or indirectly implementing any practice, policy, or legal measure that infringes the right to housing. The duty to “protect” imposes a positive obligation on the State to regulate, prevent and remedy any breaches of the right to housing by non-state actors.¹⁶⁵ Under the duty to “promote”, the State must adopt educational and informational programmes “designed to enhance awareness and understanding of fundamental human rights”.¹⁶⁶ With the duty to “fulfil”, the State is required to adopt appropriate legislative and other measures to ensure the full realisation of the right to housing. This duty encompasses interventionist measures aimed at assisting disadvantaged groups that lack adequate housing.

It is significant to mention that the Constitution furthermore entrenches other fundamental rights and freedoms that are generally accepted to be indivisible, interdependent, and interrelated to the right of access to adequate housing. Several constitutional clauses directly and indirectly apply fundamental human rights and freedoms to housing, land use planning, management, and development. These clauses and entitlements could be explained as follows:

- (1) The right to equal protection against discrimination in access to housing and related services.¹⁶⁷
- (2) The right to freedom from arbitrary interference with one’s privacy, family, or home.¹⁶⁸
- (3) The right to freedom of movement¹⁶⁹ and the right to choose where to reside.¹⁷⁰

¹⁶³ See Global Strategy for Shelter to the Year 2000 at para 13.

¹⁶⁴ Kate Tissington ‘A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice’ (2011) at 11.

¹⁶⁵ Individuals and private entities are regulated by State to prevent interference with the rights of individuals and groups. See Pierre de Vos and Warren Freedman *South African Constitutional Law in Context* (2nd ed) (2021) 796.

¹⁶⁶ Ibid 797.

¹⁶⁷ See Section 9 of the Constitution.

¹⁶⁸ Ibid Section 14.

- (4) The right to a safe and healthy (living/home) environment¹⁷¹ as well as ecologically sustainable development that promotes justifiable economic and social development.¹⁷²
- (5) Children's rights to shelter and social services¹⁷³ as well as their rights to physical or mental health or spiritual, moral, or social development.¹⁷⁴
- (6) The right to access sufficient water.¹⁷⁵
- (7) The right to legal security of tenure.¹⁷⁶
- (8) The right to protection against arbitrary deprivation of property.¹⁷⁷
- (9) The right to protection against arbitrary evictions or demolitions of one's home.¹⁷⁸
- (10) The right to judicial recourse for the infringement of the right to adequate housing.¹⁷⁹

When considered in conjunction with Sections 9(2), 25, and 26(2) of the Constitution, the right of substantive equality, access to land and property, and access to adequate housing could work together to place specific positive obligations on all levels of the government to realise spatial equity. Indeed, the constitutional clauses for property, equality, and housing are about the rectification of past spatial inequality and discrimination.¹⁸⁰ Botha asserts that the housing clause which integrates planning and housing “promotes the redistribution of land through the greater and more speedily availability of land”.¹⁸¹ In the event of conflicting rights arising from these clauses, the elements of grace and compassion must be infused within the formal structures of the law. On that account, the State must act in a principled manner to balance competing interests and shared concerns of different aggrieved parties.¹⁸² Accordingly, it is needful to balance the rights to property and equality of the landowner under Sections 25(1), 9(1), and 9(2) of the Constitution with the rights of access to land and

¹⁶⁹ Ibid Section 21(1).

¹⁷⁰ Ibid Section 21(3).

¹⁷¹ Ibid Section 24(a).

¹⁷² Ibid Section 24(b)(iii).

¹⁷³ Ibid Section 28(1)(c).

¹⁷⁴ Ibid Section 28(1)(f)(ii).

¹⁷⁵ Ibid Section 27(1)(b).

¹⁷⁶ Ibid Section 25(6).

¹⁷⁷ Ibid Section 25(1).

¹⁷⁸ Ibid Section 26(3).

¹⁷⁹ Ibid Sections 34 and 38.

¹⁸⁰ Steyn Botha ‘A critical review of the extent to which contemporary planning legislation applicable within the City of Cape Town provides legal mechanisms for promoting spatial justice’ (2020) at 4.

¹⁸¹ Ibid.

¹⁸² See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 37.

adequate housing for the landless and homeless people in terms of Sections 26(1) and (2) of the Constitution, read with Section 25(5) of the Constitution.

The Constitution does not contain a stand-alone proviso on the right to an adequate standard of living which encompasses the right to adequate housing as part of it. After all, the Constitution does explicitly provide for the right of access to adequate housing in terms of Section 26, the engine of housing law in South Africa. The provision stipulates that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) 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.

The nature of the constitutional right to housing does not expressly prescribe any specific programmes to be adopted for its actualisation. The State, therefore, has the discretion to undertake whatsoever housing projects it deems fit for purpose. The Constitution also refers to “shelter” in Section 28(1)(c).¹⁸³ In the *Government of South Africa & Others v Grootboom & Others*,¹⁸⁴ it was held that:

A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society.¹⁸⁵

Above all, Section 26 does not imply that the right of access to adequate housing must be fulfilled immediately and free of charge. Its realisation is based on three key elements that highlight the extent of the State’s obligation in relation to socio-economic rights: (1) the obligation to “take reasonable legislative and other measures”, (2) “to achieve the progressive

¹⁸³ The section provides that every child has the right to a basic shelter.

¹⁸⁴ 2001 (1) SA 46 (CC) at para 29.

¹⁸⁵ See *Grootboom* at para 36. Katlego Mashiane and Kola O Odeku ‘A critical legal perspective on the context and content of the right to access to adequate housing in South Africa’ (2020) 10 *Juridical Tribune* at 90.

realisation” of the right; and (3) “within available resources”.¹⁸⁶ However, the qualifier of the right is the phrase “access” contained in Section 26(1). The proviso stipulates that everyone has a right of “access” to housing. The phrase does not oblige the State to immediately realise every person’s right to housing. Nonetheless, this does not mean the State is under no obligation to build houses. The State is still obliged to “create conditions for access to adequate housing for people at all economic levels of our society”.¹⁸⁷

The State may also rely on other agents to provide people with access to adequate housing.¹⁸⁸ Additionally, for the purpose of ending human suffering in the event of an emergency situation, the State is required to immediately assume responsibility to provide temporary accommodation, the Court ruled so in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.¹⁸⁹ In *Grootboom*, the Court pointed out that:

Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing... The poor are particularly vulnerable and their needs require special attention.¹⁹⁰

Reasonableness requires the apportionment of responsibilities between different spheres. In *Grootboom*, the reasonableness of the measures to be adopted as outlined by the court:

The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.

¹⁸⁶ See Section 26(2) of the Constitution.

¹⁸⁷ See *Grootboom* at para 35.

¹⁸⁸ Ibid.

¹⁸⁹ 2001 (3) SA 1151 (CC).

¹⁹⁰ See *Grootboom* at 36.

The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.¹⁹¹

In addition, reasonableness is also measured both at the level of a legislative programme and its implementation.¹⁹² “Any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable”.¹⁹³ In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,¹⁹⁴ while expounding the linkage between the right to housing and the government’s provision of temporary housing, the court spells out that:

In the area of the right of access to adequate housing, of which the provision of temporary or emergency accommodation is a part, the question is essentially one of reasonableness.¹⁹⁵

The Court further held that a “reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations”.¹⁹⁶ Therefore, reasonableness requires the design, adoption, and implementation of measures to realise socio-economic rights.¹⁹⁷ Due to their achievement over time, socio-economic rights are regarded as programmatic rights.¹⁹⁸ Hence, the phrase “within its available resources, to achieve the progressive realisation of . . . [the] right” contained in Section 26(2) of the Constitution, is a positive dimension that qualifies the right of access to adequate housing. In *Thubakgale v Ekurhuleni Metropolitan Municipality and Others*,¹⁹⁹ the Constitutional Court held that:

¹⁹¹ Ibid 41.

¹⁹² See Currie and De Waal op cit note 9 at 575.

¹⁹³ See *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* at para 49.

¹⁹⁴ 2012 (2) SA 104 (CC).

¹⁹⁵ Ibid para 88.

¹⁹⁶ Ibid para 363.

¹⁹⁷ See Currie and De Waal op cit note 9 at 576.

¹⁹⁸ Boitumelo O Mmusinyane ‘Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India’ (unpublished PhD Thesis, University of South Africa, 2015) at 279.

¹⁹⁹ [2021] ZACC 45 at paras 86-89 and 109.

On this interpretation, section 26(1) does not create a self-standing right that is enforceable against the state. The right of access to adequate housing depends on the provisions of section 26(2) for it to be complete and enjoyable.²⁰⁰

The right is “realised” through State action progressively or over a period of time. However, this does not mean the State cannot reasonably take steps within its powers to realise the right immediately or as soon as possible. This element is provided for in the UN CESCR General Comment 3 and was positively cited in the *Grootboom* case:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²⁰¹

The element of availability of resources in the fulfilment of socio-economic rights is a highly contentious issue during the judicial enforcement of these rights.²⁰² In *Thubakgale*,²⁰³ the Constitutional Court held that “the objective of socio-economic rights is not to give South Africans access to necessities of life within a fixed period of time. But it is to set goals to achieve this purpose over time.”²⁰⁴ As far as the time period is concerned, de Wet contends that if the State unreasonably takes a long time to provide housing, it would be sufficient to conclude that there is a dereliction of duty on the part of the State.²⁰⁵ In *Grootboom*, it was

²⁰⁰ Ibid para 145.

²⁰¹ See UN CESCR General Comment 3 at para 9. See also *Grootboom* at para 45.

²⁰² See de Vos and Freedman op cit note 165 at 815.

²⁰³ [2021] ZACC 45 at paras 86-89 and 109.

²⁰⁴ Ibid para 164.

²⁰⁵ Erika de Wet *The Constitutional Enforceability of Economic and Social Rights: The meaning of The German Constitutional Model for South Africa* (1996) 118.

held that “there is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively, but the availability of resources is an important factor in determining what is reasonable”.²⁰⁶ The realisation of the right of access to adequate housing is limited by the qualification that it is available only to the extent that State resources are available. Therefore, “the availability of appropriate resources is a necessary condition for reasonable”.²⁰⁷

5 Adjudicating the constitutional right to adequate housing

In its monitoring report, the CESCR Committee recognises that the South African Constitution is one of the few constitutions in the world that contains a wide range of justiciable socio-economic rights.²⁰⁸ Among all socio-economic rights ensconced in the Constitution, the most frequently litigated is the right of access to adequate housing.²⁰⁹ Commendably, in varying degrees of impact, the phenomenon of judicial enforcement of the right to housing consistently gives effect to the various integral components that are necessary to uphold the required standards of housing adequacy as underlined by the UN CESCR General Comment No 4: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

The *Grootboom* case is viewed as the paramount litigation in the country’s socio-economic rights jurisprudence. It is the first matter in which the right of access to adequate housing was entertained by the Constitutional Court.²¹⁰ It was held that the fulfilment of obligations imposed by the right to housing requires proper and effective co-operation between the different spheres of government,²¹¹ a breach of which would amount a transgression of the right.²¹² Subsequent cases that adjudicated on this right have also reaffirmed its justiciability

²⁰⁶ See *Grootboom* at para 46.

²⁰⁷ See Currie and De Waal op cit note 9 at 581.

²⁰⁸ See the UN ICESCR Committee at para 4.

²⁰⁹ See Chenwi op cit note 109 at 74.

²¹⁰ Marius Pieterse ‘Balancing socio-economic rights: Confronting Covid-19 in South Africa’s informal urban settlements (2021) 39(1) *Nordic Journal of Human Rights* at 41. See also Pierre de Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ (2001) 17(2) *South African Journal on Human Rights* at 258; and Lilian Chenwi ‘Housing for persons with disabilities in South Africa’ (2021) 21(3) *International Journal of Housing Policy* 321, at 324.

²¹¹ See *Grootboom* at para 68. A major aspect of the Constitutional Court’s handling of the matter was its use of international law in protecting and enforcing the housing rights of the homeless and landless people.

²¹² See Currie and De Waal op cit note 9 at 34.

against the local government.²¹³ Together with other spheres of government, the Court in *Grootboom* jointly implicated the local government in the actualisation of the right to housing by stating that:

All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.²¹⁴

Moreover, meaningful engagement is of paramount importance for a court to assess if an eviction is just and equitable. Under Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (the PIE Act),²¹⁵ giving the occupier the courtesy and the respect of meaningful engagement is a pre-requisite of an eviction order. In the *Joe Slovo* matter, the Constitutional Court stated that:

There must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their dignity.²¹⁶

Where the relocation process concerns several households, the government has a duty to engage meaningfully with residents, both individually and collectively. With meaningful engagement, the government is enabled to fully comprehend the needs and concerns of individual households and may ascertain the appropriate steps on how to address these

²¹³ See *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (Modderklip (SCA)); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

²¹³ See *Blue Moonlight*. Socio-economic Rights Institute of South Africa 'Evictions and alternative accommodation in South Africa: An analysis of the jurisprudence and implications for local government' (2013) 3. See also Marius Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) 28 *South African Journal on Human Rights* at 360.

²¹⁴ *Ibid* para 82.

²¹⁵ 19 of 1998. Section 6(3) of the Act stipulates that:

"In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—
(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
(b) the period the unlawful occupier and his or her family have resided on the land in question; and
(c) the availability to the unlawful occupier of suitable alternative accommodation or land."

²¹⁶ See *Joe Slovo* at para 238.

concerns. The Court further held that “the goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing”.²¹⁷

In *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*²¹⁸ the Court held that “every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2).”²¹⁹ The Court also declared as unconstitutional Section 12(6) of the National Building Regulations and Building Standards Act for criminalising building occupation after a notice to vacate was served but without a court order.²²⁰ Similarly important, before evicting occupiers who could be rendered homeless afterwards, the Court held that it is essential for a municipality to meaningfully engage before ejecting people.

The primary focus of meaningful engagement is mutual understanding and the accommodation of each other’s concerns, instead of merely coming to any terms just to reach an agreement. A well-structured and co-ordinated meaningful engagement is free from confusion, misunderstanding, and mistrust which are detrimental to the relocation project. For a solution, these shortcomings often lead to court intervention. A compelling assertion by Saul rejects the contention that meaningful engagement is a procedural mechanism.²²¹ This rejection concurs with Liebenberg’s stance which views meaningful engagement as a constructive and transformative judicial measure with substantive implications for the application of Section 26(3) of the Constitution.²²² When all is said and done, “the achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves”.²²³

²¹⁷ Ibid para 244.

²¹⁸ 2008 (3) 208 (CC).

²¹⁹ See *Olivia Road* at para 17.

²²⁰ See *Olivia Road* paras 47-51, 54(5) and (6).

²²¹ Zamani Saul *Developing a community engagement model as a normative framework for meaningful engagement during evictions* (unpublished LLD thesis, University of the Western Cape, 2016) at 7.

²²² Sandra Liebenberg *Socio-economic Rights: Adjudication Under Transformative Constitution* (2010) 302. See also Lilian Chenwi and Kate Tissington ‘Engaging meaningfully with government on socio-economic rights: A focus on the right to housing’ (2010).

²²³ Ibid para 407.

5.1 Legal security of tenure

The most detrimental manifestation of tenure insecurity is vulnerability to eviction. The *Grootboom* case remains an instrumental benchmark in terms of upholding the right to housing in relation to evictions or removals.²²⁴ In this matter, the Constitutional Court asserted the legal security of the tenure of evictees. The Court held that the functions of national, provincial, and local government in housing development are to “provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements”.²²⁵

Subsequently, in *Despatch Municipality v Sunrize Estate and Development Corporation (Pty) Ltd*,²²⁶ the Court declared that Section 3B of the Prevention of Illegal Squatting Act²²⁷ which permitted landowners to demolish buildings or structures erected on their land without first requiring a lawful court order was in violation of occupiers’ rights. Similarly, in *Joe Slovo* the Court nullified the municipality’s actions of removing applicants from their homes, the demolition of their homes, and their relocation. Also, the Court in *Joe Slovo* held that “considerations of equity and justice require that the order for eviction, now suitably amplified to make it a great deal fairer”.²²⁸

In *Port Elizabeth Municipality* the Court nullified the eviction of occupants who unlawfully erected their own shelter on vacant, unused, and private land. The Court also pointed out that, the homeless must still be treated with dignity while awaiting access to new social housing developments.²²⁹ In *Fischer v Persons Unknown*,²³⁰ the City of Cape Town was ordered to construct the informal structures which were demolished and to provide temporary habitable dwellings that afford residents shelter, privacy, and amenities.

²²⁴ See Mmusinyane op cit note 198 at 290.

²²⁵ See *Grootboom* at para 51.

²²⁶ 1997 (4) SA 596 (SE).

²²⁷ 52 of 1951.

²²⁸ Ibid 409.

²²⁹ Ibid para 12.

²³⁰ 2014 (3) SA 291 (WCC).

5.2 Availability of services, materials, facilities, and infrastructure

Informal housing with minimal amenities causes people to suffer from great material inadequacies.²³¹ Each sphere of government must accept responsibility for the implementation of specific parts of the social housing programme.²³²

In *Grootboom*, the Court stated that the right of access to adequate housing obliges the government to provide access to essential services such as water, sewage, electricity, and roads.²³³ Conscious of the need to ameliorate the deplorable living conditions for all, the obligation to act positively and provide these services caters to both lawful residents and unlawful occupiers. The Court also held that “every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”²³⁴

These facilities and services have a bearing on spatial planning as well as land use and management. The Court also noted that the right to have access to adequate housing is intertwined with other cross-cutting rights, including the rights to human dignity, access to information, public participation, and equality. When a municipality provides services to residents in temporary residential units, it is fulfilling its statutory and constitutional obligations.²³⁵

Alike, in both *Grootboom*²³⁶ and *Joe Slovo*,²³⁷ it was pointed out that upholding the right to human dignity meant the local government had to fulfil its obligation of providing basic services to the poor and the most vulnerable people. In *Joe Slovo*, the order to vacate the land was conditional, subject to the occupiers’ relocation to temporary residential units that meet

²³¹ See *Blue Moonlight* at para 363.

²³² See *Grootboom* at para 40.

²³³ See *Grootboom* at paras 37.

²³⁴ Ibid para 82.

²³⁵ Ibid paras 29 and 39. Section 152(1)(b) of the Constitution provides that the object of local government is “to ensure the provision of services to communities in a sustainable manner”. In Section 152(1)(d) of the Constitution, the local government must “promote a safe and healthy environment”. Section 73(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 gives effect to these constitutional duties and requires municipalities to provide communities with the “minimum level of basic municipal services”. This Court has held that the obligation of the State to the poor and the most vulnerable includes treating them as human beings and providing them with services. For example, see *Grootboom* at paras 44 and 82-3.

²³⁶ See *Grootboom* at paras 44 and 82-3.

²³⁷ See *Joe Slovo* at para 209.

several conditions listed by the Court. The specifications in the list include basic services, materials, facilities, and infrastructure that are indispensable for adequate housing.²³⁸

Local governments are therefore required to “fulfil their constitutional mandate to provide basic human rights and services, such as housing, water and sanitation, so that all who live in South Africa can live a life of dignity, equality and safety.”²³⁹ Indeed, local governments go beyond just building houses. They aim to create sustainable human settlements by ensuring access to essential services such as the provision of clean water and proper sanitation facilities; the supply of a reliable electricity connection; the building and maintaining roads for accessibility within the community; and the development of schools, clinics, and community centres. The availability and geographic distribution of all these services, materials, facilities, and infrastructure complements the quest for the realisation of the right to adequate housing.

5.3 Affordability

Given the persistent economic inequalities in South Africa, issues of property values, housing costs, and income distribution across different areas have a bearing on housing affordability.²⁴⁰ Primarily, discrepancies in housing affordability are largely influenced by urban real estate markets. Specific geographical location, density, etc. have an impact on housing markets.²⁴¹ The Constitutional Court in *Grootboom* elaborated on housing affordability as follows:

... there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the

²³⁸ Some of the requirements for temporary residential accommodation units are tarred roads; walls constructed with a substance called Nutec; a galvanised iron roof; a pre-paid electricity meter; being situated within reasonable proximity of a communal ablution facility; toilet facilities with water-borne sewerage; and fresh water. See para 10.

²³⁹ Amnesty International ‘Poor service delivery deprives people of dignity and their basic human rights’ (05 July 2021) available at <https://tinyurl.com/yxzfur85> (accessed on 20 November 2023).

²⁴⁰ Evashnie Govender *The impact of housing costs on household income across primary and secondary areas in South Africa* (unpublished masters dissertation, Stellenbosch University, 2020) at 1. See also Brendon van Niekerk ‘Housing as urbanism: A policy to discourage urban sprawl and provide well-located and affordable housing in South Africa’ (2018) 73 *Town and Regional Planning* at 68.

²⁴¹ Elizabeth M Musvoto and Manya M Mooya ‘Addressing challenges in the South African affordable housing market: A critical realist perspective’ (2018) 8(1) *Journal of Construction Project Management and Innovation* at 2198.

system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups.²⁴²

The plight of the poor who struggle to afford adequate housing in the urban cores was also highlighted in *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others*.²⁴³ According to the Court:

... working class residents and the poor are unable to afford accommodation in the inner city or the surrounding central areas. Consequently, poorer residents of the city have to spend high percentages of their income on travelling costs to reach their places of employment, or to enjoy the city's many public and private amenities.²⁴⁴

The *Adonisi* judgement also implicated the local government in the provision of affordable housing. It was held that “all levels of state are to provide affordable housing”.²⁴⁵ Accordingly, local government has the obligation to formulate and implement policies and programmes that allows everyone to afford housing, either for rental or purchasing, irrespective of income or access to economic resources.

5.4 Habitability

The Court in *Blue Moonlight* stated that the primary purpose of including justiciable socio-economic rights in the Constitution is to address peoples' deplorable living conditions.²⁴⁶ In *Joe Slovo*, the Court exposed several issues that constitute non-compliance with the established adequacy standards.²⁴⁷ The construction of dwellings contravened municipal or building laws. Inadequate housing was also marked by arbitrarily drawn plots; lack of space for basic services; invariably density population; layout hindering installation of basic services; and poorly built dwellings that are largely unhygienic and prone to fire risks.

²⁴² See *Grootboom* at para 36.

²⁴³ See *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2021] 4 All SA 69 (WCC).

²⁴⁴ See *Adonisi* at para 34.

²⁴⁵ *Ibid* 75.

²⁴⁶ See *Blue Moonlight* at para 197.

²⁴⁷ See *Joe Slovo* at para 191.

The Constitutional Court's engagement order in *Olivia* precludes a municipality from separating...

[the] duty to ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other.²⁴⁸

Safe and healthy buildings adhere to the internally accepted prescripts for the realisation of the right of access to adequate housing. When the safety of households is under threat due to natural disasters, the State is required to take precautionary steps to secure human life, health, and safety. These measures may include the removal of residents from the disaster-stricken areas. In *Pheko and Others v Ekurhuleni Metropolitan Municipality*,²⁴⁹ the municipality discovered the development of sinkholes in Bapsfontein, a privately owned land within the municipal area. The area was considered unstable for human settlements. Having initially relocated approximately 150 families from Bapsfontein in 2005, the municipality saw the necessity to again relocate new occupiers who subsequently erected shelters in the same area, without the municipality's endorsement. In *Blue Moonlight*, Court conceded that social justice within a stable constitutional democracy is contingent on the quest for a roof over one's head.²⁵⁰ The municipality was ordered to provide temporary emergency accommodation to occupiers, including the victims evicted by private landowners.²⁵¹

5.5 Accessibility

The term "progressive realisation" has been associated with "accessibility" in *Grootboom*. The Court stated that:

It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.²⁵²

²⁴⁸ Ibid para 44.

²⁴⁹ 2012 (2) SA 598 (CC).

²⁵⁰ See *Blue Moonlight* at para 2.

²⁵¹ Ibid para 87.

²⁵² Ibid para 49.

The progressive realisation of the right to housing refers to the gradual process by which local governments fulfil their obligation to ensure everyone has access to adequate housing. It acknowledges that achieving this goal might take time and resources, but there is a continuous effort required. The notion about the gradual fulfilment of the right to adequate housing does not mean everyone gets a perfect home immediately. Rather, it is a commitment by the local government to work towards steadily improving housing conditions for all residents. The progressive realisation of the right to adequate housing is also resource dependent. Meaning, local government's ability to provide housing is influenced by their available resources, acting within its budget and economic capacity. Progressive realisation also requires careful planning and prioritisation. Local governments need to set clear goals and prioritise efforts to reach those experiencing the most significant housing challenges.

The concept of progressive realisation can also apply for in-situ upgrading, which refers to the improvement of existing informal settlements, that are generally located in peripheral areas, where people already live.²⁵³ Apart from providing secure land tenure for residents, upgrading infrastructure like sanitation, water supply, and sanitation systems improves the quality of housing structures. Upgrading is implemented in stages, progressively improving living conditions without displacing residents. This approach respects existing communities and allows residents to participate in the improvement process.

In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others*,²⁵⁴ it was underscored that “the progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected”.²⁵⁵ These vital and cumbersome processes must be carried out in an orderly and predictable manner. The Court boldly empathised with the affected homeless people and held that:

The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and

²⁵³ Mohsen M Abounaga et al ‘Informal Urban Settlements and Slums’ Upgrading: Global Case Studies’ in Mohsen M Abounaga et al (eds) *Resilience of Informal Areas in Megacities – Magnitude, Challenges, and Policies* (2021).

²⁵⁴ [2005] 8 BCLR 786 (CC) at para 49.

²⁵⁵ Ibid para 49.

enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people.²⁵⁶

The government has a constitutional obligation towards landless people and those who suffer from deplorable living conditions.²⁵⁷ Until an alternative accommodation is found, this is a duty that the government owes to “landless people to provide them with access to adequate housing”.²⁵⁸ Additionally, in *Joe Slovo*, the Constitutional Court declared that 70 per cent of the new houses built on the site of the Joe Slovo informal settlement must be allocated to qualifying current and former residents.²⁵⁹

A minority judgment of the Constitutional Court in *Thubakgale* touched on the issue of “adequacy” as one of the primary components of the right to housing.²⁶⁰ The Court’s analysis prompted the need to include defining features of adequate housing such as accessibility, affordability, and location. It was held that the “Court should be wary of endorsing housing solutions which enhance the segregation of our cities and may cause great difficulties to already vulnerable people”.²⁶¹ Having established social networks, and reliance on schools and jobs near Tembisa, the applicants’ resettlement to Palm Ridge could result in daily commuting and prohibitive costs. Hence, this might “have the same racist context as apartheid’s forced removals”.

5.6 Location

According to Shandu and Clark, “the centrality of land – particularly well-located land – as a tool in any programme to dismantle the apartheid city cannot be overstated”.²⁶² The government may provide housing, but if the developments are planned and implemented in poorly located areas, this hampers efforts to achieve spatial equity. In *Olivia Road*,²⁶³ the Constitutional Court stated that before proceeding with an eviction, local authorities are obliged to determine the availability of suitable alternative accommodation or land. However,

²⁵⁶ Ibid para 36.

²⁵⁷ See *Joe Slovo* at para 214.

²⁵⁸ Ibid.

²⁵⁹ Ibid para 5.

²⁶⁰ [2021] ZACC 45 at paras 86-89 and 109.

²⁶¹ See *Thubakgale* at para 115.

²⁶² Mandisa Shandu and Michael Clark ‘Rethinking property: Towards a values-based approach to property relations in South Africa’ (2021) 11 *Constitutional Court Review* at 39 at 41.

²⁶³ See *Olivia Road* at para 43.

the Court's judgment in *Olivia Road* is silent on the question of the location of the alternative accommodation. Chenwi's contention decries the Court's silence as follows:

... the Constitutional Court should have defined the elements to be considered in determining the location of alternative accommodation such as proximity to livelihood opportunities and distance from original site, which have been emphasised at the international level.²⁶⁴

Nonetheless, through meaningful engagement, the parties in *Olivia Road* agreed that provision for alternative accommodation must be within the city. In both *Joe Slovo*²⁶⁵ and *Thubakgale*,²⁶⁶ it was held that people did not have a right to be housed at the location of their choice. In a precise manner, Tshoose particularises these features as follows:

... in order to address the housing backlog and concomitant socio-economic realities faced by inhabitants of informal settlements the following cardinal points are important. First, the government ought to identify land which is suitable for low cost housing. Secondly, government should provide the poor with access to serviced land on which they can erect a temporary dwelling which, over time, they can improve. This land needs to be reasonably close to basic services including schools and transport to the main centres of employment. Lastly, government ought to allocate land to those who use it for the benefit of the community, not just the benefit of the few who currently own it. This includes the land used by individuals and private companies for profit without any benefit to the people.²⁶⁷

The Court deemed the Joe Slovo informal settlement to be well-located, as it is located halfway between the Cape Town International Airport and the Central Business District (CBD).²⁶⁸ Thus, it was stated that: "Where informal settlements were to be upgraded on well-located land, mechanisms were to be introduced to optimise the locational value, and preference would generally be given to medium-density social housing solutions".²⁶⁹ The

²⁶⁴ Lilian Chenwi 'A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' in Stu Woolman et al *Constitutional Court Review* (2009) 2 (2009) at 387.

²⁶⁵ See *Joe Slovo* at paras 107 and 254.

²⁶⁶ See *Thubakgale* at para 169.

²⁶⁷ Clarence Tshoose 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom*' (2015) 30 *Southern African Public Law* at 110.

²⁶⁸ See *Joe Slovo* at para 373.

²⁶⁹ *Ibid.*

Court in *Joe Slovo* further held that not all occupiers would be able to return to the Joe Slovo informal settlement. However, all of them would eventually be provided with permanent adequate housing.²⁷⁰ It is important to also highlight that the order to vacate the land was conditional, subject to the occupiers' relocation to temporary residential units that meet several conditions listed by the Court. The specifications in the list include basic services, materials, facilities, and infrastructure that are indispensable for adequate housing.²⁷¹

In *Pheko*,²⁷² the applicants also identified suitable land in the vicinity of Bapsfontein, which they could be relocated to. However, according to the municipality, the land that was identified by applicants belonged to a different State department which was not willing to relinquish it for social housing purposes. Despite the unavailability of this land, the Court held that the municipality was still not absolved from fulfilling its duty to identify and designate land for housing development for the applicants. Hence, the Court ruled that the applicants are entitled to effective relief, which obviously depends on the municipality's ability to identify and designate land for purposes of realising the applicants' rights of access to adequate housing.²⁷³ Furthermore, while striving to identify suitable land in the immediate vicinity of Bapsfontein for the relocation of the applicants, the municipality was ordered to meaningfully engage with them. Essentially, the Court granted supervisory relief wherein the municipality was required to report to the Court "about, amongst other things, whether the land has been identified and designated to develop housing for the applicants".²⁷⁴

While the cases of *Grootboom*, *Blue Moonlight*, and *Joe Slovo* emphasises that the State's housing policy must accommodate the emergency housing needs of the most vulnerable members of society, the *Adonisi* judgement extends beyond the temporary housing option and seeks a durable solution to the lack of access to urban land, makeshift housing, and spatial inequalities.²⁷⁵ The Court read Sections 26(2) and 25(5) of the Constitution in conjunction with the analysis of reasonableness employed in *Grootboom* to tackle the State's failure to

²⁷⁰ See *Joe Slovo* at paras 33, 46, and 260.

²⁷¹ Some of the requirements for temporary residential accommodation units are tarred roads; walls constructed with a substance called Nutec; a galvanised iron roof; a pre-paid electricity meter; being situated within reasonable proximity of a communal ablution facility; toilet facilities with water-borne sewerage; and fresh water. See para 10.

²⁷² See *Pheko* at para 50.

²⁷³ *Ibid.*

²⁷⁴ *Ibid* para 50.

²⁷⁵ *Ibid* paras 201-2.

implement a reasonable housing policy. The provincial and local governments were berated for lack of sensitivity and apathy toward redressing the plight of the urban poor who struggle to have access to housing and essential services and facilities that are available in the city core. The Court's judgement clarifies the enforcement of rights and opens opportunities for judicial oversight over spatial transformation-related issues.²⁷⁶

In *Adonisi*,²⁷⁷ the Court nullified the sale of a well-located property under the ownership of the Western Cape provincial government. It was held that the City of Cape Town together with the provincial government were jointly obliged to take the necessary measures aimed at enabling disadvantaged citizens to gain access to urban land on an equitable basis and for the progressive realisation of citizens' rights to access to adequate housing. The Court held that all spheres of government must jointly provide housing

... in locations proximal to socio-economic goods, services and opportunities, as expeditiously as possible, through the design and implementation of policies and programmes that not only provide better housing to the poor and marginalised, but also challenge and overcome spatial and socio-economic inequality and exclusion.²⁷⁸

Hence, the constitutional obligation imposed by the Court was derived from a joint reading of the rights of access to adequate housing and equitable access to land in reference to the principles of spatial justice and the "right to the city". As a result, based on constitutional prescriptions, the "adequacy" of social housing must be scrutinised based on its ability to address the historical injustices of spatial apartheid.

In this respect, Coggin demonstrates that the "social function of property" may contribute to the transformation of "spatial and historical geography" of the city".²⁷⁹ While commenting on the positive implications of the *Adonisi* judgement, Willems is of the view that the proceeds of the sale of the well-located property could not be used to construct affordable housing on

²⁷⁶ Paul Mudau 'Western Cape High Court sets a new benchmark for promoting spatial equity, access to land and housing' (2020) 15(3) *Local Government Bulletin*.

²⁷⁷ See *Adonisi* at para 75.

²⁷⁸ Ibid.

²⁷⁹ Thomas Coggin "'They're Not Making Land Anymore': A reading of the social function of property in *Adonisi*" (2022) 138(4) *South African Law Journal* at 697.

less expensive land that is situated in the urban peripheries.²⁸⁰ This move would amount to a violation of the right to adequate housing. However, Cotton expresses concerns pertaining to adherence to the rule of law after the *Adonisi* judgement.²⁸¹ “Given the slow pace and issues with noncompliance of court proceedings, the final outcome of the case with regards to affecting spatial justice remains to be seen”.²⁸²

5.7 Cultural adequacy

The aspect of cultural adequacy in relation to the right to housing requires that the construction of buildings should give an expression of cultural identity and diversity of housing.²⁸³ “South Africa is a multi-cultured state and cultural diversity underlies the South African legal system”.²⁸⁴ The functional area of “cultural matters” is enumerated as a concurrent competency of the national and provincial spheres of government in Part A of Schedule 4 of the Constitution. More so, the Constitution in Part A of Schedule B allocates the functional area of “provincial cultural matters” as an exclusive provincial legislative competence. The Constitution accommodates and protects ethnic, religious, and linguistic groups, by recognising everyone’s right to participate in the cultural life of their choice.²⁸⁵ The Constitution also entrenches everyone’s right to enjoy their culture, practice their religion, and use their language.²⁸⁶

In South Africa, courts play a pivotal role in the promotion and accommodation of cultural identity and diversity.²⁸⁷ As indicated earlier, both the Housing Act,²⁸⁸ and the Social

²⁸⁰ Stijn Willems *To sell or not to sell? An analysis of the Tafelberg sale in the light of the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights* (unpublished LLM dissertations, University of Cape Town, 2022) at 43.

²⁸¹ Sonya Cotton ‘Legal geographies of “community” in South Africa and the Tafelberg case (a children’s story)’ (25 January 2022) available at <https://www.landlawandjustice.eu/legal-geographies-of-community-in-south-africa-and-the-tafelberg-case-a-childrens-story/> (accessed on 03 May 2023).

²⁸² Ibid.

²⁸³ See UN CESCR General Comment No 4 at para 8(g).

²⁸⁴ HC Roodt ‘Cultural policy and the landscape of the law in South Africa’ (2006) 12(1) *Fundamina* at 203.

²⁸⁵ See Section 30 of the Constitution.

²⁸⁶ Ibid Section 31.

²⁸⁷ Christa Rautenbach ‘Celebration of difference: Judicial accommodation of cultural and religious diversity in South Africa’ (2010) 10(2) *The International Journal of Diversity in Organisations, Communities and Nations* at 117. See also Marian Burchardt ‘Law and Religious Diversity: How South African Courts Distinguish Religion, Witchcraft and Culture’ in Lene Kühle et al (eds) *The Critical Analysis of Religious Diversity* (2018) at 272; Russell H Kaschula and André Mostert ‘Communicating across cultures in South African law courts: Towards an information technology solution’ (2008) 36 *Stellenbosch Papers in Linguistics PLUS* at 89.

²⁸⁸ See Section 2(1)(e)(xi) of the Housing Act.

Housing Act,²⁸⁹ enjoin the local government to promote the expression of cultural identity and diversity in housing developments. However, there is seldom an exposition of how the element of cultural adequacy and its acceptability features in South African housing rights jurisprudence. Given the well-established vibrancy and activism of the judiciary in South Africa, the element of cultural adequacy still has a high likelihood for its entrenchment in the country's housing jurisprudence, laws, policies, and programmes.

Roodt indicates that since the new constitutional dispensation, the government hardly gives attention to “cultural policy as a tool in social, economic and physical development”.²⁹⁰ More profoundly, Roodt observes that, together with other State entities, the local government fails to assign to culture any specific role and use in community development.²⁹¹ The Integrated Development Plans of most municipalities do not feature the aspect of culture as part of social, economic, and physical development.²⁹² Nawa argues that “cultural policy can indeed maximise the power of culture to deconstruct and reconstruct decaying cities, plan new ones and build integrated societies”.²⁹³ The Department of Arts and Culture states that a local cultural policy should reflect and articulate:

Commitment to social development. This entails issues of identity, relationships, values and aspirations, diverse cultural, religious and cultural heritage background, social inclusion, cohesion, accessibility, xenophobia, youth, homelessness, health, women, cultural tourism, prisons, games (indigenous and modern) and sport.²⁹⁴

Meaningful engagement provides an opportunity to ensure that housing solutions are culturally adequate. After successfully applying for state-subsidised housing, beneficiaries may be involved in identifying the site of the housing construction and planning the settlement, with an opportunity to express the cultural practices of their choice in the process. Although not specifically incorporating the aspect of cultural adequacy, the Constitutional

²⁸⁹ See Section 2(1)(i)(vii) of the Social Housing Act.

²⁹⁰ See Roodt op cit note 284 at 205. See also Mzo Sirayi and Godfrey Anyumba ‘Local cultural policy: a tool for grassroots development’ (2007) 17(1) *South African Journal for Folklore Studies* at 15.

²⁹¹ See Roodt op cit note 284 at 205.

²⁹² Ibid at 3.

²⁹³ Lance Nawa ‘Local cultural policy in South Africa: A tool for urban regeneration’ (2016) 51(4) *Journal of Public Administration* at 759.

²⁹⁴ Department of Arts and Culture ‘Local Cultural Policy Framework for South Africa: A Guide for Local Authorities’ (2010) at 25.

Court in *Grootboom* held that the State bears the primary obligation to ensure that the housing system can facilitate self-built houses through planning laws.²⁹⁵ Accordingly, this is an opportunity for engraining the aspect of cultural adequacy in the housing process and housing product.

6 Conclusion

South Africa has progressive housing laws, policies, programmes, and jurisprudence.²⁹⁶ Numerous litigations against the local government in relation to the judicial enforcement of the right of access to adequate housing revolve around housing backlogs, evictions, and removals. The judicial enforcement of the right to housing is in line with the seven aspects identified by the UN General Comment No. 4, particularly, the legal security of tenure and location, which is the main determinant in the achievement of spatial equity.

In the process, local governments must ensure that housing is accessible to all, including vulnerable groups. In order to satisfy the right of access to adequate housing, the Constitutional Court obliges the local government to provide citizens and permanent residents with access to permanent residential structures with secure tenure.²⁹⁷ Housing must be of adequate quality, and should the essential services, materials, facilities, and infrastructure.²⁹⁸ It must be structurally sound and safe for habitation.²⁹⁹

Above all, the *Adonisi*³⁰⁰ judgement seeks a permanent solution for giving vulnerable social groups the right to access urban land through housing provision from the government. As a result, the Court has set a solid foundation for redressing spatial inequalities. The *Adonisi* judgement also obliges local governments to develop and implement appropriate policies that facilitate and promote access to land and affordable housing in well-located areas within the urban cores. In this regard, the constitutional and legislative obligations imposed on local government are aimed at promoting and protecting the rights and interests of socially and economically disadvantaged urbanites that oftentimes languish in urban peripheries.

²⁹⁵ See *Grootboom* at para 36.

²⁹⁶ See Chenwi op cit note 264 at 68.

²⁹⁷ See *Grootboom* at para 51.

²⁹⁸ Ibid para 37.

²⁹⁹ See *Joe Slovo* at para 191.

³⁰⁰ See *Adonisi* at para 70.

Therefore, the Court has established new benchmarks for judicial enforcement of access to land, housing, and the achievement of spatial equity in urban areas.

Chapter 3

The Roles, Powers, Functions and Responsibilities of Local Government Pertinent to Housing Provision

1 Introduction

There are three sets of laws and policies that are relevant to the achievement of spatial equity in relation to housing. These are (a) the general laws and policies relating to the powers, functions, competencies, and obligations of urban local government; (b) the specific housing laws and policies relating to all three spheres of government; and (c) the spatial planning and development laws and policies. Thus, this Chapter focuses on local government's roles, powers, functions, and responsibilities regarding the provision or delivery of housing to the poor as provided by the South African constitutional, legislative, and policy frameworks as well as courts' jurisprudence.

It outlines the place and role of local government in South Africa's constitutional framework of multi-level governance and the decentralisation of housing powers to local government. Since South Africa is a multi-sphere system of government that operates in accordance with a highly centralised federal State structure,¹ the local government's housing role is thoroughly assessed. This assessment is through the lens of co-operative government and intergovernmental relations, especially when considering the local government's exercise of decentralised housing powers. Therefore, the cities' ability to address housing challenges and infrastructural backlogs hinges on the nature of the local government's roles, powers, functions, and responsibilities pertinent to housing provision as dictated by the laws and policies applicable to the overall State structure and system of multi-level government.

Following the introductory section, the structure of the Chapter is in this order: the constitutional framework for multi-level system of the government; the evolution of local government reform; the general powers of local government; the local government's housing

¹ Pierre de Vos and Warren Freedman *South African Constitutional Law in Context* (2014) 268; Elem E Tepeciklioglu 'South African Federalism: Constitution-Making Process and the Decline of the Federalism Debate' (2018) 13 *Journal of Yasar University* at 164; Nico Steytler 'The constitutional conversation between the federal structure and a bill of rights' (2015).

roles, powers, functions, and responsibilities; and the reflections of the substance of the other preceding key sections.

2 Constitutional framework for multi-level system of government

2.1 Centralised federal system of government

The exact nature of South Africa's political system is a subject of contention.² The general interpretation of the constitutional framework concurs that it has established a highly centralised form of a federal system.³ However, the political system is also viewed as a hybrid system as it resembles the combined conventional elements and rudiments of a federation and unitary State designs.

A "federal checklist" has six constituent elements which are correspondingly contained in South Africa's Constitution. First, a written constitution which is the supreme law of the country establishes two or more orders of government: fundamentally, the federal (central/national) and regional governments (provinces).⁴ Secondly, by endorsing the principle of self-rule, both governments exercise a broad scope of exclusive powers.⁵ Thirdly, no level of government may alter its powers or those of the other.⁶ Fourthly, representatives of regional governments constitute a second chamber in the national legislature (shared rule).⁷ Fifthly, the judiciary or a referendum process form part of the dispute resolution mechanisms.⁸ Finally, the facilitation of intergovernmental co-operation between the federal and regional governments must be through legally constituted structures, institutions, principles, and mechanisms.⁹

² Nico Steytler and Johan Mettler 'Federal arrangements as a peacemaking device during South Africa's transition to democracy' (2001) 31(4) *Publius: The Journal of Federalism* at 93; Derek Powell 'Transition to Cooperative

Federalism: The South African Experience' (2010) at 25-26.

³ Basdeo states that South Africa has a "highly centralised federal system", see M Basdeo 'The impact and dilemma of unfunded mandates confronting local government in South Africa: A comparative analysis' (2012) 1(2) *Africa's Public Service Delivery and Performance Review* at 51. See also Nico Steytler and Jaap de Visser 'South Africa's Response to COVID-19: The multilevel government dynamic' in Rupak Chattopadhyay et al (eds) *Federalism and the Response to COVID-19 A Comparative Analysis* (2022) at 203.

⁴ See Section 2 and Section 40(1) of the Constitution of the Republic of South Africa, 1996.

⁵ Ibid Section 44(1)(a)(ii).

⁶ Ibid Section 41(1)(e) and (f).

⁷ Ibid Section 42(1)(2) and (3).

⁸ Ibid Section 41(3).

⁹ Ibid Section 41(2)(a) and (b).

2.2 Structure of multi-level system of government

The system of multi-level government established by the Constitution,¹⁰ comprises three spheres of government: the national, provincial, and local spheres. These spheres are “distinctive, interdependent, and interrelated”.¹¹ The Constitutional Court in *City of Cape Town and Others v Robertson and Others*,¹² stated that:

... the Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, ‘inviolable and possesses the constitutional latitude within which to define and express its unique character’ subject to constraints permissible under our Constitution.

The feature of “distinctiveness” denotes an element of “self-rule” or autonomy of sub-national levels of government: provinces and local governments. In order to fulfil their mandates, provinces and local governments are entitled to revenue sources and powers that are constitutionally protected.

2.3 Principles of co-operative government and intergovernmental relations

Each sphere of government is allocated legislative and executive powers within the functional areas listed in Schedules 4 and Schedule 5 of the Constitution. The constitutional allocation of powers to the three spheres of government “requires careful and nuanced interpretation to give effect to the spirit and meaning of the Constitution”.¹³ Through several measures, the different spheres of government are obliged to participate in community development initiatives and the provision of service delivery.

South Africa prides itself on its impressive constitutional and legal prescriptions for co-operative governance and intergovernmental relations. In this respect, Chapter Three of the Constitution is dedicated to co-operative governance. The Constitution sets the principles of

¹⁰ The phrase “multi-level system of government” is used to describe the systems of government with more than one level or different tiers of government, see Liesbet Hooghe and Gary Marks ‘Types of multi-level governance’ (2001) 5 *European Integration Online Papers* at 1; Tinashe C Chigwata *Provincial and Local Government Reform in Zimbabwe: An analysis of the Law, Policy and Practice* (2018) 23.

¹¹ See Section 40(1) of the Constitution.

¹² 2005 (2) SA 323 (CC) at para 60.

¹³ Jeannie van Wyk ‘Planning in all its (dis)guises: Spheres of government, functional areas and authority’ (2012) 15(5) *Potchefstroom Electronic Law Journal* at 288.

co-operative government in Section 41(1).¹⁴ For the common good of the country, these principles outline binding benchmarks of intergovernmental conduct which the three spheres of government are legally bound to fully comply with. These principles seek to eliminate competitive governance while promoting integrated governance based on formal structures and institutions, principles and mechanisms that facilitate efficient and effective intergovernmental co-operation. They assist in resolving intergovernmental disputes that may arise from shared or overlapping functional areas between the different spheres of government.

Section 41(2) of the Constitution requires that national legislation must establish or provide structures and institutions that promote and facilitate intergovernmental relations. In addition, the legislation must “provide for the appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes”. Several pieces of legislation, that address a range of political, fiscal, and administrative processes and procedures, have been promulgated to give effect to the constitutional principles of co-operative government. These include the Intergovernmental Fiscal Relations Act;¹⁵ the Intergovernmental Relations Framework Act;¹⁶ the Financial and Fiscal Commission Act;¹⁷ the Division of Revenue Act;¹⁸ the Public Finance Management Act;¹⁹ the Local Government: Municipal Finance Management Act;²⁰ and the Local Government: Municipal Systems Act.²¹

It is important to also mention that the national government is empowered to develop a uniform regulatory framework that is premised on laws, policy objectives, norms and

¹⁴ The proviso stipulates that:

“All spheres of government and all organs of state within each sphere must-

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith...”

¹⁵ 97 of 1997.

¹⁶ 13 of 2005.

¹⁷ 99 of 1997.

¹⁸ 7 of 2003.

¹⁹ 1 of 1999.

²⁰ 56 of 2003.

²¹ 32 of 2000.

standards that are applicable across all provinces and municipalities.²² The provinces thus exercise oversight over local government in its pursuit to adhere to the regulatory framework.²³ In turn, local government is assigned the main mandate to provide services to local communities and to achieve developmental objectives.²⁴

2.4 Supervision of local government

The constitutional design of South Africa's system and structure of multi-level government features a strong protection of local autonomy.²⁵ Nevertheless, the exercise of local autonomy is under legally structured supervision by the national and provincial spheres of government. The purpose of supervision is two-fold: the promotion of local government compliance with the constitutional, legal and policy framework; and the achievement of local government's developmental objectives.²⁶ Supervision of local government is meant to prevent undesirable consequences such as corruption and resource wastage, poor performance, and lack of service delivery to local communities.²⁷ This, therefore, requires a fair balance between the need for local autonomy and the requirement for supervision.

The interdependence of local government in relation to national and provincial governments pertains to a relationship of supervision. Constitutionally, the national and provincial governments are entitled to and mandated to supervise the performance of municipalities. Subject to Parts A of Schedules 4 and 5 of the Constitution, the division of functions between the national government and provincial governments determines the nature and extent to which either of them may supervise municipalities concerning a particular functional area.

If local government optimally executes the duties and performs functions conferred by the Constitution and legislation, greater autonomy to local government may be granted by

²² See Section 146(2)(b) of the Constitution. See also Derek Powell 'Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations' in Johanne Poirier et al *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) at 315.

²³ See Section 155(7) of the Constitution.

²⁴ Ibid Sections 152(1) and 153(1).

²⁵ Jaap de Visser and Nico Steytler 'Multilevel government in South Africa, Ethiopia and Kenya: Observations from the practice of designing and implementing multilevel government systems' (2018) 15 *Occasional Paper Series* at 7.

²⁶ Tinashe C Chigwata and Melissa Ziswa 'Entrenching decentralisation in Africa: A review of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development' (2018) 10 *Hague Journal on the Rule of Law* at 311.

²⁷ Ibid.

national and provincial governments. Generally, there are four forms of supervision, namely: regulation, monitoring, support, and intervention.

The national government must “establish minimum standards required for the rendering of services”.²⁸ With regulation, the national government establishes the regulatory framework within which local governments exercise their powers and undertake their functions.²⁹ Therefore, subject to Section 155(7) of the Constitution, the regulatory framework set by the national government (and provinces) for local government is uniformly applied across all nine provinces.³⁰ In *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd and Others*,³¹ the court held that the “power to regulate the exercise of a municipality’s executive authority... does not authorise any intrusion in connection with a municipality’s legislative authority in any manner or form”.³²

In this respect, the national government passes the applicable housing legislation and determines a housing policy, sets the broad national housing delivery goals, and monitors the performance of provincial and local governments in the delivery of housing goals and budgets.³³ A municipality’s housing roles and responsibilities must be implemented within the national and provincial legislative, regulatory and policy frameworks. The key aim is to ensure that local government can fulfil its service delivery mandate.³⁴

Monitoring is provided by Section 155(6)(a) and (b) of the Constitution. This process deals with mechanisms that assess if the local government performs its functions and complies with the set regulatory frameworks.³⁵ In the *First Certification of the Constitution*,³⁶ the

²⁸ See Section 44(2)(d) of the Constitution.

²⁹ See Chigwata and Ziswa op cit note 26 at 210-2011.

³⁰ “The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1)”, see Section 155(7) of the Constitution.

³¹ 2022 (4) SA 167 (WCC) at para 15.

³² Ibid para 27.

³³ The United Nations Committee on Economic, Social and Cultural Rights (CESCR) ‘Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa’ (2017) at para 97.

³⁴ Natasja Holtzhausen ‘Provincial government in South Africa’ in Chris Landsberg and Suzanne Graham (eds) *Government and Politics in South Africa: Coming of Age* 5th ed (2017) at 131.

³⁵ Mbuzeni Mathenjwa ‘Contemporary trends in provincial government supervision of local government in South Africa’ (2014) 18 *Law, Democracy & Development* at 178.

Constitutional Court held that the power to monitor local government does not entail the control of local government affairs, but the power to observe or keep local government under review. This form of supervision is implemented within the framework of intergovernmental relations. It includes undertaking periodic visits to the local government and reviewing periodical reports on the set performance targets.³⁷

The national and provincial governments are also empowered to monitor local government by means of national legislation. Section 3(2)(c) of the Housing Act³⁸ stipulates that, in co-operation with the Member of the Executive Council (MEC), the national government must monitor “the performance of provincial and local governments against housing delivery goals and budgetary goals”. In addition, the MEC is required by Section 10(3) of the Housing Act to regularly review an accredited municipality based on adequate performance against the criteria for accreditation. Similarly, the Municipal Finance Management Act also requires the national and provincial treasuries to monitor a municipality’s compliance with the Act.³⁹

In the event the monitoring mechanism discovers non-compliance with the Constitution and legislation, the local government needs support to address them. Offering support is “particularly important to poorly-resourced local governments who usually lack the capacity to comply or/and perform”.⁴⁰ The constitutional provision for offering support to local government is contained in Section 154(1) of the Constitution. It states as follows:

The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

In the same vein, under Section 3(2)(e) of the Housing Act, the national government must support and strengthen the capacity of municipalities to manage their own affairs and exercise their powers and perform their duties in respect of housing development. Section

³⁶ *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) (*First Certification of the Constitution*) at para 372.

³⁷ See Chigwata and Ziswa op cit note 26 at 313.

³⁸ 107 of 1997.

³⁹ See Section 5(2)(a) and Section 5(4)(a) of the Municipal Finance Management Act requires the national and provincial treasuries to monitor compliance with the Act by municipalities and municipal entities.

⁴⁰ See Chigwata and Ziswa op cit note 26 at 313.

7(2)(c) and (e) of the Housing Act mandates the provincial government to do the same. For the purposes of ensuring that municipalities can perform their housing duties, the Minister may, among other measures, take any steps reasonably necessary to create an environment conducive to enabling local governments to achieve their respective goals. The Municipal Systems Act also empowers the MEC to act when a municipality fails to perform or commits maladministration.⁴¹

The most extreme form of supervision is intervention.⁴² Section 139 of the Constitution prescribes preconditions for interventions, including the fact that a municipality cannot or does not fulfil an executive obligation imposed by the Constitution or legislation. First, the provincial executive may intervene in a manner and to the extent prescribed by the Constitution (procedural requirements). Secondly, the provincial executive must justify its intervention in local government affairs (substantive requirements).⁴³ An intervention is aimed at protecting and promoting the minimum standards of local government's service delivery and the fulfilment of its constitutional mandate.

In addition, Section 7(2)(e) of the Housing Act provides that, when a municipality fails to perform a duty imposed by the Act, a provincial government must intervene by taking any appropriate steps as provided by Section 139 of the Constitution. The implications of Section 10(3)(c)(ii) of the Housing Act also invoke the intervention by the MEC in cases wherein a municipality is failing to perform its housing duties. This means, that if a municipality does not fulfil its housing powers and functions which were conferred through the accreditation and assignment process, the relevant provincial government is entitled to intervene by taking the necessary steps. Intervention is specifically aimed at ensuring that a municipality adequately performs the assigned housing functions.

⁴¹ Section 106(1) of the Municipal Systems Act provides as follows:

"If a MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption, or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must –

(a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or

(b) if the MEC considers it necessary, designate a person or persons to investigate the matter."

⁴² See Chigwata and Ziswa op cit note 26 at 313.

⁴³ Nico Steytler 'National Cohesion and Intergovernmental Relations in South Africa' in Nico Steytler and Yash Pal-Ghal *Kenya-South Africa Dialogue on Devolution* (2015) 318.

3 The evolution of local government reform

3.1 Status of local government before 1994

Before 1994, local government was a subordinate creature of statute. Municipalities were institutions that lacked constitutionally conferred and protected powers.⁴⁴ They only exercised powers that were expressly or impliedly dispersed by a competent legislative authority,⁴⁵ as delegated by national and provincial legislations. Higher tiers of government could recentralise the delegated powers or simply overrule and overpower the local governments at any time. The structure of the multi-level government was in a hierarchical form. Local government was the lowest tier of government, subordinate to the national and provincial governments. Municipalities owed their existence to provincial ordinances which were passed by provincial legislatures that had limited law-making authority.

There were four types of local authorities established by the provinces, namely: city councils (for large urban areas); town councils; village councils; and health committees. In the urban areas, provinces established local authorities for black, Coloured, and Indian communities.⁴⁶ Moreover, local government played a huge role in creating massive spatial distortions, economic inequalities, and infrastructure backlogs.⁴⁷ Areas reserved for black, Coloured, and Indian communities were plagued by a lack of quality service delivery and under-development. As a result, there are sprawling black townships with informal settlements. The segregated system of local government thus contributed, in its racially differentiated administration mechanisms and service standards, to spatial inequalities in South African cities and towns.

⁴⁴ Ibid. See also *CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Municipality and Others* 2007 (4) SA 276 (SCA) at para 33:

⁴⁵ This basically meant that their powers were strictly limited to empowering legislation. See Phindile Ntliziywana *Professionalisation of local government: Legal avenues for enforcing compliance with competency requirements* (unpublished LLM research paper, University of the Western Cape, 2009) at 7.

⁴⁶ As a result, small areas had numerous local authorities, with each authority tasked with specific functions and the group of persons it had to provide services for. See Anthony Lemon 'Restructuring the local state in South Africa: Regional services councils, redistribution and legitimacy' in David W Smith (ed) *Urban and regional change in Southern Africa* (1992).

⁴⁷ Ibid 2.

3.2 Status of local government after 1994

In the new constitutional dispensation local government became a “fully-fledged government with constitutionally protected powers”.⁴⁸ In *Robertson*,⁴⁹ the Constitutional Court noted that a municipality was previously a “mere creature of statute”. Thus, the Constitutional Court also reasserted the significantly transformed constitutional status of local government in *Fed sure Life Assurance and Others v Johannesburg Transitional Metropolitan Council*.⁵⁰ The Court held that local government is an independent and distinct sphere of government and is no longer a public body that exercises delegated powers from the national and provincial governments but has original powers conferred by the 1993 Constitution. The Court held that: “Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.”⁵¹ The Constitution itself gives the powers to local governments and protects them. These powers were later expanded in the 1996 Constitution. As it has been held in *Overbeek Building*, there are no constitutional provisions that empower anyone else other than the municipalities to make by-laws or approve any by-laws made by municipalities.⁵²

In addition, due to the constitutional protection of its autonomous status and its powers which are sourced directly from the Constitution, the institution of local government is no longer dependent on the goodwill of the national government and provinces. Accordingly, this security of existence means the national and provincial spheres of government may not arbitrarily abolish or merge municipalities. Any abolishment or merger of municipalities must be subject to stringent substantive and procedural requirements laid down by the law which also requires an oversight role of an independent body, the Municipal Demarcation Board.⁵³ The transformation of the system of local government required substantial changes to the institutional and legislative frameworks that existed prior to the 2000 local government elections. Fourie and Opperman state that

⁴⁸ Ibid 8. See also Derek Powell ‘Imperfect Transition - Local Government Reform in South Africa 1994–2012’ in Susan Booysen (ed) *Local Elections in South Africa, Parties, People and Politics* (2012) at 15.

⁴⁹ See *Robertson* at para 60.

⁵⁰ 1998 (12) BCLR 1458 (CC).

⁵¹ Ibid para 26.

⁵² See *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd and Others* 2022 (4) SA 167 (WCC) at para 20.

⁵³ See Section 2 of the Local Government: Municipal Demarcation Act 27 of 1998. See also Mkhululi Ncube and Jabulile Monnakgotla ‘Amalgamation of South Africa’s rural municipalities: is it a good idea?’ (2016) 19 *Commonwealth Journal of Local Governance* at 75.

... the most important of these changes were associated with creating developmental and cooperative local government; changing political, institutional, and administrative systems; and creating a new framework for municipal finance to address the root causes of financial problems.⁵⁴

The changes were designed to eradicate poverty and address equity needs with strategies to enhance growth, job creation and competitiveness. In the new constitutional dispensation, local government powers can only be altered owing to a constitutional amendment itself as it has an autonomous governance within a framework of co-operative governance.⁵⁵

4 General powers of local government

In South Africa, the local sphere of government comprises municipalities established in the entire territory of the country. Municipalities are meant to govern the affairs of their local communities.⁵⁶ By establishing municipalities in the entire South African territory, the government is closer to the people, with high likelihood for achieving the objectives of decentralisation.⁵⁷ Municipal councils are made of members elected through a hybrid of proportional representation and ward-based representation systems. The latter is applicable in a municipality that has wards.⁵⁸

4.1 Original powers

Section 157(3) of the Constitution stipulates that “a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution”. The national and provincial government are prohibited from encroaching on a municipality’s ability or right to exercise its powers or perform its functions.⁵⁹ Municipalities can exercise their powers with no

⁵⁴ Mare-Lise Fourie and Lucas Opperman *Municipal Finance and Accounting* (3rd ed) (2015) 2.

⁵⁵ See Section 151(3) of the Constitution. On the emphasis for the concepts of local autonomy or local self-government, see United Nations Human Settlement Programme ‘International Guidelines on Decentralisation and Access to Basic Services for all’ (2007) at 1; Giovanni Boggero *Constitutional Principles of Local Self-Government in Europe* (2017) 1.

⁵⁶ See Sections 151(1) and (3) of the Constitution.

⁵⁷ The promotion of democracy, development, peace, and limiting State power, see Chigwata op cit note 10 at 4; Charles M Fombad ‘Constitutional entrenchment of decentralisation in Africa: An overview of trends and tendencies’ (2018) (62)2 *Journal for African Law* at 178.

⁵⁸ See Section 157 of the Constitution.

⁵⁹ Ibid Section 151(4).

imminent threat by the national and provincial government to recentralise municipal powers or even arbitrarily overpower municipalities.⁶⁰ From a constitutional standpoint, the powers of local government in South Africa can be classified as original, assigned and subsidiary, fiscal, and administrative in nature.

The municipal council of a municipality is vested with its legislative and executive authorities.⁶¹ These powers are exercised by municipal councillors that are democratically elected for a five-year term.⁶² Section 156(1) of the Constitution stipulates that a municipality is conferred with the executive authority and has the right to administer any local government matters enumerated in Parts B of Schedules 4 and 5 of the Constitution.⁶³ In addition, a municipality is conferred by Section 156(2) of the Constitution the power to make and administer by-laws for the effective administration of the matters which it has the right to administer. The Constitution directly devolved powers to the local government. They, therefore, constitute the principal source of powers conferred on the municipalities and are treated as the so-called “original” powers of local government.⁶⁴

4.2 Assigned powers and subsidiarity

The national and provincial governments may assign powers to local governments in relation to any function contained in Parts A of Schedules 4 and 5 of the Constitution.⁶⁵ Generally

⁶⁰ Section 41(1)(e) of the Constitution obliges that the three spheres of government must respect the constitutional status, institutions, powers, and functions of government in the other spheres. They are also prohibited from assuming any power or function unless that power or function has been conferred on them by the Constitution (see Section 41(1)(f) of the Constitution. Lastly, all three spheres of government must “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”, subject to Section 41(1)(g) of the Constitution.

⁶¹ Ibid Section 151(2).

⁶² Ibid Sections 157 and 159.

⁶³ Ibid Section 156(2).

⁶⁴ See Jaap de Visser and Annette May ‘Developmental local government: determining appropriate functions and powers’ (2007) 7; Victoria Bronstein ‘Legislative competence’ in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013); Tracy Humby ‘Hands on or hands off? The constitutional court’s denial of a provincial municipal planning role’ (2015) 1 *Journal of South African Law* at 178. In *Robertson*, the Constitutional Court held that “a municipality enjoys “original” and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits”, see *Robertson* at para 60.

⁶⁵ Section 156(4) of the Constitution.

referred to as “assigned powers” to local government, either as legislative⁶⁶ or executive⁶⁷ assignments of authority, they are implemented through national and provincial legislation.⁶⁸

Assignments can be “general assignments”, wherein the function is assigned to all municipalities in general across the whole country,⁶⁹ or “specific assignments” where only a specific municipality is assigned the function.⁷⁰ Moreover, the national and provincial governments are constitutionally obliged to assign to a municipality, the administration of a matter listed in Parts A of Schedule 4 or 5 of the Constitution.⁷¹ However, the assignee municipality must have the competent capacity to best effectively administer the function locally. Section 156(4) of the Constitution is modelled under the general traits and manifestations of the principle of subsidiarity.⁷² The wording of the provision makes it compulsory to transfer additional powers and functions to local government.⁷³ The basis of the principle of subsidiarity is premised on its requirement that “the exercise of public power takes place at a level as close as possible to the citizenry”.⁷⁴

The main difference between Section 156(4) of the Constitution and Sections 99 and 126 of the Constitution is that Section 156(4) is mandatory whilst the latter is discretionary. The appropriate procedures for assigning functions to municipalities are set out in Sections 99, 126, and 156(4) of the Constitution as well as Sections 10 and 10A of the Municipal Systems Act. These procedures are designed to properly manage and control the assignment of powers outside of the so-called original competencies of local government listed in Parts B of Schedules 4 and 5 of the Constitution.⁷⁵ The procedure ensures that the assignee municipality

⁶⁶ See Sections 44(1)(a)(iii) and 104(1)(c) of the Constitution.

⁶⁷ Ibid Sections 99 and 126.

⁶⁸ Ibid.

⁶⁹ See Section 9 of the Municipal Systems Act.

⁷⁰ Ibid Section 10.

⁷¹ See Section 156(4) of the Constitution.

⁷² The principle of subsidiarity may have several effects. First, it can prohibit the national and provincial spheres of government from assuming local government powers or performing any of its allocated functions. Secondly, it can oblige national government action; if the application of the principle dictates that a particular area is not suitable for local government activity it therefore requires the national or provincial sphere of government to occupy that space, see Jaap de Visser ‘Institutional subsidiarity in the South African Constitution’ (2010) 1 *Stellenbosch Law Review* at 90. See also Lourens Du Plessis ‘Subsidiarity: What’s in the name for constitutional interpretation and adjudication?’ (2006) 17(2) *Stellenbosch Law Review* at 209.

⁷³ Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2007) at 39-49.

⁷⁴ See de Vos and Freedman op cit note 1 at 342.

⁷⁵ Thabile Chonco and Lungelwa Kaywood ‘Local responsibilities and public services in South Africa: An Introduction’ in Michelle R Maziwisa and Jaap de Visser *Local Government in South Africa: Responses to*

has the requisite legislative, executive, financial and administrative capacity to assume and fulfil the assigned function.

4.3 Fiscal powers

Without the requisite capacity and resources, decentralisation cannot meet its developmental objectives.⁷⁶ Therefore, the conferment of significant revenue-generation powers grants municipalities the requisite fiscal power and capacity to ensure financial sustainability as well as to stimulate financial and legal accountability within the contours of good local governance. In this way, municipalities' legislative and executive authority is accompanied and supported by original fiscal powers.⁷⁷ A municipality is entitled to impose rates on property and surcharges on fees for services the municipality has rendered or those rendered on its behalf.⁷⁸

The primary aim of fiscal decentralisation is to provide revenue-generating authority and financial resources to sub-national governments. Under the 1996 Constitution, the process of fiscal decentralisation confers a certain degree of fiscal autonomy on the status, institution, powers, and functions of local government. By entrenching fiscal decentralisation, the Constitution allocates financial resources and revenue-raising powers to all the three spheres of government.⁷⁹

Hence, local government largely generates its revenue from imposing property rates and charges on user fees (etc, water and electricity).⁸⁰ Ndlovu laments that "local government income streams for service delivery depend on rates and taxes paid by property owners,

Urban-Rural Challenges (2021) at 10; Jaap de Visser and Annette Christmas 'Reviewing local government functions' (2007) 9 *Local Government Bulletin* at 13.

⁷⁶ Pundy Pillay 'Decentralisation and Service Delivery' in Anne Mc Lenna and Barry Munslow B (eds) *The Politics of Service Delivery* (2009) at 140; David Savage 'Key Themes and Trends in Municipal Finance in South Africa' in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 287; Philip Van Ryneveld 'The development of policy on the financing of municipalities' in Udesch Pillay et al (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006).

⁷⁷ See Steytler and de Visser op cit note 3 at 6.

⁷⁸ See Section 229(1)(a) of the Constitution. See also *Robertson* at para 61; National Treasury 'Local government budgets and expenditure review 2006/07-2012/13' (2011).

⁷⁹ Bongai Khumalo et al 'South Africa's intergovernmental fiscal relations system' in Nico Steytler and Yash P Ghai (eds) *Kenya-South Africa Dialogue on Devolution* (2015) at 203.

⁸⁰ See Steytler and de Visser op cit note 3 at 6; Derek Powell et al 'The withholding of property rates and taxes in five local municipalities' (2010) 12(1) *Local Government Bulletin* at 9.

surpluses resulting from the provision of services, and transfer payments from the national government”.⁸¹

The Constitution requires that Parliament must pass national legislation that may authorise a municipality to impose rates on other taxes and duties appropriate to the category of local government.⁸² To give effect to Section 229(1)(b) of the Constitution, the Local Government: the Municipal Property Rates Act,⁸³ and the Municipal Fiscal Powers and Functions Act,⁸⁴ were enacted.⁸⁵ The Municipal Property Rates Act regulates the power of a municipality to impose rates on the property,⁸⁶ and the Municipal Fiscal Powers and Functions Act regulates the exercise by municipalities of their power to impose surcharges on fees for services.⁸⁷ Section 6(1) of the Municipal Property Rates Act stipulates that a municipality must adopt by-laws to give effect to its rates policy.

However, a municipality is not permitted to impose an income tax, value-added tax, general sales tax, or customs duties.⁸⁸ The capability to provide basic services to the local community and optimally perform the functions allocated to it is contingent on the availability of financial resources. Thus, a municipality is entitled to receive an equitable share of revenue raised nationally,⁸⁹ through the provincial government concerned, on which the Financial and Fiscal Commission (FFC) makes recommendations.⁹⁰ In addition, local government “may

⁸¹ Tidings P Ndhlovu ‘Gender, evictions, and relocations during COVID-19 in South Africa: Lessons for programming and practice’ (2022) 36(2) *Agenda* 29, at 30.

⁸² See Section 229(1)(b) of the Constitution.

⁸³ 6 of 2004.

⁸⁴ 12 of 2007. The Act regulates the exercise by municipalities of their power to impose surcharges on fees for services and provides for the authorisation of taxes, levies, and duties that municipalities may impose under Section 229(1)(b) of the Constitution.

⁸⁵ Other legislation affecting the financial administration of municipalities in South Africa are the Municipal Finance Management Act; the Organised Local Government Act 52 of 1997; the Housing Act; the Municipal Demarcation Act; the Financial and Fiscal Commission Act; the Intergovernmental Fiscal Relations Act; the Promotion of Access to Information Act 2 of 2000; the Public Audit Act 25 of 2004; the Electricity Regulation Act 4 of 2006; the Infrastructure Development Act 23 of 2014; the Division of Revenue Act; the Rating of State Property Act 79 of 1984; the Protection of Personal Information Act 4 of 2013; the Consumer Protection Act 68 of 2008; the Public Management Act 11 of 2014; and the Financial Services Laws General Amendment Act 45 of 2013.

⁸⁶ Among an array of objectives, the purpose of the Act is to make provisions for municipalities to implement a transparent and fair system of exemptions, reductions, and rebates through their rating policies; to make provision for fair and equitable valuation methods of properties.

⁸⁷ In addition, the Act provides for the authorisation of taxes, levies, and duties that municipalities may impose under Section 229(1)(b) of the Constitution.

⁸⁸ See Section 229(1)(b) of the Constitution.

⁸⁹ Ibid Section 227(1)(a).

⁹⁰ Gerrit van der Waldt *Managing for Excellence in the Public Sector* (3rd ed) (2017) 150.

receive other allocations from national government revenue, either conditionally or unconditionally”.⁹¹ Furthermore, de Visser and Steytler are of the view that local government’s intergovernmental funding from the national government and not the provinces, reduces the role and influence of provinces over local government.⁹² Nonetheless, the national government is not obliged to offer financial support to municipalities that inappropriately exercise their fiscal powers.⁹³

4.4 Administrative powers

Administrative decentralisation is about transferring from the centre to sub-national governments, the power to recruit, discipline, dismiss and remunerate its staff. The White Paper on Local Government acknowledged that the decentralisation of operational responsibility is part of the key mechanisms for improving municipal performance.⁹⁴

A municipal council is constitutionally empowered to employ personnel for the effective performance of its functions.⁹⁵ In addition, a municipality has a constitutional obligation to strive, within its administrative and financial capacity, to achieve the objectives of local government.⁹⁶ A municipality is also required to “structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community”.⁹⁷ Fuo highlights that these administrative powers confirm local government’s autonomy regarding “administrative self-organisation”.⁹⁸ The local government successfully thawed

⁹¹ See Section 227(1)(b) of the Constitution.

⁹² See de Visser and Steytler op cit note 25 at 7. The UN General Assembly recognises the importance of supporting appropriate policies and capacities that enable local governments to register and expand their potential revenue base, for example through multipurpose cadastres, local taxes, fees, and service charges, in line with national policies, while ensuring several vulnerable social groups are not disproportionately affected. See United Nations General Assembly ‘Res. 71/256, annex, New Urban Agenda’ (2016) at 23.

⁹³ Tinashe Chigwata et al ‘Real or Imagined Autonomy’ in Tracy B Fenwick and Andrew C Banfield *Beyond Autonomy: Practical and Theoretical Challenges to 21st Century Federalism* (2021) 203.

⁹⁴ The White Paper on Local Government (1998) at 75.

⁹⁵ See Section 160(1)(d) of the Constitution.

⁹⁶ Ibid Section 152(2). Additionally, Section 19(1) of the Local Government: Municipal Structures Act 117 of 1998 similarly provides that “a municipal council must strive within its capacity to achieve the objects set out in Section 152 of the Constitution, 1996”.

⁹⁷ See Section 153(a) of the Constitution.

⁹⁸ Oliver Fuo ‘The Courts and Local Governments in South Africa’ in Yonatan T Fessha and Karl Kössler *Federalism and the Courts in Africa: Design and Impact in Comparative Perspective* (2020).

attempts by the national government to “streamline and integrate the local public service into a single national and provincial public service”.⁹⁹

5 Local government’s housing roles, powers, functions, and responsibilities

5.1 Constitutional framework

The starting point to properly delineate the powers, functions, rights, and duties of a sphere of government is by scrutinising the Constitution itself.¹⁰⁰ Chapter Seven of the Constitution is dedicated to local government. The Constitution specifically grants to local government the role of providing basic services. In its definition of the objectives of local government, the Constitution envisages a local government that is capable:

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.¹⁰¹

Local government is obliged to strive, within its financial and administrative capacity, for the realisation of its objectives.¹⁰² Moreso, Section 153 of the Constitution imposes developmental duties on the municipality. The proviso stipulates that a municipality must:

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.

The Constitution has assigned to local government a service delivery mandate and developmental duties.¹⁰³ Each sphere of government exercises constitutionally protected powers with respect to limited functional areas enumerated in Schedules 4 and 5 of the

⁹⁹ Jaap de Visser ‘Concurrent Powers in South Africa’ in Nico Steytler (ed) *Concurrent Powers in Federal Systems: Meaning, Making, Managing* (2017) at 238.

¹⁰⁰ See *Robertson* at para 61.

¹⁰¹ See Section 152(1)(a)-(e) of the Constitution.

¹⁰² *Ibid* Sections 152(2).

¹⁰³ See Sections 152(1) and 153(1) of the Constitution.

Constitution. Housing is listed as a “concurrent competency” of the national and provincial spheres of government in Part A of Schedule 4 of the Constitution. Nonetheless, local communities voice their housing delivery grievances at the doorstep of the local government.¹⁰⁴

However, legislative competence over the housing functional area does not equate to full responsibility for implementation - the function can legitimately be assigned to local government through an exercise of the very legislative competence. Additionally, local government still has significant housing-related powers, functions, and responsibilities in terms of legislation and policy. In terms of Sections 9 and 10 of the Housing Act,¹⁰⁵ municipalities may be accredited to administer one or more of the national housing programmes, despite being conceptualised as implementing agents towing the line of provincial governments.

Chonco argues that this placement is rather odd and impractical considering that the local government’s service delivery functions are centred on the built environment, yet housing is not a competence of the local government.¹⁰⁶ Tissington equally argues that part of the challenges for achieving scaled-up and sustainable housing delivery is because municipalities are allocated limited housing powers, even when they execute significant responsibilities in relation to the provision of infrastructure and long-term management of human settlements.¹⁰⁷ Lategan views local government as the most appropriate sphere of government for the delivery of housing projects.¹⁰⁸ However, presently it is hampered by its diminished role in the housing delivery process. Consequently, more than half of South African

¹⁰⁴ Dullah Omar Institute ‘Civic Protest Barometer’ (2018).

¹⁰⁵ See the Housing Act.

¹⁰⁶ Thabile Chonco ‘The accreditation of municipalities to administer housing programmes’ in Michelle R Maziwisa and Jaap de Visser *Local Government in South Africa: Responses to Urban-Rural Challenges* (2021) at 18. See also Nico Steytler and Yonatan T Fessha ‘Defining local government powers and functions’ (2007) 124 *The South African Law Journal* 320, at 320; Nico Steytler ‘The Currency of Concurrent Powers in Federal Systems’ in Nico Steytler *Concurrent powers in federal systems meaning, making and managing* (2017) at 1; Robert F Williams and Nico Steytler ‘Squeezing out provinces’ legislative competence in *Premier: Limpopo Province v Speaker: Limpopo Provincial legislature & Others I and II* (2012) 129(4) *The South African Law Journal* at 621

¹⁰⁷ Kate Tissington ‘A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice’ (2011) at 11.

¹⁰⁸ Louis G Lategan *A study of the current South African housing environment with specific reference to possible alternative approaches to improve living conditions* (unpublished master’s dissertation, North-West University, 2012) at 49.

municipalities lack a designated housing department that would appropriately administrate issues such as public housing delivery.

The system of multi-level government in South Africa generates manifestations of concurrency. Concurrency of powers is in reference to the existence of a “constitutional mechanism [that] permits two or more levels of government to exercise powers in the same functional area, subject to overrides or dispute-resolution arrangements”.¹⁰⁹ In accordance with Sections 44(1)(a)(ii) and 104(1)(b)(i) of the Constitution, the “Schedule 4 powers” are explicit and complete concurrent powers because both national and provincial governments have the same legislative powers over the same functional areas. This creates hitches in terms of clearly distinguishing between the functional areas which the national and provincial must legislate.

de Visser notes that both Parts B of Schedule 4 and 5 of the Constitution do not confer on local government “any function that can be seen to place the onus on it to be the primarily responsible organ for the implementation of the right to housing”.¹¹⁰ Nonetheless, certain matters under Part B of Schedule 4 relate to housing. This includes building regulations, electricity and gas reticulation, potable water supply system, stormwater management systems in built-up areas, sanitation, and waste disposal. Even though several of the listed functions and powers relating to housing, de Visser argues that “they do not place the primary obligation to take the requisite measures for the fulfilment of the right to housing on local government”.¹¹¹

The constitutional muster for this assignment process is that the matter would most effectively be administered locally and that the municipality has the capacity to administer it.¹¹² Accordingly, in cases where the benchmark for capacity is met, the national and provincial governments are compelled to delegate housing functions to competent municipalities.¹¹³ Legislative competence in a functional area of housing is not the same as the primary obligation for the fulfilment of a right to housing as enshrined in the Bill of

¹⁰⁹ Ibid.

¹¹⁰ Jaap de Visser ‘A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment’ (2004) 7 *Law, Democracy and Development* 201, at 205.

¹¹¹ Ibid.

¹¹² See Section 154(6) of the Constitution. See also de Visser op cit note 110 at 90.

¹¹³ Ibid.

Rights, which under Section 7 of the Constitution rests on all three spheres of government. Accordingly, although Schedule 4 of the Constitution allocates housing functions and powers to the national and provincial spheres of government, local government still has significant housing-related powers, functions, and responsibilities in terms of legislation and policy which are discussed in subsequent sections.

5.2 Legislative framework

Several statutes have been promulgated to give effect to Section 26 of the Constitution. Each statute allocates housing roles and responsibilities to different spheres of government. Accordingly, these statutes incorporate the various components internationally accepted to be forming part of the right to adequate housing. The primary objective of these statutes is to ensure that the housing development processes prioritises the needs of the poor and the establishment of socially and economically integrated communities. While this Chapter touches on all of them, the discussion focuses on the Housing Act and the Social Housing Act and their interactions. These statutes embed the fundamental ingredients of human settlements.

The facilitation of a sustainable housing development process is principally organised under the auspices of the Housing Act.¹¹⁴ The Act has legally entrenched the policy principles outlined in the White Paper on Housing.¹¹⁵ While giving effect to the constitutional right to adequate housing, the Preamble of the Housing Act recognises housing as encompassing adequate shelter, and as a basic human need; both a product and a process. In addition, it recognises housing as a product of human endeavour and enterprise; a vital part of integrated developmental planning; a key sector of the national economy; and as vital to the socio-economic well-being of the nation. Moreover, the Housing Act envisions that housing development must grant citizens and permanent residents' access to permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against intrusive elements.¹¹⁶

The foundation for local government's increased role or involvement in housing development emanates from the Housing Act. The Housing Act defines government roles in housing

¹¹⁴ 107 of 1997.

¹¹⁵ The White Paper: A New Housing Policy and Strategy for South Africa, 1997.

¹¹⁶ See Section 1(vi)(a) of the Housing Act.

provision and equally enjoins municipalities by allocating them certain responsibilities. It provides for the limited roles and responsibilities of municipalities in social housing developments.¹¹⁷ At the centre of the State's quest to launch large-scale housing initiatives is the social housing programme as contemplated in Section 3(4)(g) of the Housing Act. The relevant Minister may allocate funds for national housing programmes administered by municipalities.¹¹⁸

In terms of Section 9(3)(a) of the Housing Act, a municipality may by notice in the *Provincial Gazette* expropriate any land required by it for the purposes of housing development in terms of any national housing programme. The expropriation process is subject to three requirements:

- (i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof,
- (ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the *Provincial Gazette*; and
- (iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.¹¹⁹

In addition, the Section 5(1) of the Expropriation Act¹²⁰ grants a local authority the power to expropriate property. Importantly, "any reference in this Act to the Minister and the State shall be construed as a reference to the local authority concerned".¹²¹ Accordingly, the Minister may expropriate any property for public purposes,¹²² including housing developments. Hence, the legislative empowerment of municipalities to expropriate land or property for housing developments requires strategic planning, and financial and administrative capacity to finally produce housing developments for the urban poor in well-located land within the urban cores or inner-city areas.

¹¹⁷ Ibid Section 5.

¹¹⁸ Ibid Section 10.

¹¹⁹ Ibid Section 9(3)(a).

¹²⁰ 63 of 1975.

¹²¹ Section 5 of the Expropriation Act.

¹²² Ibid Section 2.

Importantly, there is a difference between the housing obligations and attendant powers that national legislation gives to all municipalities and those that pertain only to municipalities that are duly accredited to administer national housing programmes and thus, assigned to fulfil the housing functions. Based on national and provincial housing legislation and policy, every municipality is required to “ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis”.¹²³ The promulgation and amendment of housing legislation prove the willingness to promote and protect the right of access to adequate housing.¹²⁴

Tenure insecurity forms part of the housing backlog in South Africa.¹²⁵ Accordingly, the Housing Act requires that, as is reasonably possible, the three spheres of government must ensure that housing development provides individuals and communities with ample choices of housing and tenure options.¹²⁶ Security of tenure is also provided by the Social Housing Act.¹²⁷ The Social Housing Act also obliges the three spheres of government and social housing institutions to promote the best practices and minimum norms and standards in relation to the delivery and management of social housing.¹²⁸

The appropriate municipal housing frameworks are established to address “development issues essential for healthy residential areas (water, electricity, roads, refuse removal and other local services) require more ‘depth’ of delivery through large-scale and capital-

¹²³ Ibid Section 9(1)(a)(i).

¹²⁴ See the National Building Regulations and Building Standards Act 103 of 1977; the Development Facilitation Act 67 of 1995 (chapters 5 and 6 have been repealed); the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; the Extension of Security of Tenure Act 62 of 1997 (ESTA); the Housing Act; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Housing Consumers Protection Measures Amendment Act 27 of 1999; the Rental Housing Act 50 of 1999; the Construction Industry Development Board Act 38 of 2000; the Home Loan and Mortgage Disclosure Act 63 of 2000; and the Social Housing Act 16 of 2008.

¹²⁵ Megan-Leigh Burgoyne *Factors affecting housing delivery in South Africa: A case study of the Fisantekraal Housing Development Project* (unpublished master’s thesis, Cape University of Stellenbosch, 2008); Yuta J Masuda et al ‘Property Rights, Tenure Form, and Tenure Security’ in Margaret B Holland et al *Land Tenure Security and Sustainable Development* (2022) at 6.

¹²⁶ See Section 2(1)(c) of the Housing Act.

¹²⁷ Section 2(1)(h) of the Social Housing Act 16 of 2008 provides as follows:

“... the national, provincial and local spheres of government and social housing institutions must ensure secure tenure for residents in social housing institutions, on the basis of the general provisions governing the relationship between tenants and landlords as set out in the Rental Housing Act, 1999 (Act No. 50 of 1999), and between primary housing co-operatives and its members as set out in the Co-operatives Act, 2005 "(Act No. 14 of 2005)".

¹²⁸ See Section 2(1)(i)(xiii) of the Social Housing Act.

intensive infrastructure development”.¹²⁹ The National Building Regulations and Building Standards Act empower a local authority to demolish or alter any building or land that is dangerously dilapidated or showing signs of danger to human life or property.¹³⁰

Since municipalities can be accredited to national housing programmes,¹³¹ this is a typical instance of delegation of powers as provided by Section 156(4) of the Constitution. Among the general principles applicable to housing development outlined by the Act, municipalities are obliged to give priority to the needs of the poor with respect to housing development.¹³²

The South African Human Rights Commission (SAHRC) elaborates that accessibility means, “...the State must create conducive conditions for all its citizens, irrespective of their economic status, to access affordable housing”.¹³³ Thus, a municipality is further required to create conditions that are conducive to residents’ health and safety and to ensure economically efficient services of water, sanitation, electricity, roads, stormwater drainage and transport.¹³⁴

Other housing functions of a municipality as imposed by the Act are the setting of housing delivery goals.¹³⁵ These goals must be earmarked in the municipal social housing policy and must contain the planned number of houses (demands), the location of housing construction (spatial planning), and the cost of the project (budget). A function that squarely associates with the spatial planning and locational aspects of housing is the municipality’s identification and designation of land for housing developments.¹³⁶ The nature of land use development also requires the municipality to create and maintain a public environment that is conducive to housing development which is financially and socially viable.¹³⁷

¹²⁹ David Pottie ‘Local government and housing in South Africa: managing demand and enabling markets’ (2004) 14(5) *Development in Practice* at 612.

¹³⁰ See Section 12(1)(a) and B of the National Building Regulations and Building Standards Act.

¹³¹ See Sections 9(2)(b) and 10 of the Housing Act.

¹³² Ibid Section 2(1)(a).

¹³³ See South African Human Rights Commission ‘The right of access to adequate housing’ (2002). See also Katrin B Anacker ‘Introduction: housing affordability and affordable housing’ (2019) 19(1) *International Journal of Housing Policy* at 1.

¹³⁴ See Section 9(1)(a)(ii) and (iii) of the Social Housing Act.

¹³⁵ See Section 9(1)(b) of the Housing Act.

¹³⁶ Ibid Section 9(1)(c). See also Tissington op cit note 107 at 36.

¹³⁷ Ibid Section 9(1)(d).

Issues surrounding housing, land and property require efficient policies and laws for conflict management.¹³⁸ Apart from reliance on judicial remedies, the municipality must be in a position to properly handle any matters relating to residential and land rights and conflicts. Thus, the Social Housing Act requires a municipality to be capable of promoting the resolution of conflicts arising in the housing development process.¹³⁹ In addition, a municipality has the function to “initiate, plan, co-ordinate, facilitate, promote, and enable appropriate housing development”.¹⁴⁰ Other functions in terms of the Social Housing Act includes the provision of bulk engineering services and revenue-generating services;¹⁴¹ and the planning and management of land use and development.¹⁴²

A municipality’s participation in a national housing programme is subject to the rules applicable to such a programme.¹⁴³ Among other things, such participation can be invoked through the promotion of housing development projects by a developer.¹⁴⁴ It is also permissible for a municipality to act as a developer based on full pricing for cost and risk.¹⁴⁵ A municipality’s involvement can be effected through the administration of national housing programmes;¹⁴⁶ as well as the facilitation and support of other role players’ participation in the housing development process.¹⁴⁷

Priority in respect of housing development must be given to the poor.¹⁴⁸ The development process must also meet the special housing needs of persons with disabilities,¹⁴⁹ as well as marginalised women and other disadvantaged groups facing unfair discrimination.¹⁵⁰ Whereas the Social Housing Act requires that while responding to local housing demands, the

¹³⁸ Agnès Hurwitz et al ‘Housing, land, property and conflict management: Identifying policy options for rule of law programming’ (2005) at 1; Ivan F Muzondo al ‘Land conflicts in informal settlements: Wallacedene in Cape Town, South Africa (2007) 18 *Urban Forum* at 171.

¹³⁹ See Section 9(1)(e) of the Housing Act.

¹⁴⁰ Ibid Section 9(1)(f).

¹⁴¹ Ibid Section 9(1)(g).

¹⁴² Ibid Section 9(1)(h).

¹⁴³ Ibid Section 9(2)(a).

¹⁴⁴ Ibid Section 9(2)(a)(i).

¹⁴⁵ Ibid Section 9(2)(a)(ii).

¹⁴⁶ Ibid Section 9(2)(a)(v).

¹⁴⁷ Ibid Section 9(2)(a)(vi).

¹⁴⁸ Ibid Section 2(1)(a).

¹⁴⁹ Ibid Section 2(2)(e)(viii).

¹⁵⁰ Ibid Section 2(2)(e)(x).

three spheres of government must give special priority to the needs of women, children, child-headed households, persons with disabilities, and older persons.¹⁵¹

Under the Housing Act, housing development means establishing and maintaining residential environments that result in “viable households and communities in areas allowing convenient access to economic opportunities and to health, educational, and social amenities”.¹⁵² The Social Housing Act adds that the national, provincial, and local spheres of government and social housing institutions “must support the economic development of low to medium income communities by providing housing close to jobs, markets and transport and by stimulating job opportunities”.¹⁵³ Social, community and recreational facilities have to be close to social housing developments.¹⁵⁴

Section 10(1) of the Housing Act provides that a municipality may apply to the MEC to be accredited with the administration of one or more national housing programmes.¹⁵⁵ Upon accreditation, the municipality must administer the programme in respect of the accreditation granted.¹⁵⁶ Subject to Section 9(4) of the Act, when administering the programme, a municipality exercises the powers and performs the duties of the relevant provincial housing development board. The member of the Executive Council of a province responsible for housing (MEC) must regularly review an accredited municipality based on adequate performance against the criteria for accreditation.¹⁵⁷

¹⁵¹ See Section 2(1)(a) of the Social Housing Act

¹⁵² See Section 1(vi) of the Housing Act.

¹⁵³ See Section 2(1)(b) of the Social Housing Act.

¹⁵⁴ See Section 2(1)(i) (vi) of the Social Housing Act. See also Anna Granath Hansson and Björn Lundgren ‘Defining social housing: A discussion on the suitable criteria’ (2019) 36(2) *Housing, Theory and Society* 149, at 158.

¹⁵⁵ “(a) If the MEC is satisfied that the municipality which made an application under subsection (1) complies with the criteria for the accreditation of municipalities as determined by the Minister after consultation with the MEC, the MEC must accredit the municipality for the purposes of administering one or more of the national housing programmes mentioned in the application.

(b) Despite the repeal of the Housing Arrangements Act, 1993 (Act No. 155 of 1993) by section 20, any criteria determined under section 11B(2) of that Act are regarded to be criteria determined under paragraph (a), until amended or substituted under that paragraph”, see ss 10(3)(a) and (b) of the Housing Act.

¹⁵⁶ See Section 10(3)(a) of the Housing Act.

¹⁵⁷ Ibid Section 10(3)(c).

In terms of the Housing Act, a municipality must ensure that its inhabitants have “services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient”.¹⁵⁸ According to Smit,

Although poor households are, for example, able to access relatively good locations and affordable accommodation in informal settlements or adequate shelter/services and secure tenure in RDP housing settlements, they are seldom able to adequately satisfy all their minimum requirements simultaneously.¹⁵⁹

Section 10A of the Housing Act prohibits the sale of State-subsidised houses or service sites within eight years. However, poorly located housing causes most financially struggling beneficiaries to either sell or lease their houses and in turn, rent in informal human settlements located close to places of economic opportunities and convenient for daily commuting to avoid transport costs.¹⁶⁰

An additional element pertaining to the locational aspect is the protection of inhabitants’ right to health by ensuring that low-cost housing is built in pollution-free sites or not close to pollution sources. Section 24 of the Constitution confers on everyone the right to an environment that is not harmful to their health or well-being and that the environment must be protected from pollution.

With the purpose of giving effect to the right to access adequate housing, and promoting a sustainable social housing environment, the Social Housing Act defines the functions of national, provincial, and local governments. The Act makes provisions for the general principles applicable to social housing. The facilitation of the social housing development process needs to involve residents and key stakeholders.¹⁶¹

¹⁵⁸ Ibid Section 9(1)(a)(iii).

¹⁵⁹ Warren Smit ‘Analysis of qualitative survey on accessing, holding and trading land: Synthesis report’ (2008) at 29.

¹⁶⁰ Allison Goebel ‘Sustainable urban development? Low-cost housing challenges in South Africa’ (2007) 31 *Habitat International* at 291. The significance of transport is about ameliorating the involuntary mobility restrictions of poor households residing within both urban peripheries and well-located housing areas.

¹⁶¹ See Section 2(1)(g) of the Social Housing Act.

Kulundu and Muller view the Social Housing Act as a step towards addressing the deplorable living conditions of South Africa's urban poor.¹⁶² In terms of the Act, residents must be afforded the necessary dignity and privacy by providing them with a clean, healthy, and safe environment.¹⁶³ Specifically, within its jurisdiction, a municipality is obliged to prevent or remove conditions not conducive to the health and safety of the inhabitants.¹⁶⁴

The passing of the Social Housing Act was intended to define the functions of the three spheres of government with respect to social housing and the establishment and promotion of a sustainable social housing environment. The Social Housing Act similarly provides for the roles and responsibilities of municipalities in social housing developments. A vast majority of poor black commuters reside in the urban peripheries which are far away from sites of jobs and economic opportunities. Consequently, they involuntarily suffer from expensive public transportation. Thus, the general principles applicable to social housing as provided in Section 2(1) of the Social Housing Act provide that together with other spheres of government and Social Housing Institutions (SHIs), the local government must support the development of low to medium-income communities by providing housing with proximity to transport, markets, and jobs.¹⁶⁵ Section 2(1)(e)(viii) of the Social Housing Act requires that the national, provincial, and local spheres of government must promote the suitable location of social housing stock in respect of employment opportunities.

Article 5 of the Social Housing Act makes provision for the roles and responsibilities of municipalities pertinent to social housing. As part of addressing the social housing demands within its jurisdiction, and as part of the municipality's process of integrated development planning, a municipality must take all reasonable and necessary steps to facilitate social housing delivery. It does this by encouraging the development of new social housing stock and the upgrading of existing stock or the conversion of existing non-residential stock.¹⁶⁶ The demands for social housing can also be addressed when a municipality provides access:

¹⁶² Kenneth Wanyama Kulundu and Gustav Muller 'The incentivisation of inclusionary housing by South African municipalities: a property law perspective' (2020) 24 *Law, Democracy & Development* at 187.

¹⁶³ See Section 2(1)(c) of the Social Housing Act.

¹⁶⁴ See Section 9(1)(a)(ii) of the Housing Act.

¹⁶⁵ See Section 2(1)(b) of the Social Housing Act. See also Andreas Scheba and Ivan Turok 'The role of institutions in social housing provision: salutary lessons from the South' (2022) 38(6) *Housing Studies* at 1.

¹⁶⁶ Ibid Section 5(b).

- (i) to land and buildings for social housing development in designated restructuring zones;
- (ii) for social housing institutions to acquire municipal rental stock;
- (iii) to municipal infrastructure and services for approved projects in designated restructuring zones.¹⁶⁷

The Housing Development Agency Act,¹⁶⁸ in its Preamble, recognises the State's constitutional imperative to achieve the progressive realisation of the right of access to adequate housing. The Act laments that one of the major causes that contribute to the lack of adequate delivery of housing to low-income earners is the delay in the identification, acquisition, assembly, and release of State-owned and private land fast-tracking of land acquisition and housing development services for the purpose of creating sustainable human settlements. Therefore, the Act establishes the Housing Development Agency (HDA) which is mandated to assume the following four objectives:

- (a) identify, acquire, hold, develop and release state, communal and privately owned land for residential and community purposes and for the creation of sustainable human settlements;
- (b) project manage housing development services for the purposes of the creation of sustainable human settlements;
- (c) ensure and monitor that there is centrally coordinated planning and budgeting of all infrastructure required for housing development; and
- (d) monitor the provision of all infrastructure required for housing development.¹⁶⁹

Under Section 2(b) of the Housing Development Agency Act, the HDA, a national public entity with its executive authority vested in the Minister of Human Settlements, is given the enormous task to fast-track the acquisition of land and housing development services to create sustainable human settlements. In this regard, when creating a development plan, the HDA must consult the relevant authorities in the provinces and municipalities.¹⁷⁰ The HDA fulfils its mandates by partnering with relevant stakeholders such as the national and

¹⁶⁷ See Sections 5(c)(i), (ii) and (iii) of the Social Housing Act.

¹⁶⁸ 23 of 2008.

¹⁶⁹ See Section 4 of the Housing Development Agency.

¹⁷⁰ See Section 7(1)(a) of the Housing Development Agency Act. Additionally, Section 6(4) of the Housing Development Agency Act requires that these consultations undertaken under this Act must be done in terms of Chapter Three of the Intergovernmental Relations Framework Act.

provincial governments, municipalities, communities, developers, and financiers.¹⁷¹ One of the objects of the HDA is critical to municipalities' quest in achieving spatial equity through housing provision. Section 4(a) of the Housing Development Agency Act stipulates that the HDA must "identify, acquire, hold, develop and release state, communal and privately owned land for residential and community purposes and for the creation of sustainable human settlements". Hence, during consultations with the HDA, municipalities are offered the best opportunity to present, purposefully and persuasively, their spatial planning and housing challenges and priorities while epitomising the need to achieve spatial equity through social housing developments.

"Priority housing development areas" is mentioned by the Housing Development Agency Act¹⁷² as land identified by the HDA for housing purposes where buildings or structures will be built for the purpose of housing delivery.¹⁷³ Section 7(2)(a) of the Housing Development Agency Act provides that, while performing its functions, the HDA "must ensure that residential and community developments are sustainable, viable and appropriately located". In this respect, one of the crucial functions of the HDA is to develop strategic plans for identifying and acquiring land which is suitable for residential and community development.¹⁷⁴ The appropriate land could be State, private, or communal owned.¹⁷⁵ Another key provision of the Housing Development Agency Act is Section 7(2)(c) which requires the HDA to ensure that job creation is optimised in the process of residential and community development.

In addition, to the extent permitted under the Municipal Finance Management Act and the Municipal Systems Act, a municipality may (i) initiate and motivate the identification of restructuring zones; and (ii) enter into performance agreements with SHIs.¹⁷⁶ An optimum exercise of initiating and motivating the identification of restructuring zones can help in

¹⁷¹ Housing Development Agency 'About the HAD' (2021) available at <https://tinyurl.com/v7eh4zfp> (accessed 06 March 2023).

¹⁷² 23 of 2008.

¹⁷³ See Section 1 of the Housing Development Agency Act.

¹⁷⁴ Ibid Section 7(1)(b).

¹⁷⁵ Ibid Section 6(1)(a), (b), and (c).

¹⁷⁶ There are major pieces of legislation and policy documents that are essential for housing policy development and implementation. These include the Public Finance Management Act, the Municipal Finance Management Act, the Division of Revenue Act; the Municipal Structures Act; the Growth, Employment and Redistribution Strategy (GEAR), 1996; and the Expanded Public Works Program (EPWP), 2003.

addressing the lack of well-located land for social housing developments. Restructuring zones are geographic areas within the cities and are identified by municipalities to be offering good economic, social, and spatial benefits and opportunities.

Most significantly, urban areas may vary in social class, gender, age, and other demographic outlooks. The social housing programmes must be responsive to local housing demands and prioritise these disadvantaged social groups.¹⁷⁷ The social housing programmes should desist from discriminating against residents on any of the grounds set out in Section 9 of the Constitution.¹⁷⁸ In addition, Section 2(1)(b) of the Social Housing Act fits perfectly within the scope of achieving spatial equity through the realisation of the right to housing. The section stipulates that the stakeholders in the provision of social housing development must:

support the economic development of low to medium-income communities by providing housing close to jobs, markets, and transport and by stimulating job opportunities for emerging entrepreneurs in the housing services and construction industries.¹⁷⁹

Municipalities are called upon to correct the distorted patterns of residential settlement and address the exclusion of the poor from the social fabric of cities. Lastly, local government has a very limited role provided in several other legislations. This includes the Housing Consumers Protection Measures Act;¹⁸⁰ the Rental Housing Act,¹⁸¹ and the Home Loan and Mortgage Disclosure Act.¹⁸²

5.3 Policy framework

5.1 Overarching policy

The adoption of relevant housing policies contributes to the realisation of the right of access to adequate housing. There are overarching policy documents such as the White Papers, the

¹⁷⁷ See Section 2(1)(a) of the Social Housing Act.

¹⁷⁸ Ibid Section 2(1)(d).

¹⁷⁹ Ibid Section 2(1)(a). The broader social and economic rights of the urban poor must be catered for, see Mziwandile Sobantu and Ndangwa Noyoo 'Housing, human rights and social development in South Africa' (2022) 12(3) *African Journal of Development Studies* at 236.

¹⁸⁰ 95 of 1998.

¹⁸¹ Among other objectives, the Rental Housing Act defines the responsibility of the government with respect to rental housing property; creates mechanisms to promote the provision of rental housing property; and promotes access to adequate housing by creating mechanisms to ensure the proper functioning of the rental housing market.

¹⁸² 63 of 2000.

Breaking New Ground (BNG),¹⁸³ and the Integrated Urban Development Framework (IUDF).¹⁸⁴

The National Development Plan (NDP)¹⁸⁵ was designed in 2012 as the country's comprehensive plan to eliminate poverty and reduce inequality by 2030. The NDP envisions an important role for local government in contributing to the achievement of spatial equity. It presents a holistic spatial development vision for South Africa in accordance with the spatial principles encapsulated in the SPLUMA. The NDP in Chapter Eight entitled: Transforming human settlement and the national space economy, aims to create the conditions for more humane living and working environments, by seeking the realisation of the right of access to adequate housing.

The NDP importantly provides that the “state will review its housing policies to better realise constitutional housing rights, ensure that the delivery of housing is to be used to restructure towns and cities and strengthen the livelihood prospects of households”.¹⁸⁶ Equally important, the NDP further stipulates that it is aimed at systematically responding to the entrenched spatial patterns across all geographic scales that exacerbate social inequality and economic inefficiency.¹⁸⁷

Similarly, the IUDF, published in 2016 by the Department of Cooperative Government and Traditional Affairs (CoGTA), seeks to steer urban growth towards a sustainable growth model of compact, connected, and co-ordinated cities and towns. The IUDF was prepared in response to the urban challenges as highlighted in the NDP. It forms part of the blueprints for pursuing the Sustainable Development Goals (SDGs), especially Goal 11: Making cities and human settlements inclusive, safe, resilient and sustainable.

The broad vision of the IUDF is to promote socially integrated, economically inclusive cities and towns, where residents actively participate in urban life. To achieve this transformative vision, it has set four overall strategic goals: spatial integration, inclusion and access,

¹⁸³ BNG at 11.

¹⁸⁴ Integrated Urban Development Framework: A New Deal for South Africa Cities and Towns (2016).

¹⁸⁵ See National Planning Commission ‘National Development Plan 2030: Our future - make it work’ (2012).

¹⁸⁶ Ibid at ch 8.

¹⁸⁷ Ibid.

inclusive growth, and effective governance. These goals inform the priorities of nine policy levers, which are: (1) integrated urban planning and management; (2) integrated transport and mobility; (3) integrated and sustainable human settlements; (4) integrated urban infrastructure; (5) efficient land governance and management; (6) inclusive economic development; (7) empowered active communities; (8) effective urban governance; (9) and sustainable finance.¹⁸⁸ In addition, the IUDF outlines its three cross-cutting issues: rural-urban interdependency, urban resilience, and urban safety.¹⁸⁹

With integrated and sustainable human settlements, the IUDP alludes that “cities and towns that are liveable, integrated and multi-functional, in which all settlements are well connected to essential and social services, as well as to areas of work opportunities”.¹⁹⁰ The attainment of integrated and sustainable human settlements can assist in eliminating the prevailing apartheid geography and in restructuring cities and towns while creating more living and working conditions that are humane, safe and environment-friendly. Therefore, housing is a major intervention for creating liveable, integrated, and multi-functional urban environments.¹⁹¹

5.2 National housing policy

The Reconstruction and Development Programme (RDP), 1994,¹⁹² was viewed as the most comprehensive and ambitious socio-economic policy framework. The main objective of the RDP was to mobilise resources towards the total eradication of the apartheid legacy. The RDP policy served as the primary instrument for social and economic transformation, with housing at the centre of basic needs sought by most individuals and communities.¹⁹³ Hence, several important housing developments were initiated through the RDP policy, leading to the provision of State-subsidised housing to be labelled the so-called “RDP housing”, even after the policy was no longer applicable.

¹⁸⁸ Ibid 42, 51, 59, 68, 75, 82, 91, 98 and 105.

¹⁸⁹ Ibid 28, 31 and 33.

¹⁹⁰ Ibid 59.

¹⁹¹ Ibid 60.

¹⁹² The White Paper on Reconstruction and Development (1994).

¹⁹³ Dan Wessels ‘South Africa’s Reconstruction Development Programme: “A Better Life for All” (1999) 3(4) *Journal of Social Sciences* at 238.

The legacy of the RDP policy is a complex one. It is generally viewed to have failed because it was overly ambitious and complicated.¹⁹⁴ It lacked the appropriate institutional designs, developments, and arrangements.¹⁹⁵ The initial emphasis of the policy has been more on quantity (number of houses built) rather than holistic development. This could have resulted in RDP housing areas lacking proper infrastructure, services, or economic opportunities. Resource constraints made it difficult for local governments to keep up with the ever-growing demand for housing, especially with rising costs of materials and construction. Nokulunga et al highlights the challenges of the RDP policy as follows:

... the building sizes are too small; poor ventilation system inside the building; improvements out of the formal system resulting from small size; affordability problem affecting middle income earners; absence of sufficient land for huge scale housing ventures; misuse of houses by the housing recipients by leasing them out; bigger scale of informal landlords who creates informal housing stock; corruption and or dishonesty on land transaction; poor sanitation maintenance in the building; a lot of backyard dwellers and shacks around the building...

While the RDP policy has not solved the country's housing crisis entirely, it has made a significant contribution towards the provision of houses to millions of people.¹⁹⁶ South Africa is continuously working on refining its strategies to improve access to adequate housing for all residents.

The White Paper on Housing, 1997,¹⁹⁷ envisaged a government that strives for

... the establishment of viable, socially and economically integrated communities, situated in areas of allowing convenient access to opportunities as well as health, educational and social amenities, within which all South Africa's people will have access on a progressive basis to:

¹⁹⁴ Mashwama Nokulunga et al 'Challenges of Reconstruction and Development Program (RDP) houses in South Africa' (2018) at 1695. See also Raffael Beier 'Why low-income people leave state housing in South Africa: progress, failure or temporary setback?' (2023) 35(1) *Environment and Urbanization* at 111.

¹⁹⁵ Remigius C Nnadozie 'Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis' (2013) 16 *The African Statistical Journal* at 81.

¹⁹⁶ Southern African Catholic Bishop's Conference 'RDP Housing: Success or Failure?' (2017) at 1.

¹⁹⁷ White Paper: A New Housing Policy and Strategy for South Africa, 1997.

- A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and
- Potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.¹⁹⁸

The White Paper on Local Government, 1998, steered a new system of local government that plotted the concept of a “developmental local government”.¹⁹⁹ This ambitious goal was defined as “local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”.²⁰⁰ More so, the White Paper on Local Government envisaged a provincial government that plays a developmental role in conjunction with local government. In this respect, a province should ensure that various municipal integrated development plans are combined to form a viable development framework across the province. In addition, these plans must be vertically integrated with the provincial growth and development strategy.²⁰¹ All these plans can be achieved when provinces efficiently and effectively process grants to municipalities for bulk infrastructure, housing, public works and so forth.²⁰²

The White Paper on Housing captured South Africa’s ambitious housing development.²⁰³ It set out the government’s broad housing policy and strategy based on seven key strategies: stabilising the housing environment; mobilising housing credit; providing subsidy assistance; supporting the Enhanced People’s Housing Process (EPHP); rationalising institutional capacities; facilitating the speedy release and servicing of land; coordinating government investment in development. One of the important areas raised in this early housing policy was

¹⁹⁸ Ibid para 4.2

¹⁹⁹ The form of a developmental local government envisions a municipality that thrives in the following areas: (a) provision of household infrastructure and services; (b) creation of liveable, integrated cities, towns and rural areas; and (c) local economic development, see ‘Developmental local government’ (undated) available at <https://www.etu.org.za/toolbox/docs/localgov/webdevlocgov.html> (accessed on 10 June 2022). See also Nico Steytler ‘The development of Local Government’ in Nico Steytler and Jaap de Visser (eds) *Local Government Law in South Africa* (2007); Jaap de Visser *Developmental Local Government: A Case Study of South Africa* (2005); Jaap de Visser ‘Developmental local government in South Africa: Institutional fault lines’ (2009) 2 *Commonwealth Journal of Local Governance* at 7; Edgar Pieterse and M Van Donk ‘Developmental local government: squaring the circle between policy intent and impact’ in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 51.

²⁰⁰ See the White Paper on Local Government at 17.

²⁰¹ Ibid under section C 1.3.2.

²⁰² Ibid.

²⁰³ See Tissington op cit note 107.

its emphasis on the coordination and integration of housing functions such as transport and local government. It stressed the need for coordinated planning and budgeting mechanisms at the provincial and local spheres of government. According to the White Paper on Housing, local government required the correct location of the housing role within the overall framework of the RDP.²⁰⁴

Due to the physical processes of planning and housing directly impacting local communities, the White Paper on Housing envisioned an amplified role of local, rural, and metropolitan governments.²⁰⁵ The envisaged housing functions to be performed at the metropolitan and/or local level include the delivery of local housing goals; the identification and designation of land for housing purposes; the initiation, planning coordination, promotion, and enablement of appropriate housing development; land planning in areas under their jurisdiction; and the regulation of land use and development.²⁰⁶

In 2003, the South African government issued the Social Housing Policy.²⁰⁷ The Policy acknowledged that social housing is capable of significantly addressing the challenges of urban regeneration and improving housing densities. When carefully considering factors such as location, integration, viability and sustainability, social housing clearly contributes to sustainable development. Under this policy, the government is identified as a key role player in supporting, facilitating, promoting, and driving social housing development in South Africa.

To this end, while cognisant of the roles and functions delineated in the Housing Act, the policy also recognises that local authorities play a key role as partners in social housing development.²⁰⁸ The involvement of local government is vital to the achievement of social housing projects and the effective functioning of SHIs. However, local governments are prohibited from directly managing SHIs. More so, representatives of local government in an SHI board must desist from exercising management responsibilities, and local government should not be over-represented in the governing structure of an SHI. With a view to

²⁰⁴ See White Paper on Housing (1997) at 24.

²⁰⁵ Ibid 38.

²⁰⁶ Ibid.

²⁰⁷ 'A Social Housing Policy for South Africa: Towards an enabling environment for social housing development' (2003) available at <https://tinyurl.com/2kr3vh5c> (accessed on 26 March 2023).

²⁰⁸ Ibid 3.

developing social housing stock within the framework of the integrated development plans of the areas within which they operate, SHIs are expected to consult with local governments.²⁰⁹ The Policy envisaged that local governments should offer the necessary support for the accreditation of SHIs within their jurisdictions. Additional support includes the provision of land and infrastructure for SHI projects incorporated in the local government's Integrated Development Plan, bridging finance needs or credit requirements/applications of SHIs, standard municipal rates and service charges rebates or exemptions, and the local government taking an equity share in the SHI or in its projects.²¹⁰

The government policy of the BNG also envisaged a growing role for local government in the provision of social housing development. The BNG is aimed at addressing the frequent mismatch of housing supply and demand in well-located and in-demand areas. According to the BNG, "the lack of affordable well-located land for Low-cost housing resulted in the housing programme largely extending existing areas, often on the urban periphery and achieving limited integration".²¹¹ It stated that there is a need to develop more appropriate settlement designs and housing products and to ensure appropriate housing quality in both urban and rural environments. In this respect, municipalities must also play an increasing role in ensuring compliance with building plan approvals and township establishment conditions. The vision and related objectives of the BNG are detailed as follows:

The new human settlements plan reinforces the vision ... to promote the achievement of a non-racial, integrated society through the development of sustainable human settlements and quality housing. Within this broader vision, the Department is committed to meeting the following specific objectives:

- Accelerating the delivery of housing as a key strategy for poverty alleviation;
- Utilising provision of housing as a major job creation strategy;
- Ensuring property can be accessed by all as an asset for wealth creation and empowerment;
- Utilizing housing as an instrument for the development of sustainable human settlements, in support of spatial restructuring.²¹²

²⁰⁹ Ibid 15.

²¹⁰ Ibid 21.

²¹¹ Ibid 6.

²¹² Department of Human Settlements 'Accreditation Framework for Municipalities to Administer National Housing.

Programmes: Managing the incremental delegation of housing functions to local government' (2012) at 7.

The BNG policy envisioned a greater role for local government in the housing delivery process as municipalities are deemed to be closer to the communities and are best positioned to respond more effectively to housing demand.²¹³ Given that, constitutionally, housing is a concurrent competence of the national and provincial spheres of government, a municipality's role in housing delivery is contingent on the "greater devolution of responsibility and resources to them."²¹⁴ Cloete et al consider the BNG as housing policy that favoured low-income people with regard to the restructuring, renewal and integration of urban areas.²¹⁵ Nonetheless, Beier notes that, like the RDP policy, the BGN has similar "emphasis on quantitative delivery has remained striking in the shape of practical implementation of gazetted housing policy – influenced by technocratic administration and shifting, partially contradictory ministerial statements."²¹⁶ Apart from the limited pace of housing delivery, There are concerns about the quality of construction in some BNG housing projects, with instances of poor materials.²¹⁷ Worse, the location of new BGN housing projects continues to be implemented in the outskirts of towns and cities, far from job opportunities and essential services.²¹⁸ This creates challenges of accessibility and limits economic mobility for poor residents. As a result, as the main contemporary government housing policy, the quest for integrated residential development and the achievement of spatial equity become slim if the BGN continues to construct housing projects in peripheral areas.

5.3 The National Housing Code

The National Housing Code²¹⁹ operationalises all housing legislation. It was first published in 2000 in pursuance of Section 4 of the Housing Act which required the Minister of Housing (now Human Settlements) to publish a code called the National Housing Code that primarily contains a national housing policy. The National Housing Code contains, set out, and

²¹³ Kate Tissington 'A review of housing policy and development in South Africa since 1994' (2020) at 44-45.

²¹⁴ Ibid.

²¹⁵ Jan Cloete et al "Breaking New Ground", social housing and mineworker housing: The missing link' (2009) 54 *SSB/TRP/MDM* at 28.

²¹⁶ See Beier op cit note 194 at 112.

²¹⁷ Gerdus van der Watt *Considering Alternative Construction Methods for Affordable Houses in the City of Cape Town and Cape Winelands Districts* (unpublished masters thesis, Stellenbosch University, 2022) at 12-13.

²¹⁸ Ibid at 16. Nontokozo Mnisi and Aly Karam 'The impact of the integrated residential development programme on surrounding property values: Case study of Fleurhof, Johannesburg' (2020) 27(1) *Acta Structilia* at 30.

²¹⁹ The National Housing Code (2009).

regulates policy principles, guidelines, and norms and standards applicable to the national housing programmes that are categorised as financial, incremental, social and rental, and rural. While binding on both the provincial and local governments, it establishes a comprehensive plan comprising strategies and mechanisms to achieve the objectives of the government. The main goal is the creation of sustainable human settlements.

The National Housing Code contains all the national housing programmes and funding interventions such as the Integrated Residential Development Programme (IRDP), the Emergency Housing Subsidy, the Upgrading of Informal Settlements Programme (UISP), and the EPHP. The IRDP aims to create social cohesion, and plainly acknowledges that since 1994, “low-income settlements continued to be located on the urban periphery without the provision of social and economic amenities, as in the Apartheid era”.²²⁰ Within the spectrum of the housing market and with affordability as a key determinant, the objective of the IRDP is to promote integrated housing development. The programme delivers on four different types of housing: government subsidy housing, social housing, Finance-Linked Individual Subsidy Programme (FLISP) which is presently called *HelpMe-Buy-A-Home*, and bonded segment housing.

Importantly, the IRDP plans and develops integrated housing projects through a phased approach that includes:

- a) Land acquisition where required;
- b) Township planning and municipal engineering services design;
- c) The provision of municipal engineering services to all the stands where no alternative funds are available;
- d) Township establishment;
- e) The sale of the stands not identified for subsidised housing created in the township; and
- f) The construction of houses by registered contractors for housing subsidy beneficiaries who chose contractor built houses. This can be achieved through a variety of contracting options.²²¹

²²⁰ Department of Human Settlements ‘Simplified Guide to the National Housing Code’ (2009) at 13.

²²¹ The National Housing Code: Financial Interventions - Integrated Residential Development Programme (2009) at 9.

The IRDP utilise either unoccupied vacant land to develop an integrated human settlement or an undeveloped parcel of land in an existing township. Potential beneficiaries of the programme must meet the following application requirements: (a) be a lawful South African resident (citizen) or holder of a valid permanent residence permit; (b) be legally competent to contract (i.e., over 18 years of age or legally married or legally divorced and of sound mind); (c) be a first-time beneficiary of government assistance; (d) be a first-time owner of a fixed residential property; (e) be cohabiting or married (in terms of the civil law or in terms of a customary marriage); and if single with financial dependents.

The Emergency Housing Subsidy was instituted in terms of Section 3(4)(g) of the Housing Act.²²² The programme aims to provide emergency housing to households rendered homeless and destitute by natural disasters.²²³ Municipalities are granted funding to enable them to respond rapidly to emergencies by means of the provision of land, municipal engineering services and shelter. On a voluntary and co-operative basis, the municipality may relocate and resettle the affected people. The funds of the programme cannot be used to fund normal housing development projects of other national housing programmes.

With the UISP, a municipality may apply for funding to acquire and rehabilitate land on which informal settlements are located. In the process, the municipality can develop basic community facilities, and instal essential services and bulk infrastructure. The upgrading of dwellings is carried out in full co-operation with community members. There is a range of tenure options made available to the beneficiaries of the programme. Evictions or relocations of residents can only be implemented as a measure of last resort. However, the programmes lack the ability to adequately address the housing needs of poor households by developing and installing formal housing.²²⁴ Most urban municipalities prefer to demolish informal settlements and replace them with formal, low-cost housing developments. These upgrades are still carried out in the same areas or sites that are oftentimes far away from the urban core.²²⁵ Although the UISP intends to improve the living conditions of the poor, if the

²²² According to Section 3(4)(g) of the Housing Act, the national government acting through the Minister of Human Settlements, may institute and finance national housing programmes.

²²³ The National Housing Code: Financial Interventions - Emergency Housing Programme (2009) at 9.

²²⁴ Spiro N Pollalis 'Challenges and opportunities towards upgrading informal settlements' (2020) available at <https://tinyurl.com/69k8v64c> (accessed on 20 September 2023).

²²⁵ Beth Tellman et al 'Identifying, projecting, and evaluating informal urban expansion spatial patterns' (2022) 17(1) *Journal of Land Use Science* at 100.

implementation of upgrades is in the same peripheral areas or sites, the programme will not adequately overcome the patterns of spatial segregation and marginalisation of underprivileged residents.

The EPHP, which Gumbo and Onatu view as a “version of aided self-help housing development approaches in the South African context”,²²⁶ allows beneficiaries to be involved in decision-making over the housing process and housing product. According to Newton, this housing approach and mechanism allows the urban poor to gain access to housing.²²⁷ Among various channels of involvement, beneficiaries are allowed to identify the land individually and collectively, plan the settlement, and get approvals and resources to begin the development. They can also contract out or build houses and provide the services, live in, and upgrade their homes and continually improve the community.²²⁸

The White Paper on Housing envisaged State housing policies and subsidy programmes that constantly contemplate the special needs of older persons, persons with disabilities, and the youth. To this end, and to effectively implement this approach, frequent modifications of the subsidy programme must be implemented. Accordingly, affordable housing in South Africa broadly covers rental and social housing programmes and affordable housing finance instruments.²²⁹ Several housing finance options are available to low-income and middle-income households. The National Housing Finance Corporation (NHFC), a development finance institution, is mandated to provide access to affordable housing finance to these households. Crucially, the NHFC leverages private sector funding to finance housing developments and create affordable housing stock.²³⁰ “In the affordable housing sector, the NHFC plays multiple roles as an innovator, financier, and facilitator by ensuring viable

²²⁶ Trynos Gumbo and George Onatu ‘Interrogating South Africa’s People’s Housing Process: Towards comprehensive collaborative and empowering aided self-help housing approaches’ (2015) at 1.

²²⁷ Caroline Newton ‘The peoples housing process ... getting the quality in the quantity?’ (2013) 28 *Journal of Housing and the Built Environment* at 639.

²²⁸ The National Housing Code: Financial Interventions - Enhanced People’s Housing Process’ (2009) at 9.

²²⁹ Government of South Africa ‘Official guide to South Africa 2020/21: Human settlements’ (2022).

²³⁰ The NHFC must, in respect of social housing –

“(a) provide access to loan funding;

(b) make available to the Regulatory Authority when requested thereto any financial information to enable it to assess the institutional health and financial sustainability of social housing institutions;

(c) facilitate or, where possible, provide access to guarantees for loan funding from financial institutions;

(d) explore and support mechanisms aimed at facilitating public funding for social housing; and

(e) conclude an agreement with the Regulatory Authority aimed at avoiding the duplication of functions and overregulation of social housing institutions”, see Section 6(1) of the Social Housing Act.

housing finance solutions, sustainable human settlement growth, and engagement of relevant partnerships”.²³¹

The NHFC administers and facilitates the delivery and access to the FLISP which is presently called *HelpMe-Buy-A-Home*. These financing programmes provide poor and low to middle-income households with access to adequate housing. There are two categories of households that qualify for this subsidy: applicants in the gap market; and those who, at the same time, do not qualify for either fully subsidised houses or mortgage loans from the banks.

5.4 Accreditation and Assignment of housing powers and functions

The accreditation of municipalities to administer national housing programmes is a key government priority in support of the overarching principle of co-operative government.²³² Put simply, with accreditation, a municipality has the function or power to administer national housing programmes, and with assignment, the housing function or power is transferred to the municipality. Accreditation is a capacitation measure towards the assignment and has been recognised on paper, since 2009.²³³ The accreditation process transpires in the progressive assignment of housing functions or powers to local government. The housing subsidy functions and budgets are devolved from provinces to municipalities, and the latter may plan and implement housing on a more coordinated basis. It endeavours to locate “the decision-making authority and funding capacity for local development”.²³⁴

The decentralisation and accreditation of the housing powers and functions must be implemented with consistency with the principles outlined in the Accreditation and Assignment Frameworks for Municipalities. These are (1) logical application of roles and functional delegations and assignments; (2) authority and accountability must accompany responsibility; (3) accreditation follows capacity; (4) funding follows function; (5) funding arrangements must be consistent, certain, and beyond interrogation; (6) efficiency; (7) prioritised universal and flexible application across the country; and (8) co-operative

²³¹ See Department of Human Settlements op cit note 220.

²³² Department of Human Settlements op cit note 212 at 5.

²³³ Kate Tissington ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa’ (2013).

²³⁴ The National Housing Code: Accreditation of Municipalities (2009) at 9.

government.²³⁵ Subject to the principles of co-operative government and intergovernmental relations, the Accreditation and Assignment Programme requires the three spheres of government to work together in order to ensure that the assignee municipality fulfils its housing mandate.²³⁶

The formal transfer and assignment of the housing functions or powers from the province to a qualifying municipality can only take place when an assignee municipality has convincingly demonstrated the capacity to administer national housing programmes. The formalisation of the assignment process is implemented through an Executive Assignment Agreement, consistent with the provisions of the Constitution.

Consistent with the terms and conditions for the assigning agreement as required by Section 99 of the Constitution, the Minister of Human Settlements, may in terms of Sections 10(1)(a) and (b) of the Municipal Systems Act, assign a housing function or power to a specific municipality. At the provincial level, subject to Section 126 of the Constitution, the relevant MEC may also assign a housing function or power to a specific municipality.²³⁷

The Minister or MEC who initiates the assigning legislation or agreement must take appropriate steps to provide sufficient funding and capacity-building initiatives to the assignee municipality.²³⁸ These measures assist the municipality in effectively performing the assigned housing function or power. The process of assignment imposes three requirements as outlined in Section 10(3) of the Municipal Systems Act:

- (a) the assignment of the function or power imposes a duty on the municipality concerned;
- (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part 4 B of Schedule 5 to the Constitution or is not incidental to any of those functional areas, and
- (c) the performance of that duty has financial implications for the municipality concerned.

In 2012, the Minister and Members of the Executive Council (MINMEC) responsible for Human Settlements revised the Accreditation Framework for Municipalities to Administer

²³⁵ The National Housing Code - Financial Interventions: Accreditation of Municipalities (2009) at 8-9.

²³⁶ Ibid.

²³⁷ See Sections 10(2)(a) and (b) of the Municipal Systems Act. The MEC must first consult the national minister before entering into an agreement.

²³⁸ See Section 10(3) of the Municipal Systems Act.

National Housing Programmes,²³⁹ which was initially developed in 2004.²⁴⁰ The framework is meant to give effect to the principle of subsidiarity in relation to housing functions and powers.²⁴¹ By July 2014, six metropolitan municipalities were ready to be assigned housing functions and powers. These metros were: City of Cape Town Metropolitan Municipality; City of Johannesburg Metropolitan Municipality; eThekweni Metropolitan Municipality (Durban); Nelson Mandela Metropolitan Municipality (Port Elizabeth); Ekurhuleni Metropolitan Municipality (East Rand); and City of Tshwane Metropolitan Municipality (Pretoria).²⁴² Thus, the three cities (Cape Town, Johannesburg, and Durban) chosen for case studies in this Thesis, all fell in this group.

However, the Human Settlements MINMEC postponed the assignment process and recommended further revision of the framework. The 2017 revision was meant to align the public sector reform process with the 2050 vision of the NDP and to ensure the optimum performance of all the elements of the broader human settlements delivery system. The 2017 revised framework is called the Accreditation and Assignment Frameworks for Municipalities to Administer National Human Settlements Programmes (the Accreditation and Assignment Frameworks for Municipalities).²⁴³ Therefore, the implications of revision have significantly decelerated the accreditation and assignment process.²⁴⁴ As a result, the formal transfer and assignment of the housing functions or powers have not yet been implemented.²⁴⁵

Although the application for accreditation may be submitted by metropolitan, local and district municipalities, preference is oftentimes accorded to the qualifying larger urban and metropolitan municipalities. According to the BNG, “capacity building for municipalities will be targeted as an initial priority area and will focus specifically on metropolitan municipalities with a view to supporting the accreditation process.”²⁴⁶ Thus, the

²³⁹ See Department of Human Settlements op cit note 212.

²⁴⁰ Department of Human Settlements and Performance Monitoring and Evaluation ‘Summary Report on the Design and Implementation Evaluation of the Urban Settlements Development Grant’ (2015) at 2.

²⁴¹ See Chonco op cit note 106 at 19.

²⁴² Department of Human Settlements ‘Annual Report 2013/2014’ (2014) at 25.

²⁴³ Department of Human Settlements ‘Accreditation and Assignment Frameworks for Municipalities to Administer National Human Settlements Programmes’ (2017).

²⁴⁴ National Council of Provinces ‘Land use: Towards integrated spatial planning’ (2018) at 76.

²⁴⁵ David Gardner and Nick Graham ‘Analysis of the Human Settlement Programme and the Subsidy Instruments’ (2017) at 24.

²⁴⁶ Ibid 34.

Accreditation and Assignment Frameworks for Municipalities are principally applicable to metropolitan municipalities. The formalisation of the accreditation process is organised under the auspices of Section 35 of the Intergovernmental Relations Framework Act. The proviso stipulates that:

Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.

Section 35(2) and (3) of the Act provide for the requirements of the implementation protocols. A standard template of the implementation protocol is provided in the Accreditation and Assignment Frameworks for Municipalities.²⁴⁷ The Accreditation and Assignment Frameworks for Municipalities defines accreditation as follows:

... technically, is the recognition by an authority of the fact that an entity has met certain criteria and standards for purposes of fulfilling a particular function. Accreditation in itself therefore does not transfer functions from one sphere of government to another. Legally, functions can only be transferred from one sphere of government to another through assignment or delegation.

The process for accreditation is regulated in terms of Sections 9(2)(b) and 10(2) of the Housing Act,²⁴⁸ and the Division of Revenue Act. Subject to the sustainable national housing development process established by the Department of Human Settlements, an assignee municipality may be accredited to administer one or more of the national social housing programmes.

There are three levels of accreditation as provided by the Accreditation and Assignment Frameworks for Municipalities. Level 1 accreditation is a delegated function that encapsulates the accreditation to render beneficiary management, subsidy budget planning

²⁴⁷ Ibid 105.

²⁴⁸ These provisions are read with Part 3 of the National Housing Code - Financial Interventions: Accreditation of Municipalities (2009).

and allocation, and priority programme management and administration, of national housing programmes. As a delegated function, level 2 accreditation gives the accredited municipality the power to render full programme management and administration of all housing instruments and national housing programmes in addition to the responsibilities under a level one accreditation. Lastly, level 3 accreditation means an assignee municipality enjoys executive assignment to administer all aspects, including financial administration, of national housing programmes. Accreditation at this ultimate level three means a municipality is assigned the full housing function. The assignee municipality undertakes major financial projects, including the project and contractual obligations, operational funding, and transfer of staff.

For a municipality that deems itself to be in a position of financial and administrative capability to administer its own housing programme, it must approach and apply to the relevant provincial government for accreditation and assignment of housing functions. In the accreditation application, the applicant municipality must state its accreditation intention for a particular level of accreditation – starting at level 1; and that the municipal council has already approved its housing plan as part of the municipal Integrated Development Plan (IDP).

The Accreditation and Assignment Frameworks for Municipalities defines an assignment as the “transfer of the authority role – and this includes the right to directly receive the funds and the assets necessary to perform the function”.²⁴⁹ Consistent with the international literature on decentralisation, the Accreditation and Assignment Frameworks for Municipalities also uses the term “delegation”, which is defined as “the authority to exercise powers of another sphere of government”.²⁵⁰ Nonetheless, it is not a permanent transfer of the housing functions or transfer of authority, and it does not entitle a municipality to legislate on the matter. Delegation merely entails the exercise of a function on behalf of the delegating authority. With delegation, there is a principal-agent relationship: the national or provincial government is the principal, and the assignee municipality is the agent.²⁵¹ The ultimate authority is still vested in the delegating authority which can withdraw or revoke the delegated housing function at any time.

²⁴⁹ The National Housing Code: Accreditation of Municipalities (2009) at 6.

²⁵⁰ The National Housing Code - Financial Interventions: Accreditation of Municipalities (2009) at 4.

²⁵¹ See Chigwata op cit note 10 at 11.

Accordingly, municipalities that meet the constitutional and legal criteria for the accreditation of the housing function may be accredited to undertake a social housing development programme. Accredited municipalities directly receive transfers of the Human Settlements Development Grant (HSDG) from the national government. Accordingly, they assume the administration of the housing function from the provinces²⁵² and expand the role of local government.²⁵³ While undertaking the administration and delivery of the housing mandate, these municipalities are regularly obliged to be accountable for the grant that is aligned with the mandate. The fulfilment of the assigned housing function requires the national and provincial governments to provide the necessary support to the assignee municipalities.

Therefore, the assignee municipality must ensure that people within its jurisdiction have access to adequate housing.²⁵⁴ The municipality must take all the necessary steps within the framework of the national and provincial housing policy to fully realise the assigned housing function and its objectives. In conformity with the housing priorities identified in the Integrated Development Plan (IDP), the assignee municipality must set aside, plan, and manage land for social housing developments. This also requires the municipality to initiate, plan, coordinate and facilitate appropriate social housing development.²⁵⁵ In cases where there are no other service providers, the assignee municipalities do not only manage social housing development programmes but are also required to provide bulk engineering services like roads, water, sanitation, and electricity.²⁵⁶

The Accreditation and Assignment Programme is utilised as a capacity-building and support mechanism for municipalities until they are ultimately assigned the full housing functions or powers in accordance with Section 156(4) of the Constitution.²⁵⁷ After accreditation, the ultimate assignment of the housing functions is contingent on the municipality's capability in demonstrating the capacity to plan, implement and maintain the projects and programmes that

²⁵² See Sections 10(2) and (3) of the Housing Act.

²⁵³ The National Housing Code - Financial Interventions: Accreditation of Municipalities (2009) at 60.

²⁵⁴ See Section 9(1)(a)(i) of the Housing Act.

²⁵⁵ See Section 9(1)(f) of the Housing Act.

²⁵⁶ See Section 9(1)(g) of the Housing Act.

²⁵⁷ SL Sithole and NL Manthosi 'Accreditation of municipalities to administer housing programmes: The decentralisation dilemma' (2017) at 327.

are included within their Integrated Development Plans, within the three years mandated by the Municipal Finance Management Act.

5.5 Unfunded mandates

South Africa's highly centralised federal State structure and system encompass "a strong national government, relatively 'weak' provinces, and a mix of strong cities and weak rural municipalities".²⁵⁸ It should be noted that the housing function is a social service which is resource intensive. Its effective implementation (for the progressive realisation of the right to adequate housing) at the local level of government requires considerable fiscal and financial resources. The assignment of a housing function to a municipality without the requisite allocation of resources for fulfilling the act of assignment constitutes an "unfunded mandate".²⁵⁹ This is "a mismatch between the powers transferred to subnational tiers of government and the resources allocated to them."²⁶⁰ The FFC defines an unfunded mandate as follows:

Unfunded mandates refer to situations in which sub-national governments are legally mandated in terms of the Constitution or by policy pronouncement to undertake specific functions but do not receive funds from nationally raised revenues in order to fulfil these functions. This scenario is highlighted in cases where the framework underlying the provision of particular services require provincial or local governments to implement nationally determined minimum-service standards. However, the funding for the delivery of such services fails to reflect the cost of the service standards, forcing sub-national authorities to divert scarce own-revenue funds to meet the standard set.²⁶¹

Basdeo argues that unfunded mandates reflect the hierarchy of power in South Africa's system of multi-level government.²⁶² When intertwining the duty to realise the right to adequate housing with an unfunded mandate, the UN Human Rights Office states that:

²⁵⁸ See Steytler and de Visser op cit note 3 at 201.

²⁵⁹ Estian Calitz and Hassan Essop 'Poverty trends since the transition Fiscal centralisation in a federal state: The South African case' (2012).

²⁶⁰ Andrés Rodríguez-Pose and Miquel Vidal-Bover 'Unfunded mandates and the economic impact of decentralization: When finance does not follow function' (2022) 0(0) *Political Studies* at 1.

²⁶¹ Financial and Fiscal Commission 'The impact of unfunded mandates in South African intergovernmental relations' (2011) at 1.

²⁶² See Basdeo op cit note 3 at 51.

When it comes to the right to adequate housing, decentralization has created challenges. In theory local governments have more authority to address housing issues, but in reality this responsibility is rarely accompanied by more resources. Local governments are often left to develop and administer programs but lack the capacity to do so effectively. Decentralization can also create confusion about which level of government is responsible for certain functions, which makes it difficult to hold governments accountable for their actions.²⁶³

Lack of inadequate resources hamper local government's ability to effectively respond to basic housing needs, changing conditions or emergency shelter crises. The assignee municipality enters into an executive assignment agreement with the relevant provincial government. This, therefore, allows the municipality to administer all housing programmes in the National Housing Code. As a result, the assignee municipality assumes the role and status of the provincial government towards the fulfilment of the housing function within the jurisdiction of the municipality. In this case, the housing function ceases to be an unfunded mandate because one of the principles of the accreditation programme provides that "funding follows function".²⁶⁴

The system of co-operative governance faces tensions with the introduction of unfunded mandates for local government, as in the case of housing provision.²⁶⁵ The FFC reveals that an unfunded mandate of housing negatively impacts municipalities.²⁶⁶ They perform housing functions on behalf of provinces without receiving the essential funding. The Municipal Demarcation Board has bemoaned an increasing number of district and local municipalities that currently perform functions outside the competencies of local government, including housing functions.²⁶⁷ From a legal prescription, after consultation with the provincial housing development board, the MEC may allocate to an accredited municipality such amounts as the MEC considers necessary.²⁶⁸

Another aspect of an unfunded mandate in relation to housing lies in the local government's original competencies that are inextricably linked to housing delivery to the point where there

²⁶³ Office of the United Nations High Commissioner for Human Rights 'Implementing the right to adequate housing: A guide for local governments and civil society (2021) at 4.

²⁶⁴ The National Housing Code - Financial Interventions: Accreditation of Municipalities (2009) at 14.

²⁶⁵ See Pottie op cit note 129 at 616.

²⁶⁶ See FFC op cit note 261 at 85.

²⁶⁷ Municipal Demarcation Board 'Assessment of municipal powers and function' (2018).

²⁶⁸ See Sections 12(2) and 16(2) of the Housing Act.

are major problems in places where they are not accredited housing delivery agents. For example, the functions of building regulations, electricity and gas reticulation, and water and sanitation services. The amendment of the Municipal Systems Act in 2001 was solely to regulate the transfer of functions to local government and to prevent unfunded mandates. However, the Act fails to define accurately “unfunded mandate”. Section 10(3) of the Municipal Systems Act only prescribes the procedural requirements that must be followed by legislative and executive processes that assign to local government or municipality a function or power. An assignment of function or power must be accompanied by funding and capacity-building because the transfer (a) imposes a duty on the assignee municipality; (b) the duty falls outside the local government’s original competencies listed in the Constitution, and (c) the duty has financial implications for the assignee municipality.

The National Housing Code has established the Emergency Housing Programme, which seeks to provide temporary housing relief to victims of natural or manmade disasters with destroyed houses or to households whose informal settlements are under upgrading. The National Disaster Relief Fund is used as the first line to provide government assistance. Nonetheless, courts have also imposed the duty to provide emergency housing on local government.²⁶⁹ The provision of emergency services, such as temporary housing relief may constitute an unfunded mandate.²⁷⁰ Such practices shrink the policy space and limit the expenditure choices of local governments.²⁷¹

Unaccredited municipalities or those that lose accreditation are much more likely to experience unfunded mandates. Basdeo suggests that the imposition of unfunded mandates should legally be prohibited.²⁷² Alternatively, the assigning authority should evaluate and consider the impending implications of the decision before imposing the mandate on the affected municipality.²⁷³ An objective principle dictates that the housing functions should

²⁶⁹ See *Government of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 545 (CC).

²⁷⁰ Chartered Institute of Government Finance Audit and Risk Officers (CIGFARO) ‘Functions performed not assigned to municipalities and the budgetary implications (IDP/SDBIP)’ (undated).

²⁷¹ Nico Steytler et al ‘Unfounded Mandates: Directing Subnational Governments’ in Gisela Färber *Governing from the Center: The influence of the Federal/Central Government on Subnational Governments* (2012) at 135.

²⁷² See Basdeo op cit note 3 at 64.

²⁷³ Ibid.

only be assigned to a municipality that has sufficient capacity to undertake the responsibility, and in accordance with the terms and conditions set in the Executive Assignment Agreement. Where a municipality cannot fulfil a housing mandate without the necessary funding, approaching the courts for appropriate relief may serve as a measure of last resort.

6 Reflections

This Chapter dealt with the roles, powers, functions, and responsibilities of local government in relation to the provision of housing. Although the functional area of housing is listed as a “concurrent competency” of the national and provincial spheres of government in terms of Part A of Schedule 4 of the Constitution, local government still has significant housing roles and responsibilities provided by national legislation and policies.

Virtually, all municipalities may exercise attendant housing powers. However, the main housing obligations can oftentimes be exercised by the large urban and metropolitan municipalities that have been accredited to administer national housing programmes. Depending on the ability to demonstrate the capacity to administer one of the housing programmes, these municipalities may ultimately be assigned to fulfil the housing functions or powers on behalf of provinces.

A competent municipality in relation to housing provision proves the capacity to undertake and exercise housing functions and powers. The municipality’s revenue matches the financial administration of housing projects and meets the disbursement of subsidies. Accordingly, during the monitoring of its performance of housing functions, the municipality retains the right to thwart any intervention from the national or provincial governments.

Apart from an assignment of housing functions through institutional subsidiarity, a municipality that possesses the financial and administrative capacity to administer its own housing programme may voluntarily submit to the relevant provincial government its application for accreditation and assignment of housing functions. One of the application requirements is that the municipal council has already approved its housing plan which forms part of the IDP.

Before the finalisation of the assignment agreement, the fulfilment of the social housing programme remains an unfunded mandate. “Funding follows function” in the context that once the assignment agreement is concluded, housing functions and powers assigned to an assignee municipality must be followed by a consistent funding arrangement. The main aim is to ensure that the assignee municipality is capacitated with strategies and adequate resources to effectively implement the assigned housing functions and powers.

Chapter 4

The Roles, Powers, Functions, and Responsibilities of Local Government Pertinent to Spatial Planning

1 Introduction

The purpose of Chapter Four is to respond to the question of what are the local government's roles, responsibilities, powers, and functions regarding spatial planning based on constitutional, legislative, and policy frameworks as well as courts' jurisprudence. Hence, the Chapter defines spatial planning and its associated competencies (such as land use management, zoning, and development planning) and situates these in relation to local government; explains the evolution of municipal spatial planning; provides the constitutional framework for planning powers; and the judicial delineation of spatial planning powers. After expansively unpacking the Spatial Planning and Land Use Management Act (SPLUMA),¹ the Chapter finally connects municipal spatial planning and housing with the intention of establishing "well-located housing" for the urban poor.

Local government plays a critical role in spatial planning for housing and its prospects for achieving spatial equity. Within the uniform regulatory frameworks set by the national government, and in certain instances, the provincial government, it is responsible for the promulgation, development, and implementation of municipal by-laws, policies, and strategies that guide the location, design, and provision of housing within its jurisdiction. Local government's spatial planning for residential land development has a significant impact on the location, availability, affordability, and habitability of housing. Therefore, it wields tremendous influence on the urban poor's accessibility to adequate public services, materials, facilities, and infrastructure. Location and housing design and quality may also reflect the cultural norms and preferences of individual households.² All these variables constitute the integral components of the right of access to adequate housing.

¹ 16 of 2013.

² Nicole Gurrán and Glen Bramley 'Urban Governance, Policy, Planning and Housing' in Nicole Gurrán and Glen Bramley *Urban Planning and the Housing Market: International Perspectives for Policy and Practice* (2017) at 15.

In addition, the notion of spatial equity comes into play as the zoned location of State-subsidised housing is a key determinant as to whether its beneficiaries have equitable access to the needed opportunities, resources, facilities, and infrastructure. These factors are oftentimes available in the city cores whilst absent in highly needed areas such as far-distanced urban peripheries, i.e., townships. The focus of the developmental role of local government must be on the fulfilment of the social, economic, and material needs of residents as well as improving their quality of life.³

The Chapter establishes the nature and extent to which the municipal spatial planning framework intersects with its housing framework. Presently, while municipal planning powers have been settled by the SPLUMA, they do not always articulate well with municipal housing powers/responsibilities, especially in the context of intergovernmental dynamics. A combination of land use and the provision of housing for the poor in urban areas in South Africa is a complex issue that requires a co-ordinated and collaborative approach between the different spheres of government.

The Chapter deals with the unclear and contested division of planning-related powers and functions in the Constitution as well as the overlap between development, provincial planning, and municipal planning, which often leads to much uncertainty and several intergovernmental disputes. Indeed, “powers over municipal planning have become hotly contested in South African law”.⁴ As a result, there is an array of litigation.⁵ Included in the Chapter, are some of the key contestations over municipal planning powers. Various important features of court judgements that made attempts to clear much of these uncertainties are analysed to in order to delineate the breadth of local government’s spatial planning roles, powers, functions, and responsibilities.

³ Victor G Hillard and Henry F Wissink ‘Local Government and Development in South Africa in Frik de Beer and Hennie Swanepoel *Introduction to Development Studies* (2004) 96, at 104.

⁴ Victoria Bronstein ‘Mapping legislative and executive powers over ‘municipal planning’: Exploring the boundaries of local, provincial and national control’ (2015) 132 *The South African Law Journal* at 639. See also Jeannie Van Wyk and Petrus J Steyn *Planning Law Casebook* (2015); Cora Hoexter and Morné Olivie *The Judiciary in South Africa* (2014) 442.

⁵ See Bronstein op cit note 4 at 132.

2 Defining spatial planning and related key concepts

Spatial planning “anchors national visions, goals, programmes, policies and plans to human settlements of varying sizes at different spatial scales”.⁶ It is a vital instrument for creating sustainable frameworks that integrate various sectors such as housing, transport, industry, and energy. Spatial planning therefore aims:

... to create a more rational territorial organization of land uses; to balance demands for development with the need to protect the environment; to achieve social and economic objectives; to coordinate and improve the impacts of other sectoral policies on land use; to achieve a more even distribution of economic development within a given territory than would otherwise be created by market forces.⁷

Land is the basis of the planning system.⁸ In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*,⁹ Yacoob J delivering a minority judgement stated that: “Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land.”¹⁰

The process of spatial planning organises and designs the physical environment in a manner that is economically, socially, and environmentally sustainable.¹¹ It involves the development of policies and strategies that guide the use of land, resources, and infrastructure within a geographic area or jurisdiction. The goal is to promote the well-being of all residents and to ensure a high quality of life. Spatial planning is closely related to development. Tabane et al stated that the latter

... shapes the urban fabric in terms of organising land-uses, responsible growth of urban spaces, enabling accessibility through various transportation modes, enhance adequate

⁶ Ransford A Acheampong ‘The Concept of Spatial Planning and the Planning System’ in Ransford A Acheampong *Spatial Planning in Ghana* (2019) at 12.

⁷ See ‘Spatial planning’ (undated) available at <https://sc-s.si/joomla/images/Spatial%20planning.pdf> (accessed on 20 June 2022).

⁸ Philip Kivell *Land and the City: Patterns and Processes of Urban Change* (2003) 7.

⁹ 2009 1 SA 337 (CC) 384D.

¹⁰ Ibid para 30. See also Nico Steytler ‘The decisions in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* and *Another* 2009 (1) SA 337 (CC): Be wary of these holdings’ in Stu Woolman et al *Constitutional Court Review* (2009) 2 (2009) at 429.

¹¹ Economic Commission for Europe ‘Spatial Planning: Key Instrument for Development and Effective Governance with Special Reference to Countries in Transition’ (2008) at 2.

human settlements which are resilient to natural disasters and conducive to human quality of life.¹²

According to Li et al, it is extremely difficult to accurately assess the success of spatial planning.¹³ Spatial planning typically involves five steps: (1) analysis, (2) visioning, (3) policy development, (4) implementation, and (5) monitoring and evaluation. Several components and perspectives of cities may be spatially analysed.¹⁴ The process in the first step is about collecting data for the purpose of analysing the prevailing conditions in the area because various factors may impact spatial development.¹⁵ Common factors encompass population trends, transportation networks, and environmental conditions. This step embodies conducting assessments of current housing stock, demographic and economic trends, and the identification of gaps in housing supply and demand.

The second step is based on the outcomes of the analysis: the spatial visualisation of a specific area or jurisdiction.¹⁶ This step pronounces a vision for future developments. It refers to “the ability to ‘see’, inspect, and reflect on spatial objects, images, relationships and transformations”.¹⁷ The vision sets the goals and priorities for land use, regional equity, housing development, transportation, environmental sustainability, and other aspects of spatial development.¹⁸

The third step concerns the development of policies and strategies that guide the achievement of the vision for the area. For instance, based on the results of the housing needs assessment, a local government may develop zoning and land use regulations to guide the location and design of housing. The process includes developing transportation plans, environmental regulations, and other policies that support sustainable spatial development for supplying

¹² Isaac T Tabane et al ‘Assessing the efficacy of spatial planning and development system in improving living conditions of the society’ (2021) at 78-79.

¹³ Guan Li et al ‘Spatial planning implementation effectiveness: Review and research prospects’ (2022) 11 *Land* at 1.

¹⁴ Ryan Weber et al ‘A spatial analysis of city-regions: Urban form & service accessibility’ (2016) at 6.

¹⁵ See Tabane et al op cit note 12 at 80-81.

¹⁶ Jaap de Visser and Xavia Poswa ‘Municipal law making under SPLUMA: A survey of fifteen ‘first generation’ municipal planning by-laws’ (2019) 22 *Potchefstroom Electronic Law Journal* 1 at 5.

¹⁷ Michael T Battista ‘The development of geometric and spatial thinking’ in Frank K Lester (ed) *Second handbook of research on mathematics teaching and learning* (2007) at 843; Sitti Patahuddin et al ‘Characteristics of Spatial Visualisation: Perspectives from Area of Composite Shapes’ in Jodie Hunter et al (eds) *Making waves, opening spaces* (2018) at 623.

¹⁸ See Weber et al op cit note 14 at 6.

affordable and low-income housing, promoting mixed-income neighbourhoods, and protecting the legal tenure of security. This role encompasses setting standards for density, building height, and other design features, as well as designing areas for specific types of housing for the poor, persons with disabilities, the terminally ill, persons with persistent medical problems, etc.¹⁹

Once policies and strategies are in place, the fourth step is to implement them through a variety of tools, including land use regulations, and other mechanisms.²⁰ Finally, the effectiveness of spatial planning policies and strategies is monitored and evaluated to ensure that they are achieving their intended goals and to identify areas where improvements can be made. In this context, the spatial planning policies and strategies for housing are monitored to ensure that they are meeting the needs of residents and achieving their goals. This can involve collecting data on housing supply and demand, tracking the development of new housing units, and evaluating the impact of housing policies on the local economy and community.

Overall, spatial planning is an important tool for a collaborative approach that integrates physical, social, and economic considerations into the planning process. In the South African context, spatial planning is based on prescriptions outlined in Spatial Development Frameworks (SDFs), adopted at local, regional, provincial, or national levels.²¹

Land use is defined as: “the control of land-use through planning policies, regulations and enforcement; the implementation of construction planning through granting of permits; and the adjudication of land use conflicts”.²² It is the result of the decision-making process that determines the allocation and management of land, and it has a significant impact on the socio-economic well-being of residents. Land use management refers to the officially recognised systems that determine and regulates the management of land use as well as the granting of individual rights to use the land or legal entities with plans to actualise land

¹⁹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, at para 8(e).

²⁰ See Li et al op cit note 13 at 2.

²¹ See de Visser and Poswa op cit note 16 at 3. Indeed, in general terms, the planning nature and scope within any given society reflect the societal priorities, which have a bearing on the focus and core functions embraced by the planning activity and spatial scale that is undertaken, for instance, in a town, city, regional or national level.

²² Department of Rural Development and Land Reform ‘Land Audit Report: Phase II: private land ownership by race, gender and nationality’ (2017) at 26.

development.²³ A sub-component of the broader concept of land management, land use management is premised on five dimensions: (1) land accessibility and acquisition; (2) legal security of tenure conferred on individuals, households, and communities; (3) the regulation of land use; (4) the systems of land development; and (5) the trading of land.²⁴ Pertaining to land use planning, van Wyk expounds that:

Plans can either be policy plans or regulatory plans. Policy plans include integrated development plans, structure plans and spatial development frameworks while regulatory plans include zoning schemes, land use management plans or town planning schemes. Included in the planning function is a determination of the size of erven in certain areas, the determination of building restrictions and the imposition of height restrictions.²⁵

Mostly, this process is given effect through the granting of zoning rights or decisions on various types of land use applications. A zone is “a defined category of land use which is shown on the zoning map of a land use scheme”.²⁶ Zoning is a land use planning tool used by local governments to regulate the use of land in a particular area. It is a process of dividing land into different zones, each with specific regulations that govern the types of activities that are allowed in that zone. It is typically used to control the location and intensity of different land uses. The land use schemes have different types of zones and reservations.²⁷ Included, are residential;²⁸ commercial;²⁹ industrial;³⁰ agricultural; recreational; institutional; administration; open space;³¹ educational; and special zones.³² In most societies, the

²³ Land development is the “processes of implementing land-use planning or development proposals for building new urban neighbourhoods and new physical infrastructure and managing the change of existing urban or rural land use through granting of planning permissions and land-use permits.” Ibid 25.

²⁴ Margot Rubin ‘Land management and democratic governance in the city of Johannesburg’ (2008) at 3 and Phillip Booth ‘Managing land-use change’ (2009) 26S *Land Use Policy* at S154.

²⁵ Jeannie van Wyk ‘Parallel planning mechanisms as a “recipe for disaster”’ (2010) (13)1 *Potchefstroom Electronic Law Journal* 214 at 222.

²⁶ See the definition of a ‘zone’ in SPLUMA.

²⁷ John Forbes ‘An introduction to municipal planning within South Africa’ (undated) at 11, available at <https://tinyurl.com/ycShyafw> (accessed on 23 June 2022).

²⁸ Low, medium, high, planned unit development, etc. Ibid.

²⁹ Shops and offices, etc. Ibid.

³⁰ Service, light, general, heavy, noxious, extractive, mining, etc. ibid.

³¹ Private, active, passive, and conservation, etc. ibid.

³² For complex developments or where land use does not readily fit into one of the above categories. Ibid.

classification of land use has three categories: urban development;³³ urban regeneration areas;³⁴ and urban expansion from unbuilt land.³⁵

Other zones are specifically not used for urban development, including agricultural lands that are crucial for food and water security; urban cultural-heritage protection zones;³⁶ and urban buffer zones to protect sensitive ecosystems and natural environments such as forests, wetlands, etc.³⁷ In all forms of land use, residential zones (for housing) have the largest impact on urban land transformation.³⁸ Public institutions, individual firms, and households influence urban land use in a market economy concerning housing, shopping, jobs, and many other urban activities. “Each of these requires land and the activity which can outbid all others will acquire the site”.³⁹

In cities, land debates infuse issues of tenure security; accessibility to well-located land; resources to develop land; and alternative processes to engage the many hybrid processes that characterise land markets.⁴⁰ In turn, households obtain land through markets by considering an inseparable package of location, proximity to services, facilities, complementary activities, neighbourhood quality, social factors, and transport.⁴¹

Land use zones control the location of housing development. Accordingly, municipal spatial planning includes the elements of identifying and designating land for social housing development within the municipal area. Thus, land use can ensure that poor urbanites have access to essential services and consider the need for infrastructure such as roads, water and

³³ For existing built environments and areas that have adequate infrastructure. Ibid.

³⁴ Built-up areas that need to be improved. Ibid.

³⁵ United Nations Human Settlements Programme (UN-HABITAT) ‘Urban Planning Law for Climate Smart Cities: Urban Law Module’ (2022) at 35.

³⁶ André S Lopes et al ‘Assessment of urban cultural-heritage protection zones using a co-visibility analysis tool’ (2019) 76 *Computers Environment and Urban Systems* at 139.

³⁷ Ruobing Lv et al ‘Urban historic heritage buffer zone delineation: the case of Shedian’ (2022) 10(64) *Herit Sci* at 1; Somayeh Alikhani et al ‘Urban wetlands: A review on ecological and cultural values’ (2021) 13 *Water* at 1.

³⁸ Ivan Turok ‘Housing and the urban premium’ (2016) 54(3) *Habitat International* at 234. See also Ivan Turok ‘Mass housing or better cities?’ (2016) 14(2) *HSRC Review* at 40-41.

³⁹ See Kivell op cit note 8 at 14-15.

⁴⁰ Tanya Zack et al (2007) ‘Strategy for professional development in urban land and urban land markets (2007) at 21; Sarah Charlton ‘The state of land use management in South Africa’ (2008) at 22; Tanya Zack and Melinda Silverman ‘Using regulation as a tool for better urban management’ (2007).

⁴¹ Kivell op cit note 8 at 15.

sewer systems, public transportation, and adequate facilities to support community development.

A major distinction between spatial planning and land use management is “that the latter grants actual land-use rights, while the former does not”.⁴² The contents and object of local government planning tend to refer to planning in relation to land use.⁴³ In South Africa, spatial planning entails tools or instruments are used to determine specific types of land uses. These tools include Integrated Development Plans (IDPs), SDFs, and land use schemes.

3 The evolution of municipal spatial planning

In colonial and apartheid South Africa, the division of land was based on race which permeated the planning system.⁴⁴ As a result, this led to the development of fragmented parallel planning systems: one for the black population and the other for the white population. The Union of South Africa Act of 1909, passed by the British Parliament, merged the British colonies of the Cape of Good Hope, Natal, Orange Free State, and Transvaal, and formed the Union of South Africa. These four regional territories were established as provinces that were conferred with the delegated regulatory powers to regulate “town and regional planning”.⁴⁵

Apart from enacting provincial planning laws, provinces also administered and took planning decisions. Throughout the periods of the *Constitutions* of 1961 and 1983, these legislative assemblies promulgated key Ordinances: the Town Planning Ordinance (Natal);⁴⁶ the Townships Ordinance (Orange Free State);⁴⁷ the Land Use Planning Ordinance (Cape of Good Hope);⁴⁸ and the Town-Planning and Township Ordinance (Transvaal).⁴⁹ Local government was an implementing agent of provincial planning laws,⁵⁰ seeking to spatially

⁴² See de Visser and Poswa op cit note 16 at 2.

⁴³ Alan Mabin ‘Local government in the emerging national planning context’ in Suzan E Parnell et al (eds) *Democratising Local Government: The South African Experiment* (2002) at 40.

⁴⁴ Jeannie van Wyk *Planning Law* (2nd ed) (2012) 26.

⁴⁵ Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2007) at 3. See also de Visser and Poswa op cit note 16 at 5.

⁴⁶ 27 of 1949.

⁴⁷ 9 of 1969.

⁴⁸ 15 of 1985.

⁴⁹ 15 of 1986.

⁵⁰ Nico Steytler and Jaap de Visser ‘Local Government’ in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (2nd ed) (2013) at 4. See also *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 40; Xavia S Poswa *Municipal Planning By-laws and the extent to which they give effect to the*

widen and preserve racial segregation and fragmentation within towns and cities.⁵¹ Consequently, they entrenched spatial inequalities based on racially skewed spatial planning laws.⁵²

Spatial planning laws and practices determine the feasibility of integrated urban development in towns and cities.⁵³ The integration process is concerned with physical or geographical change, either through preventing change and preserving the status quo, or inducing change and bringing about improvements.⁵⁴ To this end, one of the vital facets of spatial transformation in post-apartheid South Africa which was steered by the democratisation process was the de-racialisation of local government.⁵⁵

With the advent of constitutional democracy in 1994, the implications of spatial inequalities that were anchored based on race and class during colonialism and apartheid periods had to be redressed. Local government was given the task of leading spatial transformation at the grassroots level. The Constitution abolished the provincial monopoly over planning authority and signalled the empowerment of local authorities by allocating them original planning powers.⁵⁶ Every law and executive action is subject to judicial review for adherence to the Constitution. The Constitution set the foundation for overhauling the past racist spatial planning and land use laws and practices.⁵⁷ For a long period, a considerable number of

Spatial Planning and Land Use Management Act 16 of 2013 (unpublished LLM dissertation, University of the Western Cape, 2017) at 20.

⁵¹ Stephen Berrisford 'Unravelling apartheid spatial planning legislation in South Africa - A case study' (2011) 22 *Urban Forum* at 249.

⁵² See 'List of Laws on Land Dispossession and Segregation' available at <https://www.sahistory.org.za/article/list-laws-land-dispossession-and-segregation> (accessed on 12 June 2023).

⁵³ Edgar Pieterse 'Building with ruins and dreams: Some thoughts on realising integrated urban development in South Africa through crisis' (2006) 43(2) *Urban Studies* at 285.

⁵⁴ Vanessa Watson *Change and Continuity in Spatial Planning: Metropolitan planning in Cape Town under political transition* (2002) 2.

⁵⁵ Derek Powell 'Imperfect Transition - Local Government Reform in South Africa 1994–2012' in Susan Booysen (ed) *Local Elections in South Africa, Parties, People and Politics* (2012) at 15; Rudolf Mastenbroek and Nico Steytler 'Local government and development: The new constitutional enterprise' (1997) 1(2) *Law, Democracy and Development* at 233.

⁵⁶ Jaap de Visser 'Devolution by court injunction: The case of land use planning and management in South Africa' (2016) 10(1) *The Ugandan Journal of Management and Public Policy Studies* at 89.

⁵⁷ Jeannie van Wyk 'Can legislative intervention achieve spatial justice?' (2015) 48(3) *Comparative and International Law Journal of Southern Africa* at 381; Harlan CA Cloete *Guide to effectively manage human resource development in South African local government* (2019) 2.

spatial planning and land use management laws, policies, and practices were misaligned with the transformative spirit of the Constitution.⁵⁸

The planning system in South Africa has witnessed significant transformations as it espouses the notions of democracy, development, and equality.⁵⁹ While the post-apartheid planning system pursued the drive to facilitate growth and development, the nature of the processes did not take place as required by the spatial planning laws and policy. As a result, certain areas do not observe the desirable restructurings and changes.⁶⁰ For instance, the location and/or design of housing in marginalised, poor, and mostly black areas still show little transformation in spatial form and infrastructural quality. Thus, failing to provide beneficiaries of government-subsidised housing developments with the opportunities to lead a high-quality urban life.

4 Constitutional framework

Under the 1996 Constitution, the establishment and composition of municipalities drastically reformed their legal, institutional, and structural makeup.⁶¹ The Constitution empowers municipalities to promulgate municipal by-laws that make provisions for municipal planning.⁶² The competency of municipal planning entails formulating and implementing a local IDP, incorporating local land use planning, transport planning, infrastructure planning, and the promotion of integrated local economic development.⁶³

As pointed out by de Visser, “municipal planning” is one of the most critical local government powers.⁶⁴ Municipalities are conferred with the power to control and manage the

⁵⁸ Zander S Venter et al ‘Green Apartheid: Urban green infrastructure remains unequally distributed across income and race geographies in South Africa’ (2020) 203 *Landscape and Urban Planning* at 9.

⁵⁹ Johnny Coetzee ‘The transformation of municipal development planning in South Africa (post-1994): Impressions and impasse’ (2012) 61 *Town and Regional Planning Journal* at 10. The new planning system recognises and protects everyone’s right to equality and and dignity in the spatial planning process, see Jeannie van Wyk and Mark Oranje ‘The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?’ (2014) 13(4) *Planning Theory* at 362.

⁶⁰ See Coetzee op cit note 60 at 11.

⁶¹ The Constitution of the Republic of South Africa, 1996. See also Victoria Bronstein ‘Legislative competence’ in Stu Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013).

⁶² Stephen Berrisford and Jaap de Visser ‘Important legal issues for provincial legislation dealing with a discussion document spatial planning and land use management’ (2012) at 30; Jaap de Visser ‘Local law making in cape town: a case study of the municipal planning by-law process’ (2015) 4 *Urban Legal Case Studies* at 1.

⁶³ Nico Steytler et al ‘Making law: A guide to municipal councils’ (2000) at 5.

⁶⁴ Jaap de Visser ‘Multilevel government, municipalities and food security’ (2019) at 14.

use of land, which is commonly referred to as “town planning”.⁶⁵ It is different from the power to administer land, which is the power to regulate forms of land tenure and ownership. Municipalities have the power to administer land as well.

The Constitution lists five key constitutional powers that directly concern land use and have a significant impact on it.⁶⁶ First, as it appears in Part B of Schedule 4 of the Constitution, municipalities are allocated the functional area of “municipal planning”.⁶⁷ This competency entails the local government’s authority to legislate and administer municipal planning while the national and provincial governments may only exercise limited oversight powers relating to “municipal planning”.⁶⁸ Secondly, the functional area of “provincial planning” is an exclusive provincial legislative competence.⁶⁹ This means provincial governments have the power to legislate and administer provincial planning.

Thirdly, the power for “urban and rural development” is a concurrent competency of both the national and provincial governments.⁷⁰ Both spheres of government may legislate and administer urban and rural development. In the event of conflict between national and provincial legislations, the courts must resolve the conflict.⁷¹ Fourthly, the authority for “regional planning and development” is also shared by national and provincial governments.⁷² Finally, the power for “environment” is also allocated to both the national and provincial governments.⁷³ Residual matters, not mentioned in either schedule, are reserved for the national government. “This constitutional division of planning powers was laid over the complex web of national planning laws and provincial planning ordinances that had been adopted under apartheid”.⁷⁴

⁶⁵ See Berrisford op cit note 51 at 254.

⁶⁶ These powers are municipal planning, provincial planning, regional planning and development, urban and rural development, and environment.

⁶⁷ See Part B of Schedule 4 of the Constitution.

⁶⁸ See Sections 155(6) and (7) of the Constitution.

⁶⁹ See Section 104(1)(b)(ii) of the Constitution. See also Tshepo Madlingozi and Stuart Woolman ‘Provincial Legislative Authority’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* (2nd ed) (2005) at 7; *Swartland Municipality v Louw* 2010 5 SA 314 (WCC) para 29.

⁷⁰ See Part A of Schedule 4 of the Constitution.

⁷¹ See Section 146 of the Constitution.

⁷² See Part A of Schedule 4 of the Constitution.

⁷³ See Part A of Schedule 4 of the Constitution.

⁷⁴ See de Visser and Poswa op cit note 16 at 6.

Therefore, the Constitution confers “planning” on all three spheres of government. As a result, creating an overlap between planning powers and functions.⁷⁵ As noted by the Court in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*,⁷⁶ “it is difficult to conceive any development that can take place without planning.”⁷⁷ The complexity in “the division of powers and functions causes uncertainty and complicates an understanding of the different aspects of planning law”.⁷⁸ According to van Wyk, the “boundaries between ...[these]... functional areas are opaque, their precise content is not readily apparent, and overlaps, conflicts and uncertainty may occur”.⁷⁹

The Constitution merely lists the functional areas without any detailed definitions of each functional area. Christmas and de Visser argue that “this lack of clarity has often resulted in duplication of duties, confusion, inefficiencies, and arguably even deterioration in the delivery of services to communities”.⁸⁰ Concerning the allocation of spatial planning powers in multi-level systems of government, the Economic Commission for Europe advises that there is a need to avoid a rigid allocation of competencies between different levels of government because, in practice, the interconnectedness of decisions means that competencies will inevitably be shared between them.⁸¹ Ultimately, the overregulation of local government planning laws oftentimes exacerbates the contestation of powers and functions in spatial development plans and land-use management systems.

Part of the quest to achieve spatial equity is the strategic utilisation of mixed land-use developments to facilitate and promote poor households’ accessibility to urban public services and amenities. The Constitution lists several functional areas of local government that relate to different types of land use activities and bear significant impacts on the enjoyment of urban life. This includes local amenities, beaches and amusement facilities, childcare facilities, firefighting services, local sports facilities, local tourism, markets,

⁷⁵ See van Wyk op cit note 44 at 245.

⁷⁶ 2010 (6) SA 182 (CC) para 53.

⁷⁷ Ibid 54.

⁷⁸ Ibid.

⁷⁹ Jeannie van Wyk ‘Planning in all its (dis)guises: Spheres of government, functional areas and authority’ (2012) (15)5 *PER / PELJ* at 288.

⁸⁰ Annette Christmas and Jaap de Visser ‘Bridging the gap between theory and practice: Reviewing the functions and powers of local government in South Africa’ (2009) 2 *Commonwealth Journal of Local Governance* at 110.

⁸¹ See Economic Commission for Europe op cit note 11 at 11.

municipal airports, municipal health services, municipal parks and recreation, municipal roads, municipal public transport, public places, pounds, street lighting, and traffic and parking.

5 Judicial delineation of spatial planning powers

The so-called “wall-to-wall” municipalities arose from Section 151(1) of the Constitution which requires that municipalities must be established for the whole of the territory of the country. This means, that every part or land of the country falls within the jurisdiction of a municipality and that all municipalities share borders to cover the entire breadth of the South African territory. The establishment of wall-to-wall municipalities has virtual implications on spatial planning and land developments, prompting the Supreme of Court Appeal, in *Lagoonbay Lifestyle Estate*,⁸² to point out that:

South Africa consists of wall-to-wall municipalities. Municipalities make up regions. And regions, in turn, constitute provinces. A use right in relation to land is a right to utilise that land in accordance with a category of directions setting out the purpose for which the land may be used. The authority to regulate the use of land within a municipal area is conferred upon a municipality, whilst the authority to regulate the use of land within a particular region is a provincial competence.⁸³

Several cases illuminate how courts have interpreted and asserted municipal autonomy in relation to spatial planning. The Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town and Others*, held that “the control and regulation of the use of all land” falls under municipal planning, a functional area constitutionally allocated to the local sphere of government.⁸⁴ Among them, encompassing the zoning of land and the establishment of townships. A township means “any land laid out or divided into or developed as sites for residential, business or industrial purposes”.⁸⁵

⁸² See *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2013] ZASCA 13 para 8.

⁸³ Ibid.

⁸⁴ 2012 (4) SA 181 (CC) at para 42. See also NJJ Olivier et al ‘*Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC)’ (2012) 15(5) *Potchefstroom Electronic Law Journal* at 537.

⁸⁵ See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) at para 8.

The prefix “municipal” restricts it to municipal affairs. In *Gauteng Development Tribunal and Others*, Jafta J held that:

... ‘planning’ in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.⁸⁶

Having established that the zoning of land and the establishment of townships falls under municipal planning,⁸⁷ the Constitutional Court also decided as to whether the same powers fell into the broad matter of urban and rural development. Hence, the Court held that “the scope of the functional area of ‘urban and rural development’ ... is not broad enough to include powers forming part of “municipal planning”.”⁸⁸ On the other side, usurping the power of municipalities in managing “municipal planning” amounts to intrusion into the autonomous status of local government. Nugent JA also stated that the functional area of urban development is a concurrent legislative competence of national and provincial governments, but the authority to micro-manage the use of land for any development is reserved for municipalities.⁸⁹

In *Gauteng Development Tribunal (SCA)*, before the Supreme Court of Appeal, Nugent JA stated that:

The existence of parallel authority in the hands of two different bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area.⁹⁰

Subsequently, in the same matter, the Constitutional Court held that:

Different planning responsibilities are conferred on each of the three spheres of government in accordance with what is appropriate to each sphere. To reduce the

⁸⁶ See *Gauteng Development Tribunal (CC)* at para 57.

⁸⁷ Ibid at para 57.

⁸⁸ Ibid at para 13.

⁸⁹ See *Gauteng Development Tribunal (SCA)* at para 41.

⁹⁰ See *Gauteng Development Tribunal (SCA)* at para 1.

term to its bare minimum, planning comprises the control and regulation of the use of land.⁹¹

In this matter, the local government's right to exercise executive and administrative authority over municipal planning was enforced by the Court. Hence, affirming the local government's autonomy/executive authority over the administration of the functional area.⁹² Jafta J reiterated that the constitutional allocation of functional areas remains distinct, with concurrent competencies of "regional planning and development" and "rural and urban development" assigned to both the national and provincial spheres of government; "provincial planning" exclusively allocated to the provincial government; and "municipal planning" directly devolved to the local government.⁹³ However, the attempts of Jafta J to provide a distinction are regarded as "confusing, because the contents of these functional areas overlap".⁹⁴

The subject of contention was the constitutionality of Chapters V and VI of the Development Facilitation Act (DFA)⁹⁵ which empowered the provincial development tribunals to determine applications for the rezoning of land and the establishment of townships. Provinces administered and took planning decisions in accordance with the DFA and Ordinance procedures.⁹⁶ As a result, this led to parallel provincial and municipal planning processes. To developers, Chapters V and VI of the DFA had less cumbersome application processes before tribunals in contrast to the lengthy municipal route. The City of Johannesburg Metropolitan Municipality disputed that the empowerment of the Gauteng Development Tribunal to exercise these powers within the municipal area of the city was constitutionally invalid. The Court declared the DFA as unconstitutional for empowering provincial tribunals to grant applications for rezoning land and establishing townships. To correct the defects, Parliament was ordered to enact new legislation.⁹⁷

In *Maccsand*, as adjudicated by the Supreme Court of Appeal, it was also noted that the:

⁹¹ See *Gauteng Development Tribunal (CC)* at para 53.

⁹² Ibid.

⁹³ See *Gauteng Development Tribunal (CC)* at paras 54-55.

⁹⁴ See van Wyk op cit note 79 at 291.

⁹⁵ 67 of 1995.

⁹⁶ See van Wyk op cit note 25 at 214.

⁹⁷ See *Gauteng Development Tribunal (CC)* at para 100.

... division of powers envisaged by the Constitution and would have the effect of eradicating a municipality's planning function whenever a national competence impacted on land use.⁹⁸

This case established a preliminary legal view requiring mining companies to consider local land use regulations despite holding mining rights as the matter reached the Constitutional Court. The core question was whether a mining right trumps the need for local land use planning permission.

The Constitutional Court in *Maccsand* clarified a tricky situation arising from the interplay in the mining sector of three pieces of legislation: the Mineral and Petroleum Resources Development Act (MPRDA),⁹⁹ the National Environmental Management Act (NEMA),¹⁰⁰ and the Land Use Planning Ordinance (LUPO).¹⁰¹ Provincial governments were empowered by Chapter Two of the LUPO to make scheme regulations that determined land use in accordance with the zoning applicable to the land. The primary objective of scheme regulations is to control zoning.¹⁰² Thus, a landowner was required to apply to the municipality for rezoning if the purpose of land use was not permitted in terms of the zoning scheme or regulations. In addition, permits were required in terms of the NEMA.¹⁰³

⁹⁸ See *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) at para 7.

⁹⁹ 28 of 2002.

¹⁰⁰ 107 of 1998. It is a pre-Constitution legislation that was promulgated by the Provincial Council of the former Cape of Good Hope and came into force in July 1986.

¹⁰¹ Ordinance 15 of 1985.

¹⁰² Section 9 of the LUPO provided that:

“(1) Control over zoning shall be the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council.
(2) Scheme regulations may be amended or replaced by the Administrator by notice in the Provincial Gazette after the proposed amendment or replacement has, if deemed necessary by the director, been made known in such manner as the director may think fit.”

¹⁰³ Section 24(2) of NEMA stipulates as follows:

“The Minister, or an MEC with the concurrence of the Minister, may identify—

- (a) activities which may not commence without environmental authorisation from the competent authority;
- (b) geographical areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may not commence without environmental authorisation from the competent authority;
- (c) geographical areas based on environmental attributes, and specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may be excluded from authorisation by the competent authority;
- (d) activities contemplated in paragraphs (a) and (b) that may commence without an environmental authorisation, but that must comply with prescribed norms or standards:

Nonetheless, *Maccsand*, a private party, and the Minister for Mineral Resources, a State party, argued that the LUPO which required rezoning does not apply to land used for mining. The Constitutional Court rejected this argument and held that the national law and local government law served different purposes which fell within the competencies of the local and the national spheres of government. Each law had different objectives and did not purport to serve the purpose of the other. Thus, each sphere of government exercises constitutionally allocated powers while regulated by the relevant legislation.

In addition, with all Justices concurring, Jafta J summed up the solution for intergovernmental disputes that may arise from overlapping powers as follows:

The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.¹⁰⁴

The Constitution allocates different spheres of government with specific responsibilities. The national government manages mineral resources, while local governments regulate land use planning. These powers can co-exist. Obtaining a mining right does not automatically grant permission to mine in any location. *Maccsand* still needed to comply with the Municipality's land use planning requirements for the specific area zoned for residential purposes. The impact of this case is that it has clarified the relationship between national mineral rights and local land use planning in South Africa. It established that mining companies must adhere to both national mining regulations and relevant local zoning laws.

Provided that where an activity falls under the jurisdiction of another Minister or MEC; a decision in respect of paragraphs (a) to (d) must be taken after consultation with such other Minister or MEC."

¹⁰⁴ See *Maccsand* at para 47.

National or provincial legislation that purports to confer those powers upon a body other than a municipality will be constitutionally invalid.¹⁰⁵ Given the persistent contestations over municipal planning powers between different spheres of government, the jurisprudence on “municipal planning” adds to a viable co-operative government and intergovernmental relations.¹⁰⁶

Additionally, a municipality may make and administer by-laws for the effective administration of the matters it has the right to administer,¹⁰⁷ including municipal planning. Regardless of the cumbersome nature of dealing with all municipal planning decisions, including zoning and subdivision, this function rightly belongs to municipalities. Similarly, in *Lagoonbay Lifestyle Estate*,¹⁰⁸ the Court ruled in favour of the municipality and stated that it is the competent authority to consider and determine all applications for rezoning and subdivision in respect of proposed developments.

Hence, the interpretation of the term “urban and rural development” does not include the power to approve applications for the rezoning of land and the establishment of townships. Such an interpretation would infringe the principles of co-operative government which requires that all spheres of government must respect the constitutional powers and functions of the other spheres and must not assume any functions or powers not conferred on them by the Constitution or encroach on the functional integrity of the other spheres.¹⁰⁹ Nugent JA further elaborates that the “establishment of financing schemes for development, the creation of bodies to undertake housing schemes or to build urban infrastructure, the setting of development standards” and so forth, are applied by municipalities.¹¹⁰

In the *Gauteng Development Tribunal*, the Constitutional Court stated that provinces cannot “exercise the executive powers of municipalities outside the purview of Section 139 of the

¹⁰⁵ Ibid.

¹⁰⁶ Tracy Humby ‘Hands on or hands off? The constitutional court’s denial of a provincial municipal planning role’ (2015) 1 *Journal of South African Law* at 178-188. See also the *Habitat Council CC*; and see also *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)* 2014 5 BCLR 591 (CC) (2014).

¹⁰⁷ See Section 156(2) of the Constitution.

¹⁰⁸ See *Lagoonbay Lifestyle Estate* at para 12.

¹⁰⁹ See *Gauteng Development Tribunal* (SCA) at para 58. See also Section 41(2)(e), (f), and (g) of the Constitution.

¹¹⁰ Ibid.

Constitution”.¹¹¹ The national and provincial governments may therefore regulate how municipalities exercise their executive authority in relation to municipal planning. The integration and coordination of land use between the provincial and local governments do not confer one of them with the power to usurp the powers of the other.

*The Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)*¹¹² was a landmark decision by the Constitutional Court concerning the division of powers between provincial and local governments regarding the planning decisions. The matter arises from two planning decisions. First, when the Municipality failed to timeously process an application for residential development, the developer lodged an appeal to the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape (Provincial Minister) in terms of Section 44(1)(d) of LUPO. “The Provincial Minister upheld the appeal, granting planning approval and permitting the property’s rezoning and subdivision in terms of sections 16 and 25 of LUPO”.¹¹³

In the second matter, owing to the pressure of the Habitat Council, the Municipality rejected a development proposal on a historical site due to heritage concerns. However, subject to Section 44 of the LUPO, the Provincial Minister overturned the Municipality’s decision and approved the development. The Habitat Council and the City of Cape Town challenged the Minister's decision in court. Hence, the case centered on the constitutionality of Section 44 of LUPO, which granted the provincial governments the power to hear appeals from local municipalities’ planning decisions and replace them with their own decisions.

The Constitutional Court unanimously declared Section 44 of LUPO as unconstitutional and invalid.¹¹⁴ The Court further states that: “All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities.”¹¹⁵ Provincial and national governments may have extensive planning power decisions.

¹¹¹ Ibid at para 65.

¹¹² 2014 5 BCLR 591 (CC) (2014).

¹¹³ Ibid at para 2.

¹¹⁴ Ibid at paras 15 and 31.

¹¹⁵ Ibid at para 19.

However, their powers do not include the authority to veto municipal zoning and subdivision decisions, or subject them to appeal.

The Constitution has assigned the functional area of municipal planning to local governments. Section 44 of LUPO infringed local government's autonomy regarding planning powers and has violated the constitutional and legal principles of co-operative government and intergovernmental relations. In addition, the provincial government already had other mechanisms (e.g., provincial planning frameworks) to guide and oversee local planning decisions. This case reaffirmed the power of local governments regarding spatial planning decisions within their jurisdictions. It emphasised the importance of respecting the division of powers enshrined in the Constitution. The Court also held that: "the Province is obliged to use its constitutional powers, which are not insubstantial, to assist municipalities to make planning decisions properly".¹¹⁶ This decision has implications for similar provincial legislation across the country regarding spatial planning and local government autonomy.

6 Unpacking the Spatial Planning and Land Use Management Act (SPLUMA)

In the aftermath of the Constitutional Court judgment that declared the DFA unconstitutional,¹¹⁷ SPLUMA was passed in 2013. The introduction of SPLUMA has drastically altered the legal framework for spatial planning and land use management in South Africa. Accordingly, SPLUMA has corrected the deficiencies in legal and policy frameworks as it prioritises the achievement of equitable access to infrastructure, a national priority from early post-Apartheid.¹¹⁸

SPLUMA is South Africa's primary legislation that makes provision for the role, powers, functions, and responsibilities of local government pertinent to spatial planning. It seeks to restructure South Africa's cities, towns, and settlements, consistent with the constitutional imperatives for redressing the past spatial injustices while establishing a just society that can realise spatial equity. Through aligning integrated spatial planning, integrated human settlements, urban resilience, local economic development, and sustainable local development, SPLUMA has the potential to forge and sustain an equitable share of

¹¹⁶ Ibid at para 27.

¹¹⁷ See *Gauteng Development Tribunal (CC)* at para 99.

¹¹⁸ See *Lagoonbay Lifestyle Estate* at para 8.

opportunities and access to services for all as well as the ability to promote physical, social, and economic inclusivity.

The Court in *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others*¹¹⁹ recognises that the Preamble of SPLUMA “is important in setting the legislative and socio-economic background which the act seeks to remedy”.¹²⁰ The Preamble of SPLUMA indicates that the promulgation of the Act is to give effect to the constitutional rights which are as follows:

- (1) the right to a safe and healthy environment¹²¹ as well as ecologically sustainable development that promotes justifiable economic and social development;¹²²
- (2) the right to equitable access to land;¹²³
- (3) “the right of access to adequate housing which includes an equitable spatial pattern and sustainable human settlements”;¹²⁴ and
- (4) the right to sufficient food and water.¹²⁵

Within the reformed planning framework, SPLUMA empowers municipalities to be involved in decision-making authority regarding the control and regulation of land use.¹²⁶ The Preamble of SPLUMA also notes that “municipal planning is primarily the executive function of the local spheres of government”.¹²⁷ The Act provides a uniform, recognisable, effective, and comprehensive framework for the country.¹²⁸ The Act prescribes that South Africa’s spatial planning system consists of four components: (a) the separate and distinct spatial development frameworks of the three spheres of government; (b) the development principles, norms, and standards that guide spatial planning, land use management and land development; (c) the management and facilitation of land use based on the mechanism of

¹¹⁹ See *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2021] 4 All SA 69 (WCC).

¹²⁰ Ibid para 81.

¹²¹ See Section 24(a) of the Constitution.

¹²² See Section 24(b)(iii) of the Constitution.

¹²³ See Section 25(6) of the Constitution.

¹²⁴ See the Preamble of SPLUMA read in conjunction with Section 26 of the Constitution.

¹²⁵ See Section 27(1)(b) of the Constitution.

¹²⁶ See de Visser and Poswa op cit note 16 at 8.

¹²⁷ See the Preamble of SPLUMA.

¹²⁸ See Section 3(a) of SPLUMA.

land use schemes; and (d) the procedures and processes for preparing, submitting and considering land development applications and related processes.¹²⁹

The Court in *Adonisi* held that SPLUMA seeks to rationalise the erstwhile fragmented legislative planning and land use management system.¹³⁰ At the same time, the Court views SPLUMA as a solution to transform racially and spatially divided settlement patterns while promoting socio-economic benefits, consistent with the rights protected under Section 25 and Section 26 of the Constitution.¹³¹ Section 3(f) of the SPLUMA stipulates that one of the Act's objectives is to: "redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems". The primary aim of this provision is unquestionably equivalent to the promotion of "spatial equity". Other objects of SPLUMA include ensuring a spatial planning and land use management system that promotes social and economic inclusion; provisions for sustainable and efficient use of land; and provision of co-operative government and intergovernmental relations.¹³²

SPLUMA facilitates critical areas of land use management from provincial governments to local governments. In contrast to its vague and limited role in relation to housing, the local government seems to have a more clearly defined role in SPLUMA. The Act confers local autonomy to a municipal council to adopt an SDF for the municipality.¹³³ Notwithstanding the above, de Visser and Poswa argue that SPLUMA lacks a detailed outline of how municipalities can effectively execute their municipal planning functions.¹³⁴ In turn, provinces are constitutionally empowered to promulgate provincial planning laws that regulate municipal planning within their respective jurisdictions and regulate planning at the provincial level.

Municipal planning by-laws can establish zoning, including simplified processes consistent with and subject to provincial and SPLUMA frameworks. To "avoid duplication" where possible, there must be consultation with other land development authorities to coordinate

¹²⁹ See Section 4 of SPUMA.

¹³⁰ See *Adonisi* at para 82.

¹³¹ Ibid.

¹³² See Section 3 of SPLUMA.

¹³³ See Section 20 of SPLUMA.

¹³⁴ Xavia Poswa and Jaap de Visser 'Implementing SPLUMA: A review of four 'post-SPLUMA' provincial planning bills (2017) at 3.

activities.¹³⁵ It must be noted that each sphere of government has its own independent authority. SPLUMA allows provincial governments to designate “matters of provincial interest” subject to provincial requirements. The potential jurisdictional question is subject to the given nature or site of the land. Issues regulated under municipal planning “impact intra-municipally”.¹³⁶ Where activity requiring authorisation is also regulated by another law, authorities may issue separate authorisations or an integrated authorisation.¹³⁷ The issuing of separate authorisations or integrated authorisation by different spheres of government (based on the Constitution and/or legislation) has been judicially embedded by the Constitutional Court in its *Maccsand* judgement.¹³⁸

Additionally, SPLUMA makes provision for five principles that apply to spatial planning, land development, and land use management. These principles are spatial justice;¹³⁹ spatial sustainability;¹⁴⁰ spatial efficiency;¹⁴¹ spatial resilience;¹⁴² and good administration.¹⁴³ With these principles, SPLUMA has been lauded for its approach to social justice and equity, and for awareness of the role of property and housing in creating efficient and functional human settlements.¹⁴⁴

As a result, municipalities have the requisite power and capacity to transform urban spaces into compact and densified living, working, and recreational spaces.¹⁴⁵ The practical provision of access to social housing and well-designed spatial developments that wholly cater to human welfare, empowers historically disadvantaged social groups.

¹³⁵ See Section 29 of SPLUMA.

¹³⁶ See van Wyk op cit note 57 at 302.

¹³⁷ See Section 30 of SPLUMA.

¹³⁸ See *Maccsand* at para 47.

¹³⁹ The principle of spatial justice is aimed at redressing the past spatial development imbalances and improving access to and use of land, see Section 7(a)(i) of SPLUMA.

¹⁴⁰ Among others, the principle of spatial sustainability is geared towards the promotion of land development in locations that are sustainable and limit urban sprawl (see Section 7(b)(vi) of SPLUMA); and to attain viable communities (see Section 7(b)(vii) of SPLUMA).

¹⁴¹ See Section 7(c)(i) of SPLUMA which provides that the principle of efficiency intends to ensure that land development optimises the use of existing resources and infrastructure.

¹⁴² According to Section 7(d) of SPLUMA, “the principle of spatial resilience, whereby flexibility in spatial plans, policies and land use management systems are accommodated to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks”.

¹⁴³ As embodied in SPLUMA, all three spheres of government must ensure that there is an integrated approach to land use and land development that is guided by the spatial planning and land use management systems, see Section 7(e)(i) of SPLUMA.

¹⁴⁴ Verna Nel ‘Spluma, zoning and effective land use management in South Africa’ (2016) 27 *Urban Forum* at 79.

¹⁴⁵ Paul Hendler ‘The history of spatial planning and land use in South Africa’ (2015) at 2.

The SDF, which is developed as part of the IDP,¹⁴⁶ must be adopted by the municipal council of a municipality.¹⁴⁷ Section 5(1) of SPUMA provides that municipal spatial planning consists of the following elements:

- (a) The compilation, approval and review of integrated development plans;
- (b) the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and
- (c) the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.

As the authority of the first instance, all land development applications must be submitted to a municipality.¹⁴⁸ In determining applications for land use and development within its municipal area, a municipality may establish a Municipal Planning Tribunal.¹⁴⁹ Cognisant of the fact that SPLUMA seeks to redress past spatial injustices, restructure cities and towns, and establish a spatially just society, the decision-making authority of the Municipal Planning Tribunal must be executed with the intention to achieve spatial equity.

For a municipal land use scheme to be valid, it must comply with the provisions of Chapter Five of SPLUMA. Subject to Section 24(3)(b) of SPLUMA, a land use scheme may provide for specific requirements involving special zones identified to address the municipal development priorities. Its purpose and content include the promotion of economic growth, social inclusion, efficient land development, and minimal impact on public health, the environment, and natural resources.¹⁵⁰ The quest to address spatial inequalities requires the promotion of inclusive human settlements and integrated urban development. Hence, the land use scheme issues specific requirements for special zones that may be identified for social

¹⁴⁶ See Section 20(2) of SPLUMA.

¹⁴⁷ Ibid Section 20(1).

¹⁴⁸ Ibid Section 33(1).

¹⁴⁹ Ibid Section 35(1).

¹⁵⁰ See Section 25(1)(a)-(d) of SPLUMA. In addition, Section 25(2) of SPLUMA stipulates that:

“a land use scheme must include—

- (a) scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone;
- (b) a map indicating the zoning of the municipal area into land use zones; and
- (c) a register of all amendments to such land use scheme.”

housing development, this is an opportunity to prioritise the spatial interests of the urban poor. Accordingly, Gurran and Bramley indicate that the development of appropriate “mechanisms range from planning system incentives through to mandatory requirements for dedicated affordable housing within planning laws through to voluntary and negotiated agreements”.¹⁵¹

The Local Government: Municipal Systems Act¹⁵² complements the objectives of SPLUMA.¹⁵³ Section 23(1) of the Municipal Systems Act stipulates that a municipality must undertake developmentally oriented planning. This form of planning must fulfil three mandates: (a) the achievement of local government’s objects as outlined in Section 152 of the Constitution; (b) the attainment of its developmental duties as required by Section 153 of the Constitution; and (c) the contribution towards the progressive realisation of selected ‘socio-economic rights’, including the right of access to adequate housing as contained in Section 26 of the Constitution. The Municipal Systems Act provides for the core components of the IDP. A municipality’s IDP must be reflective of the MSDF which includes basic guidelines for its land use management system;¹⁵⁴ the identification of communities without access to basic municipal services;¹⁵⁵ and applicable disaster management plans.¹⁵⁶ For the purpose of successfully carrying out its developmental objectives, the IDP’s implementation plan must be aligned with the resources and capacity of the municipality.¹⁵⁷

The Municipal Systems Act establishes a varied set of criteria that needs to be included in the MSDF.¹⁵⁸ Among several considerations, the MSDF must include the following:

- (b) ... a five-year spatial development plan for the spatial form of the municipality;

¹⁵¹ Nicole Gurran and Glen Bramley ‘Planning for Inclusionary Housing in New and Renewing Communities’ in Nicole Gurran and Glen Bramley *Urban Planning and the Housing Market: International Perspectives for Policy and Practice* (2017) at 337.

¹⁵² 117 of 1998.

¹⁵³ The provision of the IDP in Chapter Five of the Municipal Systems Act sets a firm foundation for the framework of the MSDF as provided in SPLUMA.

¹⁵⁴ See Section 26(e) of the Municipal Systems Act.

¹⁵⁵ Ibid Section 26(b)t.

¹⁵⁶ Ibid Section 26(g).

¹⁵⁷ Ibid Section 25(1)(b).

¹⁵⁸ See Section 21 of SPLUMA which outlines a long list of contents that must be contained in a MSDF.

- (c) a longer term spatial development vision statement for the municipal area which indicates a desired spatial growth and development pattern for the next 10 to 20 years; ...
- (e) include population growth estimates for the next five years;
- (f) include estimates of the demand for housing units across different socioeconomic categories and the planned location and density of future housing developments;
- (g) include estimates of economic activity and employment trends and locations in the municipal area for the next five years;
- (h) identify, quantify and provide location requirements of engineering infrastructure and services provision for existing and future development needs for the next five years;
- (i) identify the designated areas where a national or provincial inclusionary housing policy may be applicable; ...
- (n) determine a capital expenditure framework for the municipality's development programmes, depicted spatially;
- (o) determine the purpose, desired impact and structure of the land use management scheme to apply in that municipal area;...¹⁵⁹

A municipality might consider calling on national support, based on the national government's obligation under Sections 9(1) and (2) of SPLUMA. Moreover, a municipality might also request provincial support regarding capacity building.¹⁶⁰ Section 11 of SPLUMA makes provision for "municipal differentiation" which requires the national and provincial governments to monitor and support the performance of the functions of municipalities in terms of SPLUMA and other related legislation. This municipal differentiation is in line with the constitutional and legislative supervisory powers that the national and provincial governments exercise over local governments. The intention is to ensure that municipalities can optimally execute their spatial planning, land development, and land use management duties and responsibilities. Therefore, when supervising local government, the national and provincial governments must consider the unique circumstances of each municipality, based on the identified criteria. The criteria comprise (a) the categories of municipalities;¹⁶¹ (b)

¹⁵⁹ See Section 21(b), (c), (e), (f), (g), (h), (i), (n), and (o) of SPLUMA.

¹⁶⁰ See Section 10(5) of SPLUMA.

¹⁶¹ See Section 155(1) of the Constitution provides for three categories of municipalities: metropolitan, local, and district municipality.

national or provincial legislation relating to the supervision of local government; and (c) the financial resources, capacity, and financial viability of a municipality.¹⁶²

7 Connecting municipal spatial planning and housing

All three spheres of government must manage the wave of urbanisation.¹⁶³ For the desperate and hopeful masses, cities are life-changing sites offering prospects for economic and social development. The relevant planning and housing frameworks are adopted to provide the disfranchised urban masses to equally access housing and essential services. The major objective of such frameworks is to promote accessibility to adequate, and well-located housing through the creation of integrated human settlements that foster social, economic, and spatial integration.¹⁶⁴ Therefore, alignment, and integration of investments in human settlements, transportation, resilient infrastructure networks, and land governance maximises the potential of cities in driving sustainable urban development.¹⁶⁵

Rapid urbanisation exceeds the government's ability to provide housing and infrastructure.¹⁶⁶ Part of the solution is to ensure that the existing cities are becoming more compact and more integrated.¹⁶⁷ Contemporary normative urban planning goals have implications for housing as an organising force in urban and regional structures.¹⁶⁸ Spatial planning is associated with forms of urban land use management. Decisions on land use for housing have serious implications for urban residents, especially when considering the quest for attaining spatial equity.

According to Section 4 of SPLUMA, the spatial planning system in South Africa consists of four components: (a) the separate and distinct SDF of the three spheres of government; (b)

¹⁶² See Section 11(b) of SPLUMA.

¹⁶³ Terms of Reference for the Panel of Experts (POE) constituted to guide the preparation of IUDF (Section 1.3) cited in Philip Harrison and Alison Todes 'Spatial considerations in the development of urban policy in South Africa: A research paper as input into the preparation of The Integrated Urban Development Framework (IUDF)' (2016) at 1.

¹⁶⁴ Andreas Matzarakis et al 'Introduction' in Andreas Matzarakis and Beta Paramita *Equity, Equality and Justice in Urban Housing Development* (2018) at 2.

¹⁶⁵ South African Cities Network 'SPLUMA as a tool for spatial transformation' (2015) at 3.

¹⁶⁶ Niamh K Shortt and Daniel Hammett 'Housing and health in an informal settlement upgrade in Cape Town, South Africa' (2013) 28 *Journal of Housing and the Built Environment* at 616.

¹⁶⁷ Caroline Newton and Nick Schuermans 'More than twenty years after the repeal of the Group Areas Act: housing, spatial planning and urban development in post-apartheid South Africa' (2013) 28 *Journal of Housing and the Built Environment* 579 at 581.

¹⁶⁸ See Gurran and Bramley 2 op cit note 2 at 16.

development principles, norms, and standards that guide spatial planning, land use management and land development; (c) the management and facilitation of land use based on the mechanism of land use schemes; and (d) procedures and processes for preparing, submitting, and considering land development applications and related processes.¹⁶⁹

The Social Housing Policy explains the elements as follows:

1. Physical and spatial integration of social housing developments is required to ensure that the housing stock is well located within urban and inner-city areas. This will provide residents with easy access to inter alia transportation and transport routes, amenities and facilities, and thereby contributing to the quality of life of the residents. Co-operation and communication between government departments at all spheres is required to facilitate this.
2. Social integration should also be promoted through ensuring that [Social Housing Institutions] SHIs do not discriminate in any way against residents.... Mixed communities, as well as mixed land use development form part of social integration, as this mirrors systems and processes in operation in urban and inner-city areas...
3. Economic integration can be ensured through considering the mixture of the income groups in social housing development...¹⁷⁰

The IDP sets a firm foundation for the framework of the MSDF as provided in SPLUMA. The MSDF provides strategic guidance on the location and nature of housing development. The MSDF must “estimate the demand for housing units across different socio-economic categories and the planned location and density of future housing developments”.¹⁷¹ The land use scheme must include regulatory procedures and conditions for land use and development in any zone, and a map of land use zones.¹⁷²

The planning system resolves competing claims over land use and seeks to protect the interests of weaker groups.¹⁷³ In a practical sense, land use zoning for residential type provides the poor with housing and balances their interests against the dominant land use activities. The egalitarian approaches to planning development emphasise the need to

¹⁶⁹ See Section 4 of SPUMA.

¹⁷⁰ Ibid 13.

¹⁷¹ See Section 21(f) of SPLUMA.

¹⁷² Ibid Section 25(2)(a)-(b).

¹⁷³ See Kivell op cit note 8 at 8.

consider the needs of the marginalised class of people. Backyard dwellers in townships are often poor and face constant exclusion from the formal housing market. A vast majority of poor backyard dwellers are still waiting for State-subsidised houses. Others do not qualify to be beneficiaries of this housing programme because they have already received a housing subsidy in peripheral locations, lack citizenship, or their income exceeds the required limit.¹⁷⁴

The success of the planning system is determined by its protection of the poor through the provision of housing and public facilities.¹⁷⁵ The planning system of new residential land developments includes funding arrangements for infrastructure such as roads, electricity, water services, public spaces, and community facilities. The policy of urban planning ensures that the new housing development is in serviceable areas near employment centres.¹⁷⁶ Spatial development plans and land-use management systems should not compromise the realisation of human rights.¹⁷⁷ Having well-located housing developments in the urban cores promotes sustainable residential density and encourages integrated mixed-use development which is key to the achievement of integrated human settlements and spatial equity.

For urban centres to be spatially integrated cities priority must be given to the poor whose needs are often excluded in urban housing developments.¹⁷⁸ The fundamental linkage between spatial planning and social housing development offers a panacea for addressing spatial segregations.¹⁷⁹ The Court in *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others* held that:

In light of SPLUMA's commitment to give effect to ss25 and 26 of the Constitution, the development of adequate, affordable housing on well-located land thus represents an

¹⁷⁴ Andreas Scheba 'Backyard rental housing: Dynamic but neglected' (2019) at iv.

¹⁷⁵ Ibid.

¹⁷⁶ See Gurran and Bramley 2 op cit note 2 at 16.

¹⁷⁷ See van Wyk and Oranje op cit note 59 at 349.

¹⁷⁸ Alison Todes 'Regional planning and sustainability: Limits and potentials of South Africa's integrated development plans' (2004) 47(6) *Journal of Environmental Planning and Management* at 843; Anne Klen-Amin and Rashid Abubakar 'Human Rights in New Urban Agenda: Towards inclusive urban planning' in Nestor M Davidson and Geeta Tewari (eds) *Law and the New Urban Agenda* (2020) at 105-106.

¹⁷⁹ Elem E Tepeciklioglu 'South African federalism: Constitution-making process and the decline of the federalism debate' (2018) 13 *Journal of Yasar University* at 164.

appropriate mechanism for advancing and realising the legislative imperative of spatial justice.¹⁸⁰

In this context, the actual location of housing developments is central to the desired spatial transformation. Obviously, the achievement of spatial equity through the realisation of the right to housing hinges on the placements of housing developments in restructuring zones that can be deemed to be “well-located areas”. These are areas that offer social and economic opportunities to residents. Usually, low-to-lower-middle income, largely black and Coloured households cannot afford housing in these well-located areas. The meaning of “well-located” is debatable but its usage is critical in the guidance of decision-making concerning zoning and land use for residential purposes, in this instance, social housing developments. The location of these developments directly impacts the costs and availability of land and its proximity to existing bulk infrastructure and services.¹⁸¹

The United Nations New Urban Agenda advocates for “well-located housing, with special attention to the proximity factor and the strengthening of the spatial relationship with the rest of the urban fabric and the surrounding functional areas”.¹⁸² South Africa’s housing delivery challenges in creating integrated human settlements are due to the lack of available strategically located land.¹⁸³ Municipal planning processes need to prioritise the basic needs of every resident so that they may equally partake in the enjoyment of social and economic development.¹⁸⁴

By linking urban land reform, integration, and housing delivery, McKenna submits that: “the urban land reform process includes how public property can be used to realise integration and greater equality in accessing urban property markets primarily through housing in strategic

¹⁸⁰ See *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2021] 4 All SA 69 (WCC) at para 83.

¹⁸¹ Christina Culwick Fatti ‘Deconstructing sustainability and justice in government housing developments’ in Christina Culwick Fatti (ed) *In pursuit of just sustainability* (2021) at 61.

¹⁸² United Nations Conference on Housing and Sustainable Urban Development (Habitat III) ‘New Urban Agenda’ (2016) para 35.

¹⁸³ Advisory Panel on Land Reform and Agriculture ‘Final Report of the Presidential Advisory Panel on Land Reform and Agriculture’ (2019).

¹⁸⁴ See the White Paper on Local Government (1998) at 17.

locations”.¹⁸⁵ A typical developmental local government agenda will also consider the significance of land redistribution.¹⁸⁶ The relationship between municipal spatial development planning, land use management, and housing is the interdependency of these aspects in the achievement of spatial equity through the realisation of the right to housing.

New housing supply may be constrained by planning regulation owing to restrictive land release policies. More so, impediments may arise from the nature of development controls as well as the lengthy, complex, and uncertain decision processes.¹⁸⁷ Pro-poor urban planning goals such as social equity integrally linked with housing are organising forces in the urban structure.¹⁸⁸ Gurran and Bramley argue that planners have to maximise the “positive impacts of planning on housing outcomes by creating demand through infrastructure coordination and enhanced amenity and minimising potentially negative or unfair outcomes for housing affordability or supply”.¹⁸⁹

The White Paper on Housing¹⁹⁰ states that the physical processes of planning and housing are a local community matter.¹⁹¹ In areas under its jurisdiction, local government plays a fundamental role in promoting and facilitating the provision of housing to all segments of the population. However, the pace and quality of implementing housing programmes depend on the legitimacy, functionality, and viability of local authorities. The White Paper on Housing thus lists several interlinked planning and housing functions of local government, including:

- identification and designation of land for housing purposes;
- the creation and maintenance of a public environment conducive to viable development and healthy communities;

¹⁸⁵ Leila McKenna ‘Urban land reform, integration and housing delivery in South Africa: A critique of the President’s Panel on Land Reform’ (2020) available at <https://tinyurl.com/5xbryas7> (accessed on 29 March 2023). In turn, the crucial linkage between access to land and housing rights is amenable to strengthening the probability of achieving spatial equity.

¹⁸⁶ Nisa Mammon ‘Urban Land Use Regulation in the Context of Developmental Local Government’ in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 405.

¹⁸⁷ Nicole Gurran and Glen Bramley ‘Relationships Between Planning and the Housing Market’ in Nicole Gurran and Glen Bramley *Urban Planning and the Housing Market: International Perspectives for Policy and Practice* (2017) at 85.

¹⁸⁸ See Gurran and Bramley op cit note 2 at 15.

¹⁸⁹ Ibid 45.

¹⁹⁰ White Paper: A New Housing Policy and Strategy for South Africa, 1997.

¹⁹¹ Ibid 33.

- the mediation of conflict in the development process;
- the initiation, planning coordination, promotion and enablement of appropriate housing development;
- planning, funding and provision of bulk engineering services;
- provision of community and recreational facilities in residential areas;
- land planning in areas under their jurisdiction (in terms of laid down performance criteria, possibly at provincial and even national level); and
- regulation of land use and development.¹⁹²

To strengthen the livelihood prospects of households, the National Development Plan (NDP)¹⁹³ simultaneously requires the restructuring of towns and cities. The process of such restructuring must consider the need for spatial equity to directly address the entrenched spatial distortions and infrastructure backlogs.¹⁹⁴ The immense spatial fragmentation necessitates spatial equity, to achieve physical integration, social integration, and economic integration of the historically disadvantaged groups through appropriate spatial planning and land use management.

Chapter Eight of the NDP deals with transforming human settlements and the national space economy in accordance with the SDFs and seeks to realise local government's housing-related powers, functions, and responsibilities. The NDP admits that long distances between jobs and housing and poor services exacerbate poverty and inequality.¹⁹⁵ The locations often designated for most low-cost housing developments reinforce the spatial form of the apartheid city.

The Breaking New Ground (BNG) also observe that the lack of well-located land for low-cost housing resulted in the housing programme extending into existing peripheral areas, achieving limited integration.¹⁹⁶ More importantly, the BNG perfectly sums up the crucial linkage between spatial location and housing provision as follows:

¹⁹² Ibid 33.

¹⁹³ National Planning Commission 'National Development Plan 2030: Our future - make it work' (2012).

¹⁹⁴ Phindile Ntliziywana *The transformation of local government service delivery in South Africa: The failures and limits of legislating new public management* (unpublished PhD thesis, University of the Western Cape, 2018) at 2.

¹⁹⁵ See the National Planning Commission op cit note 193 at ch 8.

¹⁹⁶ Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004).

The supply of state-assisted housing must respond to housing demand. This relationship is best packaged at local level. Municipalities must accordingly take the lead role in negotiating the location of housing supply to facilitate spatial restructuring. Municipalities must also facilitate a greater match between the demand and supply of different state-assisted housing typologies. This approach envisages that municipalities will play a significantly increased role in the housing process. This will help to build linkages between housing delivery, spatial planning, and transportation systems and will also support the integration of housing into Municipal IDPs, ensuring greater budgetary coherence.¹⁹⁷

Furthermore, SPLUMA's complementarity between land use schemes and residential land developments is reflected in Section 24(2)(d). According to this provision, municipal land use schemes must include affordable housing in relation to residential land development. Most low-income and affordable housing developments in urban areas take place at the periphery.¹⁹⁸ It is ideal that the municipal land use schemes prioritise placing the government residential land developments in the city centres. However, there is stiff competition with other interests for the land, from commercial or industrial or high- and medium-income residential development.¹⁹⁹ Thus, housing developers must dedicate part of their housing developments to the low-income segment of society.²⁰⁰ Through collaborating with Social Housing Institutions (SHIs), the local government must ensure the development of housing with proximity to transport, markets, and jobs.²⁰¹ Such requires that local government must promote the suitable location of social housing stock in respect of employment opportunities.

¹⁹⁷ Ibid at 15.

¹⁹⁸ Aliksa Ludick et al 'A new affordable housing development and the adjacent housing-market response' (2021) 24(1) *South African Journal of Economic and Management Sciences* at 1; Marius Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2004) 131 *The South African Law Journal* at 39; Stuart Wilson *Human Rights and the Transformation of Property* (2021) at 36; and Marius Pieterse 'Shifting Paradigms from Between the Lines? Legal Internalizations of the Right to Adequate Housing in South Africa' in Nestor M Davidson and Geeta Tewari (eds) *Law and the New Urban Agenda* (2020) at 134.

¹⁹⁹ Stephen Berrisford and Michael Kihato 'Local Government Planning Legal Frameworks and Regulatory Tools: Vital Signs?' in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 386.

²⁰⁰ Kenneth W Kulundu and Gustav Muller 'The incentivization of inclusionary housing by South African municipalities: a property law perspective' (2020) 4 *Law, Democracy and Development* at 178.

²⁰¹ See Section 2(1)(b) of the Social Housing Act 16 of 2008. See also Andreas Scheba and Ivan Turok 'The role of institutions in social housing provision: salutary lessons from the South' (2022) 38(6) *Housing Studies* at 1.

Both spatial development planning and land use management systems are decisive drivers in the identification of well-located areas for housing developments. A justly transformed spatial planning and development laws and policies promote the facilitation and restructuring of a built environment that offers the previously disadvantaged racial groups opportunities to enjoy social and economic life found in the cities. Well-located housing developments are more socially just than peripherally located housing developments. Apart from concentrating on commercial and industrial aspects, spatial integration would then seek to accommodate immediate and future land use and infrastructural needs for residential land developments specifically dedicated to uplifting the previously disadvantaged South Africans. Provinces are legally responsible for housing. Nonetheless, they mostly shift this responsibility to the local government in a poor manner by preferably developing housing projects in cheaper land located in urban peripheries.²⁰²

8 Conclusion

Chapter Four illustrates how local government spatial planning competence and powers can be used towards spatial equity if they are used together with housing powers. The Chapter further establishes the nature and extent to which the municipal spatial planning framework intersects with its housing framework. However, the local government housing and spatial planning powers do not articulate well with municipal housing powers/responsibilities. Thus, conferring local government with spatial planning powers but not the full housing competencies means that the potential of its spatial planning powers in relation to housing remains cumbersome to be realised. Accordingly, the latter authority does not always rest adequately with the local government.

Judicial delineation of spatial planning powers has asserted municipal autonomy in relation to spatial planning.²⁰³ Each sphere of government exercises constitutionally allocated powers while regulated by the relevant legislation. “Municipal planning” is directly devolved to the local government; the concurrent competencies of “regional planning and development” and “rural and urban development” are assigned to both the national and provincial spheres of government; and “provincial planning” is exclusively allocated to the provincial government.

²⁰² Thabile Chonco ‘The accreditation of municipalities to administer housing programmes’ in Michelle R Maziwisa and Jaap de Visser *Local Government in South Africa: Responses to Urban-Rural Challenges* (2021) at 21.

²⁰³ See discussion under Chapter Four and section 5.

The interpretation of the term “urban and rural development” excludes the power to approve applications for the rezoning of land and the establishment of townships. The usurping of the power of municipalities in managing “municipal planning” would constitute an intrusion into the autonomous status of local government. The national and provincial governments may regulate how municipalities exercise their executive authority in relation to municipal planning. Nonetheless, the “power to regulate the exercise of a municipality’s executive authority... does not authorise any intrusion in connection with a municipality’s legislative authority in any manner or form.”²⁰⁴ Additionally, the SPLUMA confers municipalities with substantial planning powers. A combination of land use and the provision of housing for the poor in urban areas in South Africa requires a coordinated and collaborative approach between the different spheres of government. In the process, the achievement of spatial equity through the realisation of the right to housing hinges on the placements of housing developments in restructuring zones that can be deemed to be well-located areas.

²⁰⁴ See *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd and Others* 2022 (4) SA 167 (WCC) at para 27.

Chapter 5

The Challenges of Local Government's Housing-Spatial Planning Powers Pertinent to the Achievement of Spatial Equity

1 Introduction

Cognisant of the rights-related obligations in relation to housing and its powers and functions thereof, the purpose of Chapter Five is to illustrate how these challenges complicate local government's attempts at bringing about spatial equity through housing provision. The Chapter problematises these challenges through specific cities by exploring the emerging trends and issues in practice. The selected case study municipalities under investigation are Cape Town (in the Western Cape), Johannesburg (in Gauteng), and eThekweni (in KwaZulu-Natal). The Chapter investigates how these municipalities are attempting to overcome these challenges, through exercising their spatial planning powers. These attempts can also be analysed in their most recent Spatial Development Frameworks (SDFs) and Integrated Development Plans (IDPs) in relation to overcoming their spatial legacy and problems of access to the city. The challenges of achieving spatial equity in these three metropolitan municipalities are very different. This Chapter, therefore, considers how to remedy the identified challenges and proposes appropriate reforms. Following this introductory section, the Chapter provides the three case studies and a conclusion that captures the emerging trends and issues in practice of the metropolitan municipalities of Cape Town, Johannesburg, and eThekweni.

The achievement of spatial equity requires the local government's housing and spatial planning powers to be exercised in tandem. In South Africa, the courts and the Spatial Planning and Land Use Management Act (SPLUMA),¹ have largely resolved several fragmentations pertaining to its spatial planning powers, functions, and responsibilities. Nevertheless, when overlaying these powers, functions, and responsibilities with the housing ones discussed in Chapter Three of the Thesis, predicaments remain. An array of challenges hinders local government's ability to implement its housing and spatial planning powers and functions. So far, it has been cumbersome to assess the practice of assignment of housing powers and functions owing to the absence of "sustainable implementation of accreditation

¹ 16 of 2013.

and delegation programmes to serve as a precursor to the assignment or formal transfer of the housing function to the local government”.²

2 Case studies

2.1 City of Cape Town Metropolitan Municipality

The City of Cape Town Metropolitan Municipality is the provincial capital of the Western Cape. Cape Town is South Africa’s oldest and second-largest city (after Johannesburg). By 2021, Cape Town had an estimated population of 4, 68 million people,³ and its housing backlog is reportedly at 599, 855.⁴ It is widely regarded as the most spatially segregated city in the country.⁵ The city’s spatial inequalities were historically anchored on race and class. Black and Coloured residential areas are largely located in the urban peripheries. Howe defines “periphery” as a space that results from processes of peripheralisation: the specific ways in which urbanisation perpetuates or exacerbates structural spatial inequalities.⁶ Cape Town’s financialisation of housing intersects with colonial and apartheid history to produce one of the most unequal cities in the world, with peripheries literally severed from opportunity. The city’s MSDF concedes that “historic and apartheid-era spatial development ... remains imprinted on Cape Town’s urban form”.⁷

The physical makeup of the city inhibits the urban poor’s access to housing and perpetuates physical segregation. “The poor stands no chance for inclusivity as the Atlantic Seaboard attracts super-rich international homebuyers and tourists, which inflates house prices

² Thabile Chonco ‘The accreditation of municipalities to administer housing programmes’ in Michelle R Maziwisa and Jaap de Visser *Local Government in South Africa: Responses to Urban-Rural Challenges* (2021) at 21.

³ City of Cape Town Metropolitan Municipality ‘Five-Year Integrated Development Plan: July 2022 – June 2027’ (2022) at 22.

⁴ Marvin Charles ‘Promise of more housing projects in the pipeline for Cape Town CBD’ (2022) available at <https://tinyurl.com/mrxwy5ku> (accessed 15 August 2023).

⁵ Ivan Turok et al ‘Social Inequality and Spatial Segregation in Cape Town’ in Maarten van Ham et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) at 71. See also Jacobus van Rooyen and Charlotte Lemanski ‘Urban segregation in South Africa: the evolution of exclusion in Cape Town’ in Sako Musterd (ed) *Handbook of urban segregation* (2020) at 19.

⁶ Lindsay B Howe ‘Processes of peripheralisation: Toehold and aspirational urbanisation in the GCR’ (2022) 0(0) *Antipode* at 1. See also Ivan Turok and Jacqueline Borel-Saladin ‘Is Urbanisation in South Africa on a Sustainable Trajectory?’ (2014) 31(5) *Development Southern Africa* at 675 and Jack Ahern ‘From fail-safe to safe-to-fail: sustainability and resilience in the new urban world’ (2011) 100 *Landscape and Urban Planning* at 341.

⁷ City of Cape Town Metropolitan Municipality ‘Municipal Spatial Development Framework 2017 – 2022’ (2022) at 3.

throughout the market”.⁸ Based on data on social housing projects registered with the Social Housing Regulating Authority, Scheba et al argue that since 1994, the municipality has not built housing projects in the Central Business District (CBD).⁹ They further indicate that:

Compared to other metros in SA, Cape Town has surprisingly few social housing projects. While Cape Town makes up almost 20% of the total metro population in South Africa, it has roughly 10% of the national social housing stock.¹⁰

Its racialised spatial inequalities are still evident through its well-located northern and central residential areas that are largely dominated by the middle class and affluent, predominantly white, households.¹¹ These areas have numerous economic opportunities, transport facilities, and social amenities. On the contrary, largely poor, and working-class black and Coloured households reside in densely populated human settlements. In these peripheral townships and informal settlements, households face an acute shortage of affordable housing options, scarce economic opportunities, and access to transport facilities and social amenities.¹² Tissington also highlights that the service and infrastructural backlog have spatial connotations, “including infrastructure constraints, delays in township establishment processes, and limited availability of affordable and well-located land”.¹³ This physical dislocation results in an unjust, inefficient, and ultimately unsustainable segregated urban environment.

The increasingly growing urbanisation results in unmanageable registrations of housing demand. As captured on the Western Cape Housing Demand Database (WCHDDDB), housing need is measured and classified as the “registered demand”.¹⁴ The Cape Town housing

⁸ Ibid.

⁹ Andreas Scheba et al ‘The location of social housing in Cape Town: Separating fact from fiction’ (2021) available at <https://tinyurl.com/4t9jmafx> (accessed on 09 June 2023).

¹⁰ Ibid.

¹¹ See *Adonisi* para 35. See also Caryn Abrahams et al ‘South Africa: National urban policies and city profiles for Johannesburg and Cape Town’ (2018) at 113. The notion of social cohesion in post-apartheid Cape Town is elusive. Raakel Inkeri “*Race*” *Conditioning social cohesion in the post-apartheid Cape Town neighbourhood* (unpublished PhD dissertation, University of Helsinki, 2019); Kevin Parry and Amanda van Eeden ‘Measuring racial residential segregation at different geographic scales in Cape Town and Johannesburg’ (2015) 97(1) *South African Geographical Journal* at 31.

¹² Adi Kumar et al ‘Submission on the release of well-located state owned land in the Cape Town Metropolitan Area for low-income housing and mixed use development: Response to Covid-19 and longer term urban transformation’ (2020) at 10.

¹³ Kate Tissington ‘A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice’ (2011) at 1.

¹⁴ Western Cape Department of Human Settlements ‘Strategic Plan 2020-2025’ (2020) at 19.

market, made of private and public housing developers, is grappling to keep up with the demand for housing. The municipality faces massive housing shortages with an estimated 320 000 households living in overcrowded or informal human settlements.¹⁵ The poor, working, and middle-class families are pushed away from economic and social centres. This sustains and advances the racial and class divides entrenched during the apartheid era. The major reasons are the high costs of market-rate housing for either rented or owned property, and the government's failure to meaningfully encourage social and affordable housing in well-located areas.

On top of the general laws and policies relating to the powers, functions, competencies, and obligations of local government, provincial and municipal laws and policies are also applicable and/or enforceable. At the provincial level, the legislative and overarching policy, strategies, commitments, and directive initiatives include the Western Cape Land Use Planning Act;¹⁶ the Western Cape Land Administration Act;¹⁷ the Western Cape Housing Development Act;¹⁸ and the Western Cape Government Inclusionary Housing Policy Framework, 2022. More so, the Western Cape Monitoring and Support of Municipalities Act,¹⁹ aims to give effect to Sections 154(1) and 155(6) of the Constitution, and Section 106(1) of the Local Government: Municipal Systems Act. The Act is crucial in terms of enhancing provincial supervision of local government's exercise of municipal housing and spatial planning powers.

The Western Cape Land Use Planning Act provides for the functions of municipalities, including the development, adoption, amendment, and review of a zoning scheme for the municipal area; and the procedures in terms of which the municipality receives, considers, and decides on land use applications.²⁰ The Western Cape Land Administration Act provides for the acquisition of immovable property and the disposal of land that vests in the Western Cape Provincial Government. Crucially, the Act requires the Premier to co-ordinate the actions of the provincial government "regarding the administration of provincial state land

¹⁵ R McGaffin 'Housing in Cape Town in 2018 - A Draft Discussion Document' (2018) at 3.

¹⁶ 3 of 2014, as amended by the Western Cape Land Use Planning Amendment Act 4 of 2021.

¹⁷ 6 of 1998.

¹⁸ 6 of 1999, as amended by the Western Cape Housing Development Amendment Act 2 of 2005.

¹⁹ 4 of 2014.

²⁰ Section 2 of the Western Cape Land Use Planning Act.

with the national and local spheres of government as contemplated in Chapter 3 of the Constitution and Section 7 of the Constitution of the Western Cape”.²¹

The general principles applicable to housing development and the role of local government in housing development are contained in the Western Cape Housing Development Act. Finally, the Western Cape Government Inclusionary Housing Policy Framework indicates that the mandate of a municipality is to promote well-located affordable housing through its spatial planning and land use management system.

Municipal planning by-laws are vital for shaping spatial development, management of growth and effective land use, the provision of housing, and blending new housing developments with existing built environment, within a municipality. The Municipality has promulgated and adopted the City of Cape Town Municipal Planning By-law, 2015; the Governing Planning and Approval of Capital Projects Policy, 2023; the Allocation Policy: Housing Opportunities, 2012; the Densification Policy;²² and others.²³

The City of Cape Town Municipal Planning By-law, has undergone several amendments.²⁴ The By-law applies to all land within the geographical area of the city, including land owned by the State.²⁵ It requires that the MSDF must be adopted as part of the IDP.²⁶ Among various purposes, the MSDF must provide land use management guidelines regarding the appropriate nature, form, scale and location of development.²⁷

In terms of Section 11 of the City of Cape Town Municipal Planning By-law, the Municipal Council may adopt a District Spatial Development Framework that provides a spatial representation to support spatial restructuring and integration by indicating the locations of future publicly funded housing developments. Part 8 of the By-law provides for “emergency

²¹ Section 4(1) of the Western Cape Land Administration Act.

²² One of the purposes of the Densification Policy is to inform the City’s SDF as to the identification of areas of land use intensification.

²³ Including the City of Cape Town Electricity Supply By-Law, 2010; the City of Cape Town Problem Property By-Law, 2019; the City of Cape Town Water By-law, 2006; and the City of Cape Town Integrated Waste Management By-Law, 2009.

²⁴ Including the Municipal Planning Amendment By-law 2016; the Municipal Planning Amendment By-Law, 2017; and the Municipal Planning Amendment By-law, 2019.

²⁵ Section 2(1) of the City of Cape Town Municipal Planning By-law.

²⁶ Ibid Section 3(2).

²⁷ Ibid Section 3(3)(b).

housing and urgent housing”. Emergency housing is the provision of temporary housing to households whose homes are declared uninhabitable and cannot be rehoused on site, and are rendered homeless, requiring temporary relocation.²⁸ If there is a need to establish emergency housing on land that is not zoned for the purpose, “the City may approve the commencement of a process to declare the land to be an emergency housing site”.²⁹ In addition, the city may also declare an application for the establishment of housing to be an urgent housing application if:

- (a) the application relates to government-subsidised housing; and
- (b) the land concerned is either –
 - (i) designated for government subsidised housing in terms of the integrated development plan, the municipal spatial development framework, a district spatial development framework or a local spatial development framework; or
 - (ii) subject to an established high demand for government subsidised housing and a low supply of housing opportunities.³⁰

From face value, urgent housing may be utilised to address the housing backlog, especially when considering the requirements such as high demand government subsidised housing and a low supply of housing opportunities, and the fact that the land to be used has already been designated for government-subsidised housing as per the IDP, MSDF, etc. Since the Thesis is concerned with overcoming a particular facet of spatial inequality, with housing and access to land, at the intersection of law, policy, and urban governance, the designated land to which the government-subsidised housing and urgent housing may be implemented must be in well-located areas, instead of the peripheral townships and informal settlements.

Unfortunately, the City of Cape Town Municipal Planning By-law does not specifically mention the objective to ensure that its inhabitants have access to adequate housing while using government-subsidised housing to spatially restructure and integrate the city. Nonetheless, the Municipality’s IDP states that:

²⁸ Ibid Section 68(1).

²⁹ Ibid Section 68(2).

³⁰ Ibid Section 69(2).

The lack of adequate housing is an urgent concern that affects the city's health and well-being, and slows down efforts to unstitch the legacy of apartheid spatial planning. The City must do everything it can to support the accelerated building of homes, both formal and informal, by the private sector to ensure adequate supply of housing to meet the needs of Capetonians.³¹

Both the IDP and the MSDF set out the spatial vision and development priorities for a reconfigured and inclusive spatial form of a city.³² The IDP of the Municipality specifically mentions the aims for a more spatially integrated and inclusive city, which provides everyone with equitable access to economic opportunities and social amenities.³³ The Municipality is explicitly committed to addressing the injustice of apartheid spatial planning by investing in public infrastructure to become a spatially integrated and inclusive city. Importantly, the IDP asserts that MSDF “is required by law to translate the vision and strategy of the City’s IDP into a desired spatial form for the municipality”.³⁴ The MSDF has three spatial strategies: (1) plan for employment and improve accessibility and access to economic opportunities;³⁵ (2) build an inclusive, integrated and vibrant city;³⁶ and (3) manage urban growth and create a balance between urban development and environmental protection.³⁷ The Municipality’s Zoning Scheme Regulations³⁸ provide for various land use zonings including single and general residential zonings, and community zonings. All properties within the jurisdiction of the Municipality form part of its integrated zoning scheme as regulated by land use provisions contained in the Development Management Scheme (DMS).³⁹ The DMS is part of the City of Cape Town Municipal Planning By-law.

³¹ See City of Cape Town Metropolitan Municipality op cit note 3 at 22.

³² Steyn Botha ‘A critical review of the extent to which contemporary planning legislation applicable within the City of Cape Town provides legal mechanisms for promoting spatial justice’ (2020) at 29.

³³ See City of Cape Town Metropolitan Municipality op cit note at 3 at 22.

³⁴ Ibid 43.

³⁵ Following the principle of transit-oriented development, the Municipality will promote sustainable economic growth and the reduction of costs for poor households to access opportunities through quality and affordable transport and housing.

³⁶ The Municipality will address the economic and social exclusions entrenched by the apartheid era. The desired results are a greater mix of income groups and land uses in neighbourhoods, and adequate and equitable provision of utilities, social facilities, heritage, cultural and recreational spaces.

³⁷ The promotion of an urban form with higher densities and mixed land use patterns in the urban inner core, supported by efficient public transport and infrastructure networks and amenities.

³⁸ City of Cape Town Metropolitan Municipality ‘Zoning Scheme Regulations: A component of the policy-driven land use management system’, 2019.

³⁹ ‘The City of Cape Town’s Development Management Scheme’ (undated) available at <https://tinyurl.com/mr2f6a96> (accessed on 01 October 2023).

The five-year implementation plan of the IDP is informed by 16 objectives. Two objectives relating to housing - Objective 7: “Increased supply of affordable, well-located homes”, and objective 8: “Safer, better-quality homes in informal settlements and backyards over time”.⁴⁰ Regarding Objective 7, the IDP states that:

The City will drive the programmatic release of City-owned land and use its regulatory mechanisms to support the development of more affordable and well-located formal housing in Cape Town. ‘Well-located’ refers to land that is in close proximity to economic opportunities, transport nodes, and social facility support.

The MSDF for 2017 – 2022 states that one of the IDP’s three spatial strategies is to build an inclusive, integrated, vibrant city.⁴¹ Part of the specific and immediate implementation actions in achieving this spatial strategy is to develop a land acquisition strategy including a section for well-located residential development.⁴²

The Municipality’s Allocation Policy: Housing Opportunities⁴³ directs the city’s allocation process for government-subsidised housing to persons and households registered on the city’s Housing Needs Register. The Policy also provides for the roles and responsibilities of its internal Housing Development Department. This includes the responsibility to recommend the target area for the housing development.⁴⁴ Interestingly, the recommendation should be based on “an analysis of the context and housing demand within the suburb(s) surrounding the location of the housing development”.⁴⁵

However, the land and building release initiative is more market-related because the Municipality intends to give the private sector the task of delivering more affordable housing in well-located areas, instead of prioritising this initiative to develop new government-subsidised housing for the urban poor. Concerning the Integrated Residential Development Programme, the IDP does not mention the development of national and provincial subsidised-housing programmes in well-located areas of Cape Town. It merely highlights the downward

⁴⁰ See City of Cape Town Metropolitan Municipality op cit note 3 at 49.

⁴¹ See City of Cape Town Metropolitan Municipality op cit note 7 at 7.

⁴² Ibid 12.

⁴³ City of Cape Town Metropolitan Municipality ‘Allocation Policy: Housing Opportunities’, 2015.

⁴⁴ Ibid clause 2.1.1.3.

⁴⁵ Ibid.

trend of Grant funding from national and provincial governments and that the Municipality will leverage its housing project and contract management capabilities to ensure the efficient delivery of government-subsidised housing.⁴⁶ Hopefully, these developments will “yield maximum benefit for housing beneficiaries and do not contribute to spatial inequality”.⁴⁷

Remarkably, the Court in *Adonisi* admonished the Western Cape provincial government for selling a State property which is situated in central Cape Town. In the words of the Court:

... the site presents an ideal opportunity for the development of a social housing scheme to provide much needed affordable housing to the women and men who live and work in the Sea Point area, be they domestic workers, nurses, shop assistants, employees in the hospitality industry or semi-skilled workers earning enough to meet the income threshold set under the [Social Housing Act].⁴⁸

Subject to the Executive Assignment Agreement between the MEC for Human Settlements in the Western Cape and the municipal council of the municipality, the granting and scope of accreditation to the Municipality are currently at level 2.⁴⁹ Since March 2011, the Department of Human Settlements of the Western Cape provincial government has delegated its housing functions to the Municipality.⁵⁰ This entails rendering full management and administration of all housing instruments and national housing programmes. With level 2 accreditation, the city receives funding for housing projects from the Western Cape provincial government while the City controls key processes, including monitoring of housing projects.⁵¹

The City’s Governing Planning and Approval of Capital Projects Policy provides guidelines for the plans and approval of projects of a capital nature. These plans form part of strategic

⁴⁶ Ibid 79

⁴⁷ Ibid.

⁴⁸ See *Adonisi* at para 46.

⁴⁹ ‘Implementation Protocol and Deed of Delegation: Entered into by and between the City of Cape Town and the Western Cape Government in its Department of Human Settlements’ (2012) available at <https://tinyurl.com/2p9x4m9k> (accessed on 29 March 2022).

⁵⁰ Democratic Alliance ‘City and Western Cape Government sign significant agreement to speed up delivery of housing opportunities’ (2017) available at <https://www.da.org.za/government/undefined/2017/10/city-western-cape-government-sign-significant-agreement-speed-delivery-housing-opportunities> (accessed on 29 March 2022).

⁵¹ Business News ‘Building: City receives housing accreditation’ (2011) available at <https://tinyurl.com/e7wwduhc> (accessed on 20 September 2023).

focus areas of the City's Five Year IDP (2022-2027), including housing.⁵² The Policy indicates that the sources of municipal capital budget emanate from its own revenue, loans from the External Financing Fund, the Capital Replacement Reserve (from the accumulated surplus), and Grant Funding (from the National and Provincial Treasuries, public contributions).

The Municipality's 2023/24 - 2025/26 budget for affordable housing, land release and dignified transitional shelter is as follows:

- R2,3 billion on BNG housing for the poorest, R767 million on informal settlement upgrading, R1 billion on public housing maintenance, R37,8 million for no cost transfers of 2 500 rental units annually over three years, and a 50-site land release pipeline worth 6 500 social housing units for development by SHI's and the private sector.
- R230 million over the next three years to operate and expand Safe Space transitional shelter,
- 62% increase over the previous three-year budget cycle.⁵³

However, the genuine intentions of the Western Cape provincial government and the City of Cape Town in releasing well-located for housing the poor remains questionable. It seems that there is a silent policy preference for not developing low-cost housing in central areas due to wanting to preserve the lucrative real estate market. This was encapsulated in *Adonisi* as the Court observed that there is a tendency to adhere to a policy of not developing government-subsidised housing in the CBD.⁵⁴ The Court further held that:

the only meaningful way in which [the] shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land as exist in and around the CBD... Simply put, the procurement by the State of privately owned land in the inner city has become prohibitively expensive. Indeed, at the end of the day, there is no dispute between the Province and the City, on the one hand, and RTC on the other, over the shortage of state-owned land in or near the inner city which is available for the development of affordable housing and, in particular, social housing projects. In the result, unless

⁵² See the Governing Planning and Approval of Capital Projects Policy at 6.

⁵³ City of Cape Town Metropolitan Municipality '2023/24 - 2025/26 Budget' (2023) at 4.

⁵⁴ See *Adonisi* at paras 302, 364, 400 and 440.

meaningful attempts are made by the authorities to redress the situation, spatial apartheid will be perpetuated, not only in the inner city areas but across the greater Cape Peninsula.⁵⁵

This means, there are reasonable housing and planning instruments in place in the form of SPLUMA and the Social Housing Act.⁵⁶ However, their implementation has not been reasonable. This implies that municipalities have the necessary housing powers, at least in relation to social housing, but are not exercising these powers effectively. In *Adonisi*, the Court further held that when the Western Cape provincial government disposed of a property without first consulting and engaging with the national government contravened the province's obligations as dictated by Chapter Three of the Constitution, which provides for co-operative governance, and the Intergovernmental Relations Framework Act (IGRFA).⁵⁷ In addition, the decision was inconsistent with the provision of the Government Immovable Asset Management Act (GIAMA).⁵⁸ Ideally, the property should have been identified as a restructuring zone for the government's social development initiatives and be utilised for integrated human settlements in order realise the right of access to adequate housing and as part of the attainment of spatial equity.

There are parcels of well-located land that could be utilised for the poor, low-income housing, and mixed-use developments. However, although the city does have the spatial planning powers to use them for housing, it cannot use these powers because the land is not under its control. These parcels of land are owned by the national government. Accordingly, Therefore, Kumar et al identify Ysterplaat, Wingfield and Youngsfield as the "three large and exceptionally well-located parcels of unused or under-used military land for the development

⁵⁵ See *Adonisi* at paras 18801-2. The courts play a significant role in the quest to address the ramifications of apartheid spatial planning, land use, and housing laws and practices. Jeannie van Wyk 'Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?' (2015) 30 *Southern African Public Law* at 31.

⁵⁶ 16 of 2008.

⁵⁷ 13 of 2005. The establishes a framework that promotes and facilitates efficient intergovernmental relations; and provides for mechanisms and procedures for settling intergovernmental disputes.

⁵⁸ 19 of 2007. Section 5(1)(f)(ii) of GIAMA obliges that, prior to selling an asset, the provincial government must first determine if the immovable property cannot be used for social development initiatives of the government. For instance, for providing housing in well-located areas. In addition, under the State Land Disposal Act (SLDA) 48 of 1961, also the President has the discretionary powers to sell, exchange, donate, or lease certain State land on behalf of the State (see Section 2 of the SLDA). The President may also assign his or her powers and duties in terms of SLDA to the Minister of Public Works, the power to assign a deed of grant over State land.

of affordable housing”.⁵⁹ In addition, the State has vast tracts of land in well-located areas in Cape Town marked by 93 000 buildings and 1.9 million hectares of land under the custodianship of the Department of Public Works.⁶⁰ Whereas according to the Municipality, its property is made of 87,000 immovable assets.⁶¹ The unused or under-used lands provide ample space for suitable housing developments in Cape Town. However, the State - the Province and the Municipality failed to unlock and release the well-located land for housing development. Instead, they sell the well-located land for “the highest market value or leasing it to private entities for decades at a time (often at discounted rates)”.⁶²

The MSDF may aim for the achievement of spatial equity. However, the actions of the Municipality point otherwise. Recently, there have been signs of urban regeneration and gentrification in both Woodstock and Salt River – located 3 km from the CBD, on the eastern edge of Cape Town’s city centre.⁶³ The displacement of the poor from their established community demonstrates the lack of willingness to restructure and integrate the city. In addition, this undesirable practice emanates from rising property values that are accompanied by the redevelopment of neighbourhoods that the poor cannot afford. Nonetheless, there are economic and market factors at work that are not directly under the City’s spatial planning or housing control. As a result, there are deepening spatial inequalities when the poor are driven to the outskirts of the city, far from economic opportunities and social services. Moreover, property and infrastructural development in black and Coloured areas “saw little or no improvements over the years”.⁶⁴

Despite the Municipality’s rights-related obligations in relation to housing as witnessed in *Government of South Africa & Others v Grootboom & Others*,⁶⁵ *Fischer v Persons Unknown*,⁶⁶ and *Adonisi*,⁶⁷ the City is reluctant to provide government-subsidised housing in

⁵⁹ See Kumar et al op cit note 12 at 6.

⁶⁰ Ibid 15; Bekezela Phakathi ‘Patricia de Lille wants to speed up release of State-owned land for housing’ (2019) available at <https://tinyurl.com/yn3za8h6> (accessed on 16 August 2023).

⁶¹ City of Cape Town Metropolitan Municipality ‘Management of certain of the City of Cape Town’s immovable property policy’ (2010) at 10.

⁶² See Kumar et al op cit note 12 at 15.

⁶³ Kathlyn Douglas *Investigating the perceived effects of street art in urban regeneration, gentrification and on the local community in Cape Town’s Woodstock and Salt River* (unpublished master’s dissertation, University of Cape Town, 2021) at 1 and 3.

⁶⁴ See Botha op cit note 32 at 16.

⁶⁵ 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 29.

⁶⁶ 2014 (3) SA 291 (WCC).

well-located areas found in the inner city or adjacent spaces. The general gaps and disconnects between the local government's housing functions or powers and its spatial development powers as well as the lack of full legal, institutional and structural commitment to place government-subsidised housing in the inner city contribute to the perpetuation of spatial segregation in Cape Town. In the absence of a focused and intentional practical implementation of the desired spatial transformation in the City, all the impressive laws and policies at the national, provincial, and local levels, will remain in vain.

2.2 City of Johannesburg Metropolitan Municipality

A major urban centre and economic hub of both South Africa and the southern African region,⁶⁸ the City of Johannesburg Metropolitan Municipality, situated in Gauteng Province, is the most populous city in South Africa and the richest city in Africa.⁶⁹ In 2000, eleven municipalities in and around Johannesburg were amalgamated to establish the City of Johannesburg Metropolitan Municipality.⁷⁰ Johannesburg is the biggest metro by population size in South Africa, with an estimated population of 5.87 million people,⁷¹ and has a 455, 600 housing backlog.⁷² The urban poor face a continuous struggle for living space in the central part of Johannesburg.⁷³

The spatial form of the city is characterised as one of urban sprawl and fragmentation, poor mobility, and pockets of decay and deprivation, inner-city decline, within the broader Gauteng City-Region (GCR)⁷⁴ surrounding Johannesburg and Pretoria. The GCR is described as “the central core of the province, with the wealthiest wards located in the heart of

⁶⁷ See *Adonisi* at para 75.

⁶⁸ Owen Crankshaw and Susan Parnell ‘Johannesburg: race, inequality, and urbanization’ in Josef Gugler *World Cities beyond the West: Globalization, Development, and Inequality* (2004) at 348. See also Alison Todes ‘Urban growth and strategic spatial planning in Johannesburg, South Africa’ (2012) 29 *Cities* at 158.

⁶⁹ Kiptoo Kosgei ‘Richest cities in Africa and millionaires they host’ (2022) available at <https://theexchange.africa/business/richest-cities-in-africa-and-millionaires-they-host/> (accessed on 20 June 2022).

⁷⁰ City of Johannesburg Metropolitan Municipality ‘Housing Research Publication 2022’ (2022) at 12.

⁷¹ City of Johannesburg Metropolitan Municipality ‘Integrated Development Plan 2021-26’ (2020) at 14.

⁷² City of Johannesburg Metropolitan Municipality op cit note 70 at 35.

⁷³ Marius Pieterse *Rights-based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017) at 38.

⁷⁴ The GCR comprises three metropolitan municipalities - the City of Johannesburg, the City of Tshwane, and Ekurhuleni - and two district municipalities - Sedibeng and West Rand. Inequality in the Gauteng City-Region is visible from satellite imagery, see Lindsay Blair Howe at 1-12.

Johannesburg's northern suburbs such as Sandton, and pockets in Tshwane".⁷⁵ The city is spatially divided and splintering.⁷⁶ The poor live in informal settlements spotted on the city's periphery. The rich securely enjoy luxurious lives in safe townhouse complexes.⁷⁷ The urban design of new large-scale housing developments under the auspices of the government "segregates, separates and perpetuates a disempowered urban population".⁷⁸ Large segments of the city have been prevented from accessing jobs, social opportunities, and high-quality education. They travel long distances to work and to amenities and spend an inordinate proportion of their monthly income, about 21 per cent on transport.⁷⁹ Their inaccessibility to housing in the inner city is aggravated by high rental prices for accommodation.⁸⁰ In this way, this reflects the continuous struggles for access to adequate housing.⁸¹

Despite being a major urban centre and economic hub, the city's IDP describes its spatial inequality as follows:

The bulk of the metropolitan area (95%) features low density suburban neighbourhoods enjoyed by the few. While, around one third of all Joburg inhabitants by contrast, live on only 5% of the metropolitan area in densely populated and often overcrowded townships.⁸²

⁷⁵ Gauteng City-Region Observatory 'Changing spatial inequality across the GCR' (2014) available at <<https://www.gcro.ac.za/outputs/map-of-the-month/detail/changing-spatial-inequality-across-the-gcr/>> (accessed on 23 June 2023).

⁷⁶ Edgar Pieterse and Kate Owens 'Towards a more equal city Johannesburg: Confronting spatial inequality' (2018) available at <https://tinyurl.com/yjxzcvuw> (accessed on 20 November 2020). See also Edith Hofer et al 'Inclusivity insights: two urban development projects in Johannesburg' (2022) 37 *Journal of Housing and the Built Environment* at 1; David Everatt 'Poverty and inequality in the Gauteng city-region' in Philip Harrison et al (eds) *Changing space, changing city* (2014) at 63.

⁷⁷ Ibid. See also Richard Ballard et al 'Megaprojects and urban visions: Johannesburg's Corridors of Freedom and Modderfontein' (2017) 95 *Transformation* at 111.

⁷⁸ Leila McKenna 'Paper 1: Realising social and economic integration in South Africa's residential property markets' (2020) at 20.

⁷⁹ Ibid. See also Gauteng Provincial Government 'Gauteng Spatial Development Framework 2030 - Draft for Public Comment' (2016) at 70.

⁸⁰ Carla Robb *Housing for the poor: A case study of the Johannesburg inner city* (unpublished master's dissertation, University of Cape Town, 2018) at 13. See also Stuart Wilson 'Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight*' (2014) 5 *Constitutional Court Review* at 280; and Stuart Wilson 'Litigating housing rights in Johannesburg's inner city: 2004–2008' (2011) 27 *South African Journal on Human Rights* at 127.

⁸¹ Lauren Royston et al 'A place for the poor? Realising the right to adequate housing in Johannesburg' (2016) available at <https://tinyurl.com/ycy6c9sk> (accessed on 29 November 2020). The scale and nature of homelessness and the spatial location of the homeless in central Johannesburg are based on a survey of street shelters, public places, and buildings used by the homeless. The broader context wherein the legacy of apartheid combines with inadequate housing policies leaves much of the low-income population with little possibility of finding adequate quality housing, see Olusola Olufemi 'Street homelessness in Johannesburg inner-city: a preliminary survey' (1998) 10(2) *Environment and Urbanization* at 223.

⁸² City of Johannesburg Metropolitan Municipality 'Integrated Development Plan 2021-26' (2020) at 25.

Its MSDF concedes that the city is ranked as one of the most unequal cities in the world.⁸³ The inequitable spatial arrangement leads to unequal access to the needed public services, jobs, and well-located housing. The city's spatial form presents a huge challenge to the achievement of sustainability and inclusion in relation to the objectives of SDG 11.⁸⁴ In *Thubakgale v Ekurhuleni Metropolitan Municipality*,⁸⁵ the Court stated that "Apartheid's spatial structures persist, and today continue to maintain race- and class-based inequities in access to resources and services across Johannesburg and surrounding areas".⁸⁶ The Municipality acknowledges that it is faced with major spatial discontinuities in the city structure.⁸⁷ Spatial inequalities have prevented large segments of the city from accessing jobs, social opportunities, and high-quality education.

Nonetheless, Johannesburg is undergoing massive reconfiguration of its social geography, rapid changes in racial composition, and substantial desegregation of its spatial form.⁸⁸ A black majority replacing whites in the CBD and surrounding areas, which are being increasingly settled by upwardly mobile Africans, Coloureds, and Indians. The wealthier and predominantly white people are relocating to the northern suburbs of the city. Such spatial pattern aims to broaden economic gaps, restrict development to privatised progress owned by wealthy whites and perpetuate spatial disparities. In addition, the substantial desegregation of the white northern suburbs is insufficient for the pursuit of promoting access to land and the achievement of housing rights for historically disadvantaged South Africans.

The fast-growing population leads to an increase in housing demand in the city. The provision of low or medium-cost housing, in conducive areas that meet the requirements of

⁸³ City of Johannesburg Metropolitan Municipality 'Spatial Development Framework 2040' (2016) at 44.

⁸⁴ Jaap de Visser 'City Regions in Pursuit of SDG 11: Institutionalising Multilevel Cooperation in Gauteng, South Africa' in Helmut Philipp and Anel Du Plessis *The Globalisation of Urban Governance: Legal Perspective on Sustainable Development Goal 11* (2019) at 190.

⁸⁵ [2021] ZACC 45 at paras 86-89 and 109.

⁸⁶ Ibid at para 104.

⁸⁷ City of Johannesburg Metropolitan Municipality 'Municipality Spatial Development Framework 2040' (2014) at 11.

⁸⁸ Amy Kracker-Selzer and Patrick Heller 'The spatial dynamics of middle-class formation in post apartheid South Africa: enclavization and fragmentation in Johannesburg' in J Go (ed) *Political power and social theory* (2010) at 149. The formerly white-only suburbs experienced a steady diffusion of black middle-class residents replacing the whites in these residential areas. See Richard Ballard and Christian Hamann 'Income Inequality and Socio-economic Segregation in the City of Johannesburg' in Maarten van Ham et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) at 91.

the needed service facilities and infrastructure, may at least elevate the historically disadvantaged South Africans. There is a need “to embody an enforceable positive obligation to use well-located urban land towards ensuring their inclusion”.⁸⁹ Nevertheless, the MSDF concedes that the city’s housing delivery has worsened the apartheid spatial development patterns because social housing developments are implemented in areas that are far from economic activity.⁹⁰ The choice for their location stems from the availability of land in the urban peripheries. According to the MSDF: “The location of future housing developments to meet demand across socio-economic categories should be located close to urban amenities, including economic activity, public transport and jobs”.⁹¹

Several pertinent provincial laws and policies provide for various matters relating to land use management, spatial planning and housing. These include the Gauteng Land Administration Act;⁹² the Gauteng City Improvement Districts Act;⁹³ the Gauteng Housing Act;⁹⁴ the Gauteng Township Economic Development Act;⁹⁵ and the Gauteng Spatial Development Framework (GSDF).⁹⁶

The Municipality enacted the City of Johannesburg Municipal Planning By-Law, 2016; the City of Johannesburg: By-law on Problem Properties; and other by-laws.⁹⁷ The City of Johannesburg Municipal Planning By-Law applies to all land and land development

⁸⁹ Marius Pieterse ‘Towards a right to the City? The Slow Convergence of Rights to Housing and Land in South African Constitutional Jurisprudence’ (2022) 11 *International Human Rights Law Review* at 38. See also Margot Strauss and Sandra Liebenberg ‘Contested spaces: Housing rights and evictions law in post-apartheid South Africa’ (2014) 14(3) *Planning Theory* at 432-434; Ivan Turok and Andreas Scheba “‘Right to the city” and the New Urban Agenda: Learning from the right to housing’ (2018) 7(4) *Territory, Politics, Governance* at 495; and Ralph Madlalate ‘(In)equality at the intersection of race and space in Johannesburg’ (2017) 33(3) *South African Journal of Human Rights* at 489-493.

⁹⁰ See City of Johannesburg Metropolitan Municipality op cit note 83 at 11.

⁹¹ Ibid 139.

⁹² 11 of 1996. The Act provides for land administration and immovable asset management in Gauteng, and the acquisition and disposal of provincial State land.

⁹³ 12 of 1997. The Act provides for procedures to which a municipality may ordinarily facilitate investment in the city to improve the district and prevent the degeneration of cities.

⁹⁴ 6 of 1998. Section 22 of the Act provides for the assignment of powers and functions to a municipal council.

⁹⁵ 2 of 2022. The Act provides the designation, promotion, development, and operation of Township Enterprise Zones.

⁹⁶ Gauteng Spatial Development Framework 2030. The Gauteng Planning and Development Act was not implemented, see South African Cities Network ‘Provincial land use legislative reform Gauteng Province: Status Report’ (2011) at 3.

⁹⁷ For instance, the Greater Johannesburg Metropolitan Council Standardisation of Electricity By-Laws, 1999; the City of Johannesburg: By-law on Problem Properties, 2014; the City of Johannesburg Metropolitan Municipality Waste Management By-law, 2013.

applications within the jurisdiction of the City of Johannesburg.⁹⁸ Section 2(5) of the By-law provides that:

In the event of a conflict between SPLUMA and its Regulations, any Provincial Act dealing with spatial planning and land use management and any regulations issued in terms thereof and the provisions of this By-law, the provisions of this By-law shall prevail to the extent that the provisions of this By-law give effect to “municipal planning” as a local government matter as per Part B of Schedule 4 of the Constitution.

The land development applications made in terms of the By-law must give effect to the development principles as set out in Section 7(1) of the SPLUMA.⁹⁹ “The City shall adopt and approve, after public consultation, a single land use scheme for its entire area of jurisdiction”.¹⁰⁰ The land use scheme must include appropriate categories of land use zoning and regulations, including the provision of affordable housing in residential land development.¹⁰¹ The city must also adopt and approve the MSDF for the municipality.¹⁰² The MSDF must be prepared as part of the city’s IDP process.¹⁰³ As required by Section 11(1)(1) of the By-law, the content of the MSDF must designate areas for national, provincial or local inclusionary housing policy. In addition, the MSDF must estimate “the demand for housing units across different socio-economic categories and the planned location and density of future housing developments”.¹⁰⁴

On 4 March 2011, the Municipality was accredited to manage and administer social housing programmes. The accreditation is at level 2 which therefore enables the Municipality to act as a developer of programmes and projects in its jurisdiction.¹⁰⁵ An important innovation by the city in addressing the challenges of housing and spatial inequalities is the adoption of the Policy of Inclusionary Housing Incentives, Regulations and Mechanism, adopted by the city in May 2019.¹⁰⁶ The Policy seeks to address issues of inequality, the demand for formal

⁹⁸ See Section 2(2) of the City of Johannesburg Municipal Planning By-Law.

⁹⁹ Ibid Section 5(1).

¹⁰⁰ Ibid Section 6(1).

¹⁰¹ Ibid Section 6(2)(e).

¹⁰² Ibid Section 10(1).

¹⁰³ Ibid Section 10(2).

¹⁰⁴ Ibid Section 11(1)(f).

¹⁰⁵ City of Johannesburg Metropolitan Municipality ‘Housing Research Publication 2022’ (2022) at 12.

¹⁰⁶ Martin J Murray *City of extremes: The spatial policies of Johannesburg* (2011) 1.

housing opportunities in well-located areas, and the limited social mix in terms of race and income. The conception of the Policy is derived from different and related legal and policy frameworks such as SPLUMA, the National Development Plan, the City of Johannesburg Spatial Development Framework 2040,¹⁰⁷ and the Integrated Urban Development Framework (IUDF).¹⁰⁸ The Policy defines “inclusionary housing” as:

A housing programme that, through conditions attached to land use right approvals, require private developers to dedicate a certain percentage of new housing developments to low income and low- middle income households, or to households that may not otherwise afford to live in those developments.¹⁰⁹

The Spatial Framework and Implementation Strategy contained in the MSDF of the city intends to achieve its spatial visions through Transformation Zones, which are areas prioritised for future urban intensification and growth.¹¹⁰ Apparently, through the Inner City Transformation Roadmap and the Inner City Housing Implementation Plan, issues of fragmented developments and lack of affordable housing in the CBD will be addressed. The city-wide spatial policy regulations must provide affordable, low cost and social housing within all new housing developments.¹¹¹ In this respect, the MSDF emphasises that:

The bulk of provision of low income, affordable housing (both by the private sector and the state) should shift from peripheral greenfield developments, to high density, mixed use brown field development near to jobs, economic activity, public transport and services (hard and soft), with a focus on Transformation Zones such as the Corridors of Freedom, the Inner City and mixed use nodes.¹¹²

The Municipality has adopted a transformation agenda towards a spatially just city and it has adopted eleven strategic priorities to realise the Johannesburg 2040 Growth and Development Strategy (GDS).¹¹³ Priority 3 is integrated sustainable human settlements which recognises

¹⁰⁷ See City of Johannesburg Metropolitan Municipality op cit note 83 at 11.

¹⁰⁸ Integrated Urban Development Framework: A New Deal for South Africa Cities and Towns (2016).

¹⁰⁹ See the Inclusionary Housing Incentives, Regulations and Mechanisms, 2019.

¹¹⁰ See City of Johannesburg Metropolitan Municipality op cit note 83 at 17.

¹¹¹ Ibid 20.

¹¹² Ibid.

¹¹³ The GDS is an aspirational document that defines the type of city Johannesburg wants to achieve by 2040, see City of Johannesburg ‘Johannesburg 2040 Growth and Development Strategy’ (2019) at 7.

the spatial imbalances in the Municipality and that measures towards spatial balance include spatial planning and economic, and social investment. To reverse the apartheid spatial planning, the city aims to create inclusive communities through mixed-income developments.¹¹⁴ The Department of Development Planning in the city is a key agent in the promotion of urban development that enables the establishment of sustainable human settlements.¹¹⁵

The IDP of the city indicates the intention to tackle homelessness and landlessness by focusing on the issues of housing and land.¹¹⁶ The appropriate measures to achieve these outcomes are increasing housing stock, fast-tracking the issuing of title deeds to State-subsidised housing, revising housing policies, and incorporating problem buildings (and their residents) into the housing plans for the city. Furthermore, “the city will provide access to affordable, improved and mixed housing that will contribute to reducing social inequalities, improve social integration, and strengthen the drive towards sustainable urbanisation in the City of Johannesburg”.¹¹⁷

In order to fulfil its housing obligations and responsibilities, the Municipality has several formal funding sources.¹¹⁸ This includes internal funding, the Housing Subsidy Scheme through the National Housing Programmes, parastatal and NGO funds, private sector funds/investments, and international or national donor funds.¹¹⁹ Accordingly, with regard to housing, considerable funds emanate from internal reserves, and another contribution is from the Urban Settlements Development Grant,¹²⁰ and the Upgrading of Informal Settlements Programme (UISP).¹²¹

¹¹⁴ Ibid 70.

¹¹⁵ Ibid 155.

¹¹⁶ Ibid 156.

¹¹⁷ Ibid.

¹¹⁸ ‘Institutional Arrangements of Current Housing Delivery: National, Provincial and Local Government’ (undated) available at <https://tinyurl.com/2p95v7hk> (accessed on 20 September 2023).

¹¹⁹ Ibid 16.

¹²⁰ Department of Human Settlements and the Department of Performance Monitoring and Evaluation ‘Design and Implementation Evaluation of the Urban Settlements Development Grant: Study Report’ (2015) at 80.

¹²¹ City of Johannesburg Metropolitan Municipality ‘Integrated Development Plan 2020/21’ (2020) at 161.

2.3 eThekweni Metropolitan Municipality

The city of Durban is the seat of the eThekweni Metropolitan Municipality, which is in the province of KwaZulu-Natal. The Municipality's formation took place in 2000 owing to the merger of six local sub-structure authorities. The process led to the combination of the Durban metropolitan area with 45 per cent of the land in the rural areas and additional open space within the municipal area. Virtually, 13 per cent of land previously in the former homeland areas covers the region of 18 million ha. As a result, approximately 68 per cent of the Municipality comprises rural areas.¹²² The Municipality's estimated population is 3, 240 million, has a housing backlog of 496, 000.¹²³

Thus, the notion of dual governance in rural and traditional authority areas within a metropolitan municipality is best reflected in the eThekweni Metropolitan Municipality. Rural areas that are under the ownership of the KwaZulu-Natal Ingonyama Trust Board, which was established in terms of the Kwazulu-Natal Ingonyama Trust Act,¹²⁴ as amended by the KwaZulu Ingonyama Trust Amendment Act,¹²⁵ and other traditional authorities, fall beyond the urban development line with communal land tenure. Therefore, the new municipal boundaries have produced a dual system of governance made of municipal and traditional governance in rural areas.¹²⁶ "The land is owned by the government but managed through the tribal authority".¹²⁷ In these areas, traditional leaders are the face of local government.¹²⁸ In addition, spatial planning for housing developments in rural areas presents unique challenges to the Municipality.

¹²² eThekweni Metropolitan Municipality 'Draft Integrated Development Plan - 5 Year Plan: 2023/24 to 2027/28' (2022) at 47.

¹²³ Ibid 213.

¹²⁴ 3KZ of 1994.

¹²⁵ 9 of 1997.

¹²⁶ Xavia Poswa 'Land use management: Where traditional and municipal governance meet in rural areas' (2019) 14(2) *Local Government Bulletin*.

¹²⁷ Grain SA 'Unpacking the various forms of land ownership' (2015) available at <https://tinyurl.com/jzidx2mb> (accessed on 24 April 2023).

¹²⁸ Jesse Harber and Megan Rose Bryer 'Unrealistic expectations: Bus Rapid Transit in Johannesburg' (2020) at 2.

In terms of spatial transformation, Schensul and Heller view the city of Durban to have undergone minimal changes.¹²⁹ Nonetheless, Schensul has observed some positive spatial changes and narrates this as follows:

... in buffer zones, previously undeveloped areas between the core and the periphery that under apartheid had separated race groups, the state was able to construct public housing for poor Africans near both economic activity and white and Indian residential areas.¹³⁰

From a spatial frame of reference, the outcomes of low-income housing development still depict the forms of spatial inequality and exclusion in the city.¹³¹ Typical challenges of the Global South such as inequality, informality, and housing and service backlogs, are also faced by the city.¹³² The Municipality has a significant number of informal settlements located on marginal land, such as flood-prone areas, steep slopes, or land with poor soil quality. These settlements lack basic services and infrastructure, including water, sanitation, electricity, and proper road networks. Upgrading these settlements and providing adequate housing options for the poor is a crucial challenge.

Rapid population growth and urbanisation put pressure on available land, leading to high land prices and an inability to provide affordable housing options for the poor. The Municipality experiences spatial inequalities, which perpetuate social and economic disparities and limit the opportunities for the poor to access quality housing, employment, and essential services located in the inner city. Hence, most low-income residents rely on informal rental arrangements, often in overcrowded and substandard living conditions, due to the lack of affordable formal housing options. Informal settlements reflect the lack of adequate formal

¹²⁹ Daniel Schensul and Patrick Heller 'Legacies, change and transformation in the post-apartheid city: Towards an urban sociological cartography' (2010) *International Journal of Urban and Regional Research* at 1.

¹³⁰ Daniel Schensul 'From resources to power: the state and spatial change in post-apartheid Durban, South Africa' (2008) 43(3/4) *Studies in Comparative International Development* at 290.

¹³¹ Ntombifuthi P Nzimande and Szabolcs Fabula 'Socially sustainable urban renewal in emerging economies: A comparison of Magdolna Quarter, Budapest, Hungary and Albert Park, Durban, South Africa' (2020) 69(20) *Hungarian Geographical Bulletin* at 383; Helen Louise Cooke *Exploration into Knowledge Production in Spatial Planning: The Cornubia Housing Project, eThekweni Municipality, South Africa* (unpublished master's dissertation, University of KwaZulu-Natal, 2014) at 1.

¹³² Catherine Sutherland et al 'Conceptualizing 'the Urban' through the lens of Durban, South Africa' (2018) 29(4) *Urban Forum* at 333.

provision of housing, and “the lack of administrative and legislative control of these areas by the former white administration of the city”.¹³³

The Municipality faces rapid urbanisation and overcrowding in the urban cores.¹³⁴ As a result, the predicaments of housing provision are compounded by scarce financial resources, lack of available land, persistence and increasingly growing informal human settlements, and ineffective co-operative governance in the delivery of the social housing mandate. The Municipality’s central region is the urban core of the Metro.¹³⁵ This region boasts from its 56 per cent contribution to the Municipality’s total Gross Domestic Product (GDP).¹³⁶ It is the key industrial hub and largest employment generator. In addition, the region has several lifestyle options as well as significant coastal resources and service nodes. However, its spatial challenges include land constraints for residential development.¹³⁷ As a result, this has led to a forceful drive of residential development in the north and west (to a certain extent). In the same vein, the region’s spatial form is racially structured, highly fragmented, and poorly integrated.

The Municipality is grappling to improve the existing built environment for the lower-income communities, and most new developments are inconsistent with municipal priorities.¹³⁸ Primarily, illegal land use activities are implemented based on inadequate and outdated policies and zoning. In addition, the low densities and fragmented settlement patterns result in poor service delivery.¹³⁹ More intensely, there are poor linkages from rural and informal settlements to metropolitan transport links and to metropolitan facilities and services. Consequently, this results in costly travel patterns.

The Municipality concedes its struggle to address key housing issues such as massive backlogs; limited funds/unfunded mandates; lack of well-located and suitable land; protracted

¹³³ Colin Marx and Sarah Charlton ‘Urban Slums Reports: The case of Durban, South Africa’ (2003) at 5.

¹³⁴ Ravesh Govender *Evaluation of the approach of eThekweni Municipality in delivering low Income Housing in the context of urbanization* (unpublished masters dissertation, University of KwaZulu-Natal, undated) at 2.

¹³⁵ The CMPR is the commercial, retail, financial, and administrative hub.

¹³⁶ See eThekweni Metropolitan Municipality op cit note 122 at 69.

¹³⁷ Ibid 70.

¹³⁸ Ibid 72.

¹³⁹ Ibid.

delays experienced in land acquisition; and conflicting interests of environmental and developmental approvals, especially with adjoining communities.¹⁴⁰

The MSDF notes as follows:

In the South African context, the concept of equity is an extremely important component of society as it emphasizes the need to redress unequal planning of the past. As with other South African cities, eThekweni has been shaped by the political ideologies of apartheid and post-apartheid class divisions, in which racial groups are separated and buffered from each other with the poorer and most vulnerable groups located on the periphery of the Municipality.¹⁴¹

As a result, access to job opportunities and employment requires long daily commuting, with distances ranging from 12–25 km to more than 40 km. Hence, there is a need to promote mixed land uses to support various spatial urban and rural scales. While the SDF of the Municipality emphasises the need to focus on the spatial development of historically neglected former townships and rural areas,¹⁴² equal attention must be given to restructuring the urban areas to accommodate the historically disadvantaged social groups. Another point of concern is the fact that, while striving to promote a balanced and sustainable urban and rural development, and epitomising the principle of an equitable city, the Municipality lists several possible measures which do not specifically include the strategic utilisation of housing to achieve spatial equity.¹⁴³

At the provincial level, the relevant laws include the KwaZulu-Natal Planning and Development Act;¹⁴⁴ the KwaZulu-Natal Rationalisation of Planning and Development Laws Act;¹⁴⁵ the KwaZulu Land Affairs Act;¹⁴⁶ the KwaZulu-Natal Land Administration and

¹⁴⁰ eThekweni Metropolitan Municipality 'Integrated Development Plan - 5 Year Plan: 2012/13 to 2016/17' (2016) at 71.

¹⁴¹ See eThekweni Metropolitan Municipality op cit note 122 at 407.

¹⁴² Ibid.

¹⁴³ Ibid 407-408.

¹⁴⁴ 6 of 2008.

¹⁴⁵ 2 of 2008. The Act gives a municipality numerous responsibilities concerning the adoption, replacement, and amendment of land use schemes.

¹⁴⁶ 11 of 1992. Among several objects, the Act provides for the disposal of government land and certain rights of tenure to land.

Immovable Asset Management Act;¹⁴⁷ the Kwazulu-Natal Ingonyama Trust Act; the Kwazulu-Natal Housing Act,¹⁴⁸ as amended by the Kwazulu-Natal Housing Amendment Act;¹⁴⁹ and the Kwazulu-Natal Elimination and Prevention of Re-Emergence of Slums Act.¹⁵⁰

Section 16 of the Kwazulu-Natal Housing Act provides for the duties and responsibilities of municipalities, while Section 17 of the Act makes provision for the powers and functions of municipalities. Notably, some of the key duties and responsibilities of the Municipality are to ensure that its inhabitants have access to adequate housing,¹⁵¹ and the identification and designation of land for housing purposes.¹⁵² Part of the Municipality's powers and functions of municipalities are the facilitation and co-ordination of housing developments,¹⁵³ in its municipal area; and participation in any housing programme.¹⁵⁴

In 2016, the Municipality enacted the eThekweni Municipality Planning and Land Use Management By-Law,¹⁵⁵ which applies to all land which falls within the municipal area. The By-law provides for SDF and the land use scheme of the Municipality.¹⁵⁶ It also regulates and manages spatial and land use planning and development. However, at the current juncture, the Municipality does not have clear-cut by-laws that specifically integrate the provisions of the Housing Act¹⁵⁷ and Social Housing Act. It has promulgated important municipal by-laws such as the eThekweni Municipality: Municipal Premises and Facilities

¹⁴⁷ 2 of 2014. The Act provides for land administration and immovable asset management in KwaZulu-Natal; the acquisition and disposal of provincial State land; the expropriation of property by the Provincial Government; and the management and maintenance of provincial State land or immovable assets.

¹⁴⁸ 12 of 1998.

¹⁴⁹ 8 of 2000.

¹⁵⁰ 6 of 2007. In terms of Section 9(1) of the Kwazulu-Natal Elimination and Prevention of Re-Emergence of Slums Act, a municipality must ensure that as part of its integrated development plan and within its available resources, the progressive realisation of the right to adequate and affordable housing as contained in Section 26 of the Constitution.

¹⁵¹ Section 16(a) of the Kwazulu-Natal Housing Act.

¹⁵² Ibid Section 16(c).

¹⁵³ Ibid Section 17(b).

¹⁵⁴ Ibid Section 17(c).

¹⁵⁵ 13 of 2016.

¹⁵⁶ Section 4 of the eThekweni Municipality Planning and Land Use Management By-Law.

¹⁵⁷ 107 of 1997.

By-Law, 2015; and the eThekweni Municipality: Problem Buildings By-Law, 2015; and others.¹⁵⁸

Section 9 of the eThekweni Municipality Planning and Land Use Management By-Law requires the Municipality to prepare an MSDF. Among other objects, the MSDF must include previously disadvantaged areas, and areas governed by traditional authority, informal settlements, and slums and address their inclusion and integration into the spatial, economic, social, and environmental objectives.¹⁵⁹ The MSDF must also address historical spatial imbalances in development;¹⁶⁰ indicate priority areas for investment in land development;¹⁶¹ and “promote a rational and predictable land development environment”.¹⁶² The MSDF must be prepared as part of the Municipality’s IDP.¹⁶³ Its content must identify current and future significant structuring and restructuring elements of the spatial form of the Municipality,¹⁶⁴ population growth estimates for the following five years,¹⁶⁵ and must estimate “the demand for housing units across different socio-economic categories and the planned location and densities of future housing developments”.¹⁶⁶ The content of the MSDF must also identify and designate areas where national or provincial inclusionary housing policy may be applicable.¹⁶⁷

The Municipality must adopt a land use scheme for its entire municipal area which has to include suitable categories of land use zoning and regulations.¹⁶⁸ The land use scheme is framed against the requirements of SPLUMA. Several factors serve as guiding principles in the adoption of a land use scheme, including the inclusion of affordable housing in residential

¹⁵⁸ Other important by-laws include the Borough of Durban Building By-Laws 82 of 1932; Durban Transitional Metropolitan Council Electricity Supply By-Laws 45 of 1998; City of Durban Food By-Laws of 1950; the eThekweni Municipality: Sewage Disposal By-Law, 2015; the eThekweni Municipality: Fire Safety By-law, 2022; the eThekweni Municipality: Accommodation Establishments By-Law, 2022; the eThekweni Municipality: Waste Removal By-law, 2016; and the eThekweni Municipality: Water By-law, 2023; and the eThekweni Municipality: Public Health By-law, 1911.

¹⁵⁹ Section 9(1)(h) of the eThekweni Municipality Planning and Land Use Management By-Law.

¹⁶⁰ Ibid Section 9(1)(i).

¹⁶¹ Ibid Section 9(1)(k).

¹⁶² Ibid Section 9(1)(l).

¹⁶³ Ibid Section 9(5)(a).

¹⁶⁴ Ibid Section 10(1)(d).

¹⁶⁵ Ibid Section 10(1)(e).

¹⁶⁶ Ibid Section 10(1)(f).

¹⁶⁷ Ibid Section 10(1)(i).

¹⁶⁸ Ibid Section 14(5).

land development.¹⁶⁹ However, the eThekweni Municipality Planning and Land Use Management By-Law does not feature explicitly the principles or provisions of spatial justice, spatial sustainability, spatial efficiency, spatial resilience, and good administration that are enshrined in Section 7 of SPLUMA. Notwithstanding these omissions, the MSDF for the next five-year period of 2022/2023 to 2026/2027 incorporates these principles.¹⁷⁰ Unfortunately, the development of MSDFs does not address the infrastructure and housing-related shortcomings of the MSDF.¹⁷¹

At least the spatial vision as outlined in the MSDF encompasses an analysis layer of built environment and housing and its guiding principle is spatial justice.¹⁷² The spatial proposals and strategies for this layer include integrated human settlements; areas of need; spatial transformation; and township regeneration. In turn, there are five intended outcomes: (1) managing urban growth and urbanisation; (2) combating urban sprawl and supporting infill development; (3) facilitating sustainable human settlement; (4) promoting adequate provision of social and economic amenities; and (5) supporting balanced urban and rural development.¹⁷³

The layer that relates utilities and infrastructure is guided by the principles of spatial sustainability, spatial efficiency, and spatial justice.¹⁷⁴ Part of its spatial proposals and strategies are strategic investment areas and human settlement mega projects. The intended outcomes are the reduction of poverty, unemployment, and spatial inequality; the facilitation of efficient and cost-effective utilisation of municipal resources; ensuring adequate provision of services and infrastructure to support densification and infill; and the promotion of balanced development.

Housing supply in the Municipality has challenges from the urban estate market which does not strive to provide adequate housing and optimal locations for the poor, lower and lower-middle segments. State-funded housing is mostly applicable to the low-income sub-market. “The main outcomes have been free standing houses coupled with individual freehold title,

¹⁶⁹ Ibid Section 14(6)(b).

¹⁷⁰ eThekweni Metropolitan Municipality ‘Spatial Development Framework 2022-2023’ (2022) at 405-408.

¹⁷¹ See Marx and Charlton op cit note 133 at 11.

¹⁷² Ibid 418.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

transfer of state owned rental stock to tenants, and some hostel upgrades coupled with rental tenure”.¹⁷⁵

The eThekweni Housing Sector Plan (EHSP) is currently limited at this stage to fully and partially subsidised residential infrastructure. With the inclusion of the poor, the EHSP has spatial and social transformation benefits that include providing social infrastructure, eradicating infrastructure backlogs, and informal tenure.¹⁷⁶ The EHSP is aligned with numerous housing programmes of the Municipality, including the Housing Catalytic Projects; the Incremental Services to Informal Settlements; the Institutional and Social Housing; the Affordable Housing; the Upgrades and Greenfields; the Retrofit of Engineering Services; and the Township Establishment, Infrastructure Handover; and the Title Deed Issuing for RDP projects.

The broad challenges to housing delivery that the Municipality faces are:

Available funding versus the demand for housing within the City.

The current housing subsidy quantum does not take into account or cover the escalating costs for certain key aspects such as steep terrain, retaining walls and densification.

Unavailability of Bulk infrastructure (sewer, water, electricity and roads) and/or aging infrastructure especially in historical projects.¹⁷⁷

In conjunction with Human Settlements Unit and Strategic Projects Office, the Municipality’s Development Planning Department is embarking on a strategic and integrated planning approach in response to housing issues in the inner city of Durban. Key measures include:

- (a) Formal engagements with private sector initiated to attract investment into social housing and related projects.
- (b) Partnership Agreements with private sector being encouraged.
- (c) Housing deliverables (10,000 units).
- (d) Social Housing: 3,000 units.
- (e) Affordable: 2,000 units.
- (f) Student Accommodation: 5,000 units.¹⁷⁸

¹⁷⁵ Ibid 218.

¹⁷⁶ Ibid 210.

¹⁷⁷ See eThekweni Metropolitan Municipality op cit note 122 at 255.

Importantly, the Municipality is prioritising housing development applications in terms of SPLUMA.¹⁷⁹ Hence, the Priority Human Settlements and Housing Development Areas (PHSHDAs), underpinned by principles of the National Development Plan (NDP) and the objectives of the Integrated Urban Development Framework (IUDF), are projected “to advance Human Settlements Spatial Transformation and Consolidation by ensuring that the delivery of housing is used to restructure and revitalise town and cities”.¹⁸⁰

One of the elements of the PHSHDAs is Urban Integration Zones which is a targeted approach for sustainable urban development. The Urban Integration Zones aim to achieve long-term spatial transformation and inclusivity, facilitating economic growth and improved service delivery. It overlaps with the Social Housing Restructuring Zones as well as the Housing Catalytic Projects. The Social Housing Restructuring Zones aim to restructure areas to spatial, social, and economic changes while the Housing Catalytic Projects intend to restructure settlement patterns and induce changes in the environment. The Housing Catalytic Projects are strategically located within or near the Urban Integration Zones.

All things considered, budget requirements and funding sources determine the Municipality’s fiscal and financial capacity in delivering housing in restructuring zones, to enable the achievement of spatial equity. Potential funding sources include:

- Urban Settlement Development Grant (USDG);
- Human Settlements Development Grant (HSDG);
- Municipal Funds;
- Other spheres for some of the social infrastructure, particularly schools and clinics;
- Other spheres for some of the core infrastructure, particularly provincial or national routes, bridges and interchanges; and/or
- Private Investments, particularly for the development of commercial sites, and for developer contributions to core infrastructure.¹⁸¹

¹⁷⁸ Ibid 558.

¹⁷⁹ Ibid 224.

¹⁸⁰ Ibid 223.

¹⁸¹ Ibid 244.

Other sources arise from Social Housing Restructuring Grants, Institutional Housing Subsidies, Private Equity, and Development Finance.¹⁸² The various funding sources capacitate the Municipality with the requisite fiscal and financial resources to optimally provide housing to the poor in well-located areas.

3 Conclusion

The Chapter provided an outlook of explicit spatial inequality and housing inadequacy issues regarding the selected three case studies of the Thesis. A key priority of the metropolitan municipalities of Cape Town, Johannesburg and eThekweni is to eradicate slums and inadequate shelters through the provision of low-cost housing. All the municipalities are grappling with housing backlogs as officially “registered demand”. Housing is envisioned to serve a larger purpose in terms of restructuring South Africa’s spatially segregated and fragmented cities and towns. Unquestionably, housing is analogous to a two-edged sword because it can be utilised to simultaneously confront both spatial inequalities and housing inadequacies. This assertion is corroborated by the fact that housing “is the only policy instrument that is explicitly designed to support higher density housing in well-located urban areas”.¹⁸³ However, these cities have limited housing powers and functions regarding housing developments. More so, the spatial planning powers of these cities lack the gist to plan and build housing developments in well-located areas such as urban cores. The disconnection between local government housing functions or powers and its spatial development powers compromises the cities’ ability to ensure an integrated approach to the provision of housing.

The extent of the local government’s spatial planning powers does not adequately complement its housing powers. For instance, the identification and designation of suitable well-located land for government-subsidised housing in the urban cores or areas close to city centres remains a challenge. In addition, the obstacles to equitable spatial planning are aggravated by ineffective identification, quantification, and provision of bulk engineering infrastructure and services for existing and future development, across all areas within the

¹⁸² Ibid 244-445.

¹⁸³ National Treasury ‘Managing urbanisation to achieve inclusive growth: A review of trends in South African urbanisation and suggestions for improved management of urbanisation’ (2018) at 8. See also National Association of Social Housing Organisations (NASHO) ‘Cracking spatial apartheid: How social housing could help remake Cape Town’ (2018).

municipality.¹⁸⁴ When effectively implemented, SPLUMA and other housing-related laws and policies pave the way for local government's critical role in fast-tracking the release of well-located land, spatial planning for housing, delivery of housing at scale and the achievement of spatial equity.

Although the IDP and MSDF of Cape Town may express the aims and plans to spatially integrate the City, little action is shown in terms of placing new government-subsidised housing in or near the urban core. As revealed in *Adonisi*,¹⁸⁵ the tendency to adhere to a policy of "no RDP in the CBD" in Cape Town perpetuates spatial segregation. The quest to address spatial inequalities is boosted by the Municipality's impressive spatially inclusive by-laws, policies and programmes of actions that strengthen the drive towards sustainable urbanisation and the achievement of spatial inequalities. Durban is far more integrated than the cities of Cape Town and Johannesburg. The Municipality demonstrates the will to effectively address spatial inequalities through housing provisions.

Nonetheless, certain challenges impede the effective assignment of housing functions to municipalities.¹⁸⁶ The main challenges are the lack of requisite capacity in municipalities and the elusive reluctance of national and provincial governments to defuse their housing powers and functions to municipalities. Among the three levels of accreditation, all the three - metropolitan municipalities of Cape Town, Johannesburg and eThekweni are accredited at level 2. Meaning, that they all exercise delegated housing functions and powers to render full programme management and administration of all housing instruments and national housing programmes in addition to the responsibilities under a level one accreditation. In the absence of level 3 accreditation, these municipalities have not been fully assigned housing functions and powers to enjoy executive assignment to administer all aspects, including financial administration, of national housing programmes. Hence, they currently have limited legal capacity to undertake major housing projects.

The IDPs and MSDF of the case study municipalities further shows that there is the lack of realistic investment in infrastructure and economic development projects in poor and

¹⁸⁴ Kevin Wall 'The right to functioning urban infrastructure - A review' (2021) 79 *Town and Regional Planning* at 55.

¹⁸⁵ See *Adonisi* at paras 302, 364, 400 and 440.

¹⁸⁶ See Chonco op cit note 2 at 21.

disadvantaged areas. There are poor efforts for improving their overall attractiveness and creating a more inclusive urban fabric. Empowering the poor and low-income communities to participate in planning and decision-making processes can foster a sense of ownership and improve the sustainability of housing projects. Developing collaborative models between government and the private sector can unlock additional funding sources and expertise for affordable housing initiatives.

Both the Housing Act and the Expropriation Act¹⁸⁷ empowers a municipality to expropriate any land or property for the purposes of housing development in terms of any national housing programme. However, the IDPs, MSDFs, by-laws and policies of the Municipalities do not intend to utilise these powers to expropriate any suitable land or property to deliver housing in restructuring zones, to enable the achievement of spatial equity. Surely, the implementation of seemingly good housing and spatial planning laws and policies remains a challenge in South African cities. Finding suitable land at an affordable price for large-scale housing projects is difficult, especially in city centres. The urban real estate markets are unwilling to sell, and land acquisition processes are slow and bureaucratic. This has been encapsulated in *Adonisi*, when the Court observed that there is a tendency to adhere to a policy of not developing government-subsidised housing in the CBD.¹⁸⁸

¹⁸⁷ 63 of 1975.

¹⁸⁸ See *Adonisi* at paras 302, 364, 400 and 440.

Chapter 6

Toward the Achievement of Spatial Equity Through the Realisation of the Right to Housing

1 Introduction

The main objective of the Thesis was to investigate the role and obligations of local government in the realisation of the right of access to adequate housing, and the interdependence of this with its role in the achievement of spatial equity in South Africa. The focal point was the reconciliation of the enormous constitutional, legislative, policy, and judicial obligations imposed on local government with its actual limited financial resources, institutional capacity, and structural role in the realisation of the right of access to adequate housing and the achievement of spatial equity. Accordingly, the Thesis aimed at identifying and elaborating on the legal, institutional, and structural challenges to the attainment of these aspirations and considering ways in which they could be remedied.

The primary research question of the Thesis was: How should the role, powers, functions, and responsibilities of local government in relation to the realisation of the right of access to adequate housing be reconfigured considering constitutional, legal, and policy goals pertaining to the achievement of spatial equity?

Additional secondary questions were as follows:

- (a) How does the current role of local government in relation to the right to housing relate to its role in relation to achieving spatial equity?
- (b) Based on constitutional, legislative, and policy frameworks as well as the courts' jurisprudence, what are the local government's responsibilities, powers, and functions regarding housing?
- (c) Based on constitutional, legislative, and policy frameworks as well as the courts' jurisprudence, what are the local government's responsibilities, powers, and functions regarding spatial planning?
- (d) Between its housing and spatial planning powers, what are the challenges in the current role and responsibilities of local government in the context of achieving spatial equity and how could these be remedied?

- (e) How should the role of local government in housing be reconceptualised to match its rights-related responsibilities and its role in achieving spatial equity?

2 Summary of findings

In Chapter One, this Thesis unpacked the background of spatial inequality and housing inadequacies in South Africa and clarified its understanding of spatial equity, the achievement of which was then related to the developmental mandate of local government. Chapter One proceeded to hold forth the research questions which were reiterated above. The Constitution has assigned to local government the main developmental mandate and service delivery responsibilities at the grassroots level. The consequences of spatial inequalities and housing inadequacies in a constitutional dispensation amount to indirect racial discrimination under Section 9(3) of the Constitution and warrant appropriate redress by the State.

The concept of spatial equity is closely related to the right to adequate housing and denotes the fair distribution of resources and services within a given area or jurisdiction. The Chapter defines spatial equity as the concept of fairness and justice that involves the provision of equal access to and distribution of basic public service goods, opportunities, resources, services, materials, facilities, and infrastructure across different geographic areas or regions (e.g., a city, region or a country) as measured by distance.¹ Regardless of their location, everyone must have access to an equitable share of resources and opportunities. Spatial equity seeks to ensure that all individuals and communities have equal access to the benefits of urban and regional development, regardless of their socio-economic status, race, gender, ethnicity, or other factors. Physical and infrastructural developments bear significant impacts on the realisation of the rights to adequate housing and spatial equity. Therefore, it is important that local governments and other stakeholders involved in urban and regional development prioritise the protection of human rights, inclusive of the right of access to adequate housing, spatial equity, and the provision of basic services, in their planning and decision-making processes, particularly, in relation to social housing developments.

In Chapter Two, the Thesis answers the question: based on constitutional, legislative, and policy frameworks as well as Constitutional Court jurisprudence, what are the local government's responsibilities, powers, and functions regarding housing? It discusses the

¹ See discussion under Chapter One and section 2.

normative content and implications of the right of access to adequate housing as provided by international human rights law, the African human rights system, and the domestic legal system in South Africa. The ambit of the right to housing does not solely concern the mere provision of a roof over one's head. It is about integrally linking the right to housing with other human rights and fundamental principles while epitomising the inherent dignity of the human person and meeting the "adequacy" requirements of housing. Under the United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1)),² the significance of the "adequacy" concept regarding the right to housing underlines baseline factors that determine if a certain form of shelter amount to "adequate housing" as per the ICESCR. These factors are: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

South Africa has progressive housing laws, policies, programmes, and jurisprudence.³ The nature of the constitutional right to housing does not expressly prescribe any specific programmes to be adopted for its actualisation. The State, therefore, has the discretion to undertake housing projects it deems fit for purpose. The justiciability of the right has been affirmed in an array of court judgements handed down by the Constitutional Court. The indispensability of location as an integral part of meeting the adequacy standards of housing also emanates from various court rulings. In the process, housing jurisprudence has reshaped the role and obligation of local government in the realisation of the right to adequate housing. This entails protecting individuals and families against forced eviction and the determination of the availability of suitable alternative accommodation or land, in the event of eviction, emergency housing, and relocation. From a review of the relevant Constitutional Court judgments pertaining to the right to housing as contained in Section 26 of the Constitution,⁴ it is clear from the analysis in Chapter Two that the courts' understanding of adequacy of housing includes its location; that courts are aware of spatial inequity as something that hinders the achievement of the right to housing and that they are increasingly placing the responsibility to address this with local government. The local government's role includes the

² The United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, at para 1.

³ Lilian Chenwi 'Implementation of housing rights in South Africa: Approaches and strategies' (2015) 24 *Journal of Law and Social Policy* at 68.

⁴ The Constitution of the Republic of South Africa, 1996.

promotion of housing affordability. This includes ensuring that financially capable individuals can access self-built houses, based on the applicable laws for planning and access to finance.

A vast majority of litigations against the local government in relation to the judicial enforcement of the right of access to adequate housing revolve around housing backlogs, evictions, and removals. Despite the limited legal, institutional, and structural role that local government plays in housing delivery, as well as with the limited resources at its disposal, the Constitutional Court repeatedly ordered local government to provide emergency housing, mostly, to the needy and homeless.⁵ The judicial enforcement of the right to housing is in line with the seven aspects identified by the UN CESCR General Comment No. 4, particularly, the legal security of tenure and location, which is the main determinant in the achievement of spatial equity. Each sphere of government is required to accept responsibility for the implementation of specific parts of the social housing programme.⁶

Chapter Three analyses the roles, powers, functions, and responsibilities of local government in relation to the provision of housing. The functional area of housing is listed as a “concurrent competency” of the national and provincial spheres of government in terms of Part A of Schedule 4 of the Constitution. Nonetheless, local government has a number of key housing roles and responsibilities provided by national legislation and policies.⁷ As enumerated in Parts B of schedules 4 and 5 of the Constitution, the local government’s service delivery functions are aligned with the built environment and housing. These functions include building regulations, electricity and gas reticulation, potable water supply systems, stormwater management systems in built-up areas, sanitation, and waste disposal. In addition, the local government is responsible for the construction, servicing, and implementation of provincial housing policies and programme. Nonetheless, housing is not a functional area allocated to local government.

All municipalities may exercise housing powers. However, certain powers and functions can only be exercised by municipalities that are duly accredited to administer national housing

⁵ See discussion under Chapter Two and section 5.

⁶ See *Government of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 40.

⁷ See discussion under Chapter Three, section 52, and section 53, respectively.

programmes and/ or ultimately assigned to fulfil the housing functions. An assignment of the housing powers and functions is about the “transfer of the authority role – and this includes the right to directly receive the funds and the assets necessary to perform the function”.⁸ Local government endures a lengthy and cumbersome application process to be finally assigned housing powers or functions. Depending on the ability to demonstrate the capacity to administer one of the housing programmes, these municipalities may ultimately be assigned to fulfil the housing functions or powers on behalf of provinces. The Constitution makes it compulsory to assign to a municipality the housing function if it would most effectively be administered locally, and the municipality has the capacity to administer it.⁹ Apart from an assignment of housing functions through institutional subsidiarity, a municipality that possesses the financial and administrative capacity to administer its own housing programme may voluntarily submit to the relevant provincial government its application for accreditation and assignment of housing functions. However, so far, no municipality has been fully assigned housing functions or powers as per level 3 accreditation. Which therefore limits municipalities’ abilities to address the housing backlogs under their own initiatives.

The process of assignment has been recognised on paper since 2009.¹⁰ However, the formal transfer and assignment of the housing functions or powers have not yet been implemented.¹¹ Six metropolitan municipalities, including the City of Cape Town Metropolitan Municipality; the City of Johannesburg Metropolitan Municipality; and the eThekweni Metropolitan Municipality (Durban),¹² were ready for assignment by July 2014. Nonetheless, the assignment process was postponed by the Minister and Members of the Executive Council (MINMEC) responsible for Human Settlements, after recommending for the further revision of the Accreditation Framework for Municipalities to Administer National Housing Programmes, initially developed in 2004. The framework is meant to give effect to the principle of subsidiarity in relation to housing functions and powers. Since 2017, the revised Accreditation and Assignment Frameworks for Municipalities to Administer National Human

⁸ The National Housing Code: Accreditation of Municipalities (2009) at 6.

⁹ See Section 156(4) of the Constitution of the Republic of South Africa, 1996.

¹⁰ Kate Tissington ‘Jumping the Queue’, *Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa* (2013).

¹¹ David Gardner and Nick Graham ‘Analysis of the Human Settlement Programme and the Subsidy Instruments’ (2017) at 24.

¹² Department of Human Settlements ‘Annual Report 2013/2014’ (2014) at 25.

Settlements Programmes have not been effectively used to gauge the capacity and ultimately assign housing functions and powers to qualifying municipalities. Perhaps the call for revision of the framework during imminent assignment around 2014 was a deliberate move to avoid devolving housing powers and functions to local government. At the present juncture, the national and provincial governments are still reluctant to fully assign these powers and functions to qualifying municipalities.

Chapter Four responds to the question of what are the local government's roles, responsibilities, powers, and functions regarding spatial planning based on constitutional, legislative, and policy frameworks as well as courts' jurisprudence. It also illustrates how local government spatial planning competence and powers can be used towards spatial equity if they are used together with housing powers. The Chapter further establishes the nature and extent to which the municipal spatial planning framework intersects with its housing framework. However, the local government housing and spatial planning powers do not articulate well with municipal housing powers/responsibilities. Thus, conferring local government with spatial planning powers but not the attendant housing competencies means that the potential of its spatial planning powers in relation to housing remains cumbersome to be realised. Accordingly, the latter authority does not always rest adequately with the local government.

Judicial delineation of spatial planning powers has asserted municipal autonomy in relation to spatial planning.¹³ Each sphere of government exercises constitutionally allocated powers while regulated by the relevant legislation. "Municipal planning" is directly devolved to the local government; the concurrent competencies of "regional planning and development" and "rural and urban development" are assigned to both the national and provincial spheres of government; and "provincial planning" is exclusively allocated to the provincial government.

The interpretation of the term "urban and rural development" excludes the power to approve applications for the rezoning of land and the establishment of townships. The usurping of the power of municipalities in managing "municipal planning" would constitute an intrusion into the autonomous status of local government. The national and provincial governments may regulate how municipalities exercise their executive authority in relation to municipal

¹³ See discussion under Chapter Four and section 5.

planning. Nonetheless, the “power to regulate the exercise of a municipality’s executive authority... does not authorise any intrusion in connection with a municipality’s legislative authority in any manner or form.”¹⁴ Additionally, the Spatial Planning and Land Use Management Act (SPLUMA)¹⁵ confers municipalities with substantial planning powers. A combination of land use and the provision of housing for the poor in urban areas in South Africa requires a coordinated and collaborative approach between the different spheres of government. In the process, the achievement of spatial equity through the realisation of the right to housing hinges on the placements of housing developments in restructuring zones that can be deemed to be well-located areas.

Chapter Five of the Thesis investigated the compatibility between local government’s housing and spatial planning powers and sought to ascertain the challenges in the current role and responsibilities of local government in terms of pursuing the achievement of spatial equity. The problematisation of challenges faced by local government is assessed by exploring the emerging trends and issues in the practice of metropolitan municipalities of Cape Town (in the Western Cape), Johannesburg (in Gauteng), and eThekweni (in KwaZulu-Natal). These three metropolitan municipalities have very different challenges in achieving spatial equity.

The Chapter shows that, despite having a full gamut of spatial planning powers and well-stocked planning departments, the municipalities still struggle to achieve spatial equity. The municipalities have a low level of housing accreditation. As a result, they have limited decision-making autonomy over land use and the location of housing developments. An additional challenge is that these municipalities do not utilise their expropriation powers granted by Section 9(3)(a) of the Housing Act¹⁶ and the provisions of the Expropriation Act¹⁷ to expropriate property for housing purposes. Despite some impressive objectives and intentions contained in the Integrated Development Plans (IDPs) and Municipal Spatial Development Frameworks (MSDFs), the legal, institutional and structural shortcomings of the municipalities emanate primarily from the inability to efficiently and effectively use their

¹⁴ See *Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd and Others* 2022 (4) SA 167 (WCC) at para 27.

¹⁵ 16 of 2013.

¹⁶ 107 of 1997.

¹⁷ 63 of 1975.

constitutional and legislative housing and spatial planning powers to their advantage and drastically reform the provision of housing in well-located urban land. While the municipalities' planning departments might pursue the achievement of spatial equity, they need considerable housing fiscus to accomplish this goal.

Although local government has been conferred substantial powers by legislation, policy, and courts, all three municipalities are accredited at level 2, reflecting that they are currently not fully assigned housing powers and functions. The courts' pattern for imposing rights-related obligations in relation to housing requires municipalities to implement these obligations within the general housing and spatial planning powers and functions of local government.

3 Recommendations

Rapid urbanisation and the concentration of the economy in urban areas reinforce the focus on speeding up the development of cities through housing.¹⁸ The empowerment of qualifying municipalities with full (level 3 accreditation) housing powers and functions will expedite the quest for integrated urban development, and the delivery of large-scale housing to the urban poor in need of economic opportunities and public services available in the city cores. Hence, this section of recommendations answers the last research question which ponders how should the role of local government in housing be reconceptualised to match its rights-related responsibilities and its role in achieving spatial equity?

At face value, as proven in previous chapters, particularly Chapter Five which dealt with case studies, local government's challenges are not only owing to limited legal powers and functions in relation to housing, but are also institutional and structural in nature. Accordingly, the recommendations offered below are deemed to be crucial in addressing all the pertinent legal, institutional, and structural shortcomings to reconceptualise local government's role in housing provision to match its rights-related responsibilities and the achievement of spatial equity.

¹⁸ Kate Tissington 'A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice' (2011) at 11.

3.1 Devolution of housing powers and functions

The devolution of housing powers and functions from the national and provincial governments to local governments in South Africa is a complex legal issue with implications for all levels of government. All municipalities can exercise attendant housing powers conferred by national legislation. Unless accreditation of the most capable municipalities (including Cape Town, Johannesburg, and eThekweni) finally gives full power over all aspects as well as full control over the relevant State-owned land, then local government will not be able to fully use their spatial planning powers - i.e., the inherent limits in their housing accreditation status holds them back. In certain instances, some municipalities are reluctant to assume authority and responsibilities in the provision of housing.¹⁹ Much of the reluctance to assume housing roles is to avoid overstretching their housing programmes and fiscus.

As observed in the evidence presented in case studies discussed in Chapter Five of the Thesis, the metropolitan municipalities of Cape Town, Johannesburg, and the eThekweni, which have all been accredited at Level 2, possess considerable fiscal and financial resources as well as political and administrative capacity to be fully assigned housing functions. However, the three cities are still struggling to implement their housing and spatial planning powers to promote the achievement of spatial equity. Thus, these municipalities should effectively exercise their powers in order to address spatial inequalities and housing backlogs while providing the poor with access to well-located urban land.

In addition, as previously indicated, extending municipal powers to undertake the housing functions or powers may best expedite the provision or delivery of housing in South Africa. If adequately legally, financially, and structurally equipped or empowered to implement housing and planning-related competencies and responsibilities, local government can fulfil its constitutional developmental role and contribute to the achievement of spatial equity. Thus, it is hereby recommended that the national and provincial governments should devolve housing functions and powers to qualifying municipalities. The application of the accreditation process should be efficiently used to vet the capacity of every applicant municipality. Nonetheless, the accreditation process should not be used as a tool to frustrate and alienate qualifying municipalities. Lastly, the implementation of the assignment process

¹⁹ Municipal Demarcation Board 'Municipal powers and functions: Capacity assessment 2018' (2021) at 19.

must be applied and enforced to every qualifying metropolitan municipality that can plan and execute housing on a more coordinated basis.

Devolving housing powers to local governments in South Africa has the potential to improve housing outcomes. However, careful consideration needs to be given to the legal framework, financial resources, capacity building, and accountability mechanisms in order to ensure for effective implementation and achievement of spatial equity through the provision of adequate housing to the urban poor.

3.2 Viable co-operative governance in rapid release of well-located land

All three spheres of government have a duty to manage the wave of urbanisation, subject to the effective management of urban land reform. The latter aims to provide the poor with access to urban land and must focus on releasing well-located parcels of land. “The national government owns vast amounts of public land in our cities, but so far little of it has been put to more productive, efficient and just use”.²⁰ Nevertheless, a major institutional and structural hurdle to municipalities’ land use for housing provision is the reluctance of the national and provincial governments to release well-located parcels of land. The main bodies responsible for this problem are the National Department of Human Settlements and the Housing Development Agency.²¹ Disjointed efforts between national, provincial, and local governments hinders the efficient implementation of housing programmes. Delays in approvals and funding disbursement are common. This points to poor intergovernmental collaboration regarding the common goal of addressing housing backlogs and spatial inequalities.

A functional and dedicated multi-level system and governance must redress spatial inequalities in metropolitan regions. Section 12(2)(a) of SPLUMA requires that the three spheres “must participate in the spatial planning and land use management processes that impact each other to ensure that the plans and programmes are coordinated, consistent, and in harmony with each other”.

²⁰ Adi Kumar and Nick Budlender ‘Idle SANDF land in Cape Town could accommodate 67,000 homes, reducing the housing backlog’ (2023) available at <https://tinyurl.com/3sku4x4d> (accessed on 25 August 2023).

²¹ Ibid.

The central proposition that is advanced therefore is underscored on the premise for co-ordinating their resources and actions to produce comprehensive and inclusive spatial equity-based planning and housing outcomes. Cognisant of the implications of the Court judgment in *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others*,²² there must be intergovernmental coordination around the sale of government property in accordance with the provisions of Chapter Three of the Constitution, the Government Immovable Asset Management Act,²³ and the Intergovernmental Relations Framework Act.²⁴ This highlights the significance of co-operative governance wherein the three spheres of government can jointly coordinate their activities in the quest to address spatial inequalities and promote access to land and affordable housing in South Africa.

The State plays a dominant role “in constructing and sustaining spatially and racially segregated urban settlement patterns at the national, regional and local levels through the implementation of various administrative, political and legal mechanisms”.²⁵ However, since 1994, the post-apartheid government has lacked the will to redress the spatial legacy of apartheid and push for the city’s integration.²⁶

The Court in *Adonisi* berated both the Western Cape provincial government and the Cape Town Metropolitan Municipality for lacking the will to address spatial segregation in inner city Cape Town. Before the sale of any government land, the custodian of the immovable property is obliged to first consider whether the asset can be used in relation to the social development initiatives of the government. Accordingly, before the sale of any well-located government land or site, the provincial government and/or the municipality must first establish if the land or site might be used for government-subsidised housing. In the current juncture wherein the struggle to access urban land by the poor is commonplace, provincial, and local governments are legally bound to comply with the constitutional and legal obligation to address spatial inequalities. This can help to address problems surrounding the

²² See *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2021] 4 All SA 69 (WCC) (31 August 2020).

²³ 19 of 2007.

²⁴ 17 of 2005.

²⁵ Margot Strauss ‘A historical exposition of spatial injustice and segregated urban settlement in South Africa’ (2019) 25(2) *Fundamina (Pretoria)* at 162.

²⁶ Ivan Turok et al ‘Social Inequality and Spatial Segregation in Cape Town’ in Maarten van Ham et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) at 71.

lack of sufficient land for affordable housing and the promotion of integrated and sustainable human settlements.

Good governance in urban land management and administration is not confined to the different spheres of government but also different government departments.²⁷ It is recommended that SDFs need to do more thorough land audits within cities and have a plan for acquiring such land (either through buying or expropriating land or through intergovernmental transfer). Through the Housing Development Agency and other stakeholders, the audits are conducted by the Department of Public Works, the Department of Agriculture, Land Reform and Rural Development, and the Department of Human Settlements.²⁸ Concerted recommendations are deduced from a number of invaluable resolutions adopted at the 2018 National Member's Assembly of the South African Local Government Association.²⁹ With the intent to advance the achievement of spatial equity, this Thesis also considers these resolutions as part of its recommendations. After evaluating the appropriateness of land for developmental purposes, municipalities should exercise the proactive first option in acquiring State-owned land before its disposal. Intergovernmental co-ordination in developing and maintaining a comprehensive database of State-owned land will enable municipalities to easily identify owners, subject to clear procedures for land acquisition.³⁰

Through exploring the expropriation of urban land, municipalities may make acquisitions through two options: financial acquisition process; and non-financial acquisition process. The former option invokes negotiated prices and grant support from the Urban Land Grant, the Urban Settlements Development Grant (USDG), and the Human Settlement Development Grant (HSDG). The latter process includes incentives for investments and land use development; land banking or expropriation with compensation (while relying on the legislative framework, in particular, the Housing Act and the Expropriation Act).³¹

²⁷ Neo Molefe and Seana Nkhahle 'Municipal urban land release and acquisition – SALGA's proposals to facilitate spatial transformation and inclusive economic growth through efficient urban land governance and management approaches' (2019) *75 Town and Regional Planning* at 5.

²⁸ Ibid 4.

²⁹ Ibid 3-5.

³⁰ Ibid 4.

³¹ Ibid.

3.3 Housing developments in well-located areas

The notion of “well-located” land plays a central role in the achievement of spatial equity because urban and inner-city areas allow residents to easily access, *inter alia*, public amenities and facilities, transportation, and transport routes, leading to a good quality of urban life. Nonetheless, there are challenges in terms of identifying and designating suitable locations and spaces for government-subsidised housing developments.³² Traditional interventions by the State often focus on in-situ upgrading and construction of government-subsidised housing in poorly located peripheral townships and informal settlements instead of promoting economic, social, and spatial integration in the urban spaces.³³

In *Government of South Africa & Others v Grootboom & Others*,³⁴ the Constitutional Court emphasised that “the unavailability of land suitable for housing development is a key factor in the fight against the country’s housing shortage”.³⁵ Mindful of the spatial inequalities wherein a majority of poor and working-class black Africans reside on the urban periphery, are distanced from places of employment, and lack access to amenities and services. The acute shortage of affordable housing options causes an unsustainable segregated urban environment.³⁶

The State has opted to upgrade informal settlements and develop peripheral greenfield areas, albeit, emanating primarily from the National Housing Code,³⁷ the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,³⁸ and the court jurisprudence in cases such as *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*.³⁹ Surely, the housing policy has aggravated the apartheid spatial form and reinforced racial exclusion. Inevitably, instead of merely capturing in vain priorities in the MSDFs without concrete implementation, this Thesis recommends that municipalities must prioritise the achievement of spatial equity, which is no longer negotiable almost 30 years into South Africa’s

³² The Fuller Centre for Housing ‘Housing delivery in South Africa - Draft Report: Housing delivery 2014’ (2014) at 2.

³³ Calvin Nengomasha ‘Post-Apartheid Cities in South Africa: A Mirage of Inclusivity’ in Hangwelani H Magidimisa-Chipungu and Lovemore Chipungu *Urban Inclusivity in Southern Africa* (2021) at 163.

³⁴ 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 373.

³⁵ See *Grootboom* para 3.

³⁶ See *Adonisi* para 35.

³⁷ The National Housing Code: Upgrading of Informal Settlements Programme (2009) at 9.

³⁸ 19 of 1998.

³⁹ 2010 (3) SA 545 (CC).

constitutional democracy. Plans for achieving spatial equity must spearhead the development of new government-subsidised housing in urban and inner-city areas. Conventional peripheral areas require an increase in opportunities and access to amenities.

The MSDFs and IDPs must guide housing developments in a manner that promotes spatial, social, and economic integrations and the creation of mixed-use neighbourhoods.⁴⁰ The actualisation of bringing into line imperatives such as integrated spatial planning, integrated human settlements, urban resilience, local economic development, and sustainable local development,⁴¹ has the potential of realising the right of access to adequate housing as well as creating human settlements that foster the desired transformation.⁴²

Although certain levels of service delivery may be attained at the local level, the developmental mandate of local government extends much further than basic service delivery. This mandate, however, can only be achieved if municipalities are equipped with the appropriate functions and powers to fulfil these roles,⁴³ as reiterated above under the subsection dealing with the devolution of housing powers and functions. Hence, the building block to overcoming spatial inequalities is through local government's realisation of the right of access to adequate housing. Primarily, the spaces or lands that are identified and designated for housing developments, whether inner-city or near urban cores, must be capable of elevating socially disadvantaged racial groups.

3.4 Legal dimensions of spatial equity-based professional development initiatives

Professional planners play a crucial role in ensuring spatial equity within housing developments. This involves considering legal frameworks and regulations that impact how these projects are planned, implemented, and ultimately, achieve equitable outcomes. Planners must ensure compliance with fair housing laws and policies, including the respective municipal by-laws and policies that explicitly prohibit discrimination based on race, socio-economic status, disability, etc. This translates to creating inclusive housing

⁴⁰ Daphne Ntlhe 'The transformation of compact rural human settlements in South Africa - The case of Elim in Limpopo' (2022) 17(1) *International Journal of Sustainable Development and Planning* at 313.

⁴¹ Gerrit van der Valt 'Local Government' in Chris Landsberg and Suzanne Graham (eds) *Government and Politics in South Africa: Coming of Age* (2017) at 157.

⁴² South African Cities Network 'State of South African Cities Report 2016: The People's Guide' (2016) at 3.

⁴³ Annette Christmas and Jaap de Visser 'Bridging the Gap between Theory and Practice: Reviewing the Functions and Powers of Local Government in South Africa' (2009) 2 *Commonwealth Journal of Local Governance* at 109.

developments accessible to diverse populations. Understanding accessibility standards for different categories of residents is crucial to ensure their needs are met in housing design and infrastructure. Zoning regulations dictate land use within a municipality. Planners should advocate for regulations that allow for mixed-income housing developments, promoting social and economic integration. Overcoming restrictive zoning that limits housing options in desirable locations is important for achieving spatial equity.

Municipal spatial planning cannot operate optimally without the requisite human resources. It requires capable, competent, and qualified personnel who can fulfil its planning developmental objectives. Indeed, the requisite composition of personnel among planners, together with the brand-new institutions, laws, visions, systems, and plans, form part of the government's machinery in appropriately reshaping the South African society and, more particularly, the cities and towns.⁴⁴ Throughout, the Thesis demonstrates that, for local government to flourish in performance and service delivery, it requires the necessary capacity, resources, and skills. However, municipalities already have command over substantial resources and skills e.g., in their planning departments. By understanding the legal dimensions of spatial equity, professional planners can ensure housing developments are inclusive, create opportunities for diverse populations, and ultimately contribute to a more just and equitable society. There is also a need to ensure that municipalities have the financial resources, skilled personnel, and technical expertise required to effectively plan, manage, and deliver large-scale housing projects.

A variety of reasons have been attributed to the stagnated spatial transformation in towns and cities owing to political interference, weak planning tools, lack of capacity, and planners' lack of the necessary skills. At the local government level, the low retention of skilled civil servants undermines continuity in service provision and reduces the veracity of community project implementation.⁴⁵ Investing in training programmes for local government officials on housing management and project implementation can significantly improve delivery capacity.

⁴⁴ Alan Mabin and Dan Smit 'Reconstructing South Africa's cities? The making of urban planning 1900–2000' (1997) 12(2) *Planning Perspectives* at 193.

⁴⁵ Danielle Resnick and Gilbert Siame *Bureaucratic commitment to local government service: Lessons from Zambia* (2022).

Thus, another salient feature of local government's spatial planning powers, functions, and responsibilities relates to its institutional and leadership capacity as well as administrative competency in executing these powers, functions, and responsibilities. Cognisant of the benefits of administrative decentralisation, local government is conferred with the powers to recruit, discipline, dismiss and remunerate its staff.⁴⁶ Accordingly, this, therefore, concerns mainly the composition of municipal planners' human resources and internal procedural systems within the municipal administration.⁴⁷ In this regard, Molefe and Nkhahle recommend that "municipalities should employ professional town planners, land surveyors and other real estate professionals that form part of the land management and administration".⁴⁸

In addition, the members of the Municipal Planning Tribunal, which is established in terms of Section 35(1) of SPLUMA, form an integral part of urban spatial governance. They must be well-versed, qualified, and competent to make the appropriate decisions that pursue the achievement of spatial equity. Some could be professional planners in accordance with Section 13(4) of the Planning Professions Act.⁴⁹ In terms of Section 2(a) of the Planning Professions Act, professional planners are required to further human development, specifically in the fields of:

- (i) delimitation, regulation and management of land uses;
- (ii) the organisation of service infrastructure, utilities, facilities and housing for human settlements; and
- (iii) the co-ordination and integration of social, economic and physical sectors which comprise human settlements.

They are bound to maintain a high standard of professional conduct and integrity. Section 36(1) of SPLUMA dictates that non-municipal officials who are members of the Municipal Planning Tribunal must be in possession of requisite "knowledge and experience of spatial

⁴⁶ Ignatius M Naha *Full decentralisation of powers, resources and functions in the Kingdom of Lesotho: An evaluation from a developmental local government perspective* (unpublished master's dissertation, Stellenbosch University, 2015) at 48.

⁴⁷ SB Koma 'Governance and resource management in Southern Africa: strategies for advancement' in Charles O.K Allen-Ile, Modimowabarwa H Kanyane and Isioma U Ile (eds) *Governance and resource management in Southern Africa: Challenges and strategies for advancement* (2015).

⁴⁸ See Molefe and Nkhahle op cit note 27 at 4.

⁴⁹ See the Planning Professions Act 6 of 2002 as amended by Rural Development and Land Reform General Amendment Act 4 of 2011.

planning, land use management and land development or the law related thereto”.⁵⁰ These non-municipal officials, by assuming and executing authorities given by the municipal council, need to conform to the expected performance standards and due diligence on equal footing with municipal officials.

4 Areas for further research

Several salient issues were scantily discussed in the Thesis. For future legal research agendas, the sub-sections below highlight these issues.

4.1 Legal dimensions of rural-urban interdependency

An important area for further study should concern “rural-urban interdependency” and the role of small towns and rural municipalities in the realisation of the right of access to adequate housing and the achievement of spatial equity in South Africa. Due to the exponentiate rapid urbanisation process, urban centres are bound to play a pivotal role in uplifting large segments of society. Evidently, the process leads to the unjust concentration of resources in urban areas. Clearly, the post-apartheid decentralisation framework has financially and institutionally set to advance principally metropolitan municipalities and neglects district and local municipalities that share jurisdictions.⁵¹ This framework inadvertently perpetuates the practice of spatial inequalities, separations, and disparities within the system of local government. It aggravates the challenges stemming from urban-rural interplay. Thus, empowering district and local municipalities to develop their communities, lessens the burden of rapid urbanisation, minimises rural-to-urban migration, and simultaneously addresses regional disparities socially and economically.

Even though the urban local governments are ideal sites for socio-economic development, they still face infrastructure backlogs and economic challenges that hamper their immediate

⁵⁰ In addition, section 2 of the Planning Professions Act provides for the planning profession principles. The planning professionals, with their expertise, need to initiate and manage change in the built and natural environment of urban and rural areas delineated at different geographic scales (region, subregion, city, town, village, neighbourhood).

⁵¹ A high of municipalities encountering challenges of unemployment, poverty and weak infrastructure are in rural areas. They largely depend on financial transfers to fulfil their mandate. The government is grappling to minimize this problem as evidenced by the recent Department of Cooperative Governance and Traditional Affairs proposal of amalgamating many municipalities to make them self-reliant and functional. See Mkhululi Ncube and Jabulile Monnakgotla ‘Amalgamation of South Africa’s rural municipalities: is it a good idea?’ (2016) 19 *Commonwealth Journal of Local Governance* at 75.

and long-term potential to cater to the entire urban population. There is a need to address urban and rural challenges in a balanced manner.⁵² The least economically developed and the most spatially and physically disadvantaged areas need to be given special priority. The SDFs of district municipalities must give more explicit attention to how the rural and urban areas in their jurisdiction can interact and link. The Small Town Regeneration Strategy, 2021, alludes to decisive spatial transformation and simultaneously managing the growing urban population, without neglecting the rural poor.⁵³ Most rural municipalities have some small towns, and they can use their spatial planning and housing functions accordingly to manage “rural-urban interdependency” efficiently and effectively. Part of the solutions includes sustaining (or expanding) rural investment to provide poor rural households with employment and income opportunities; and due to the stronger connections to the rural poor, investing in towns and secondary cities.

4.2 Integrated public transport

Another promising avenue for future studies is the attainment of integrated public transport in cities. Transport is also essential for spatial equity, and it adds another layer of functional complexity to the articulation of problems already highlighted in this Thesis. Effective public transport integration needs to be considered alongside urban planning. An integrated public transport system combines different modes of transportation (buses, trains, etc.) into a seamless network. This offers several benefits that contribute to spatial equity. Integrated systems make it easier for people to reach different parts of the city, especially those who rely on public transport (the poor, low-income residents, etc). This bridges the gap between disadvantaged communities and opportunities.

There is a constitutional division of functional competencies and powers in relation to transport. As such is an important area for further study. In the contemporary discourse, there is a paucity of critical attention given to the provision of urban passenger transport pertaining

⁵² Dennis A Rondinelli ‘Increasing the access of the poor to urban service: problems, policy alternatives and organizational choices’ in Dennis A Rondinelli and G Shabbir Cheema (eds) *Urban Services in developing countries: public and private roles in urban development* (1988). See also Moipone Rakolojane ‘Rural and Urban Development Issues’ in Frik de Beer and Hennie Swanepoel *Introduction to Development Studies* (2004) at 25-26 and John Ntema ‘The State and Implications of Housing Provision in Small Towns: Experiences in the Raymond Mhlaba Local Municipality, Eastern Cape Province’ in Ronnie Donaldson (ed) *Socio-Spatial Small Town Dynamics in South Africa* (2023) at 127.

⁵³ Department of Cooperative Governance ‘The Small Town Regeneration Strategy and Implementation Plan’ (2021) at xvii.

to the developmental role of local government in South Africa.⁵⁴ The infrastructure for municipal public transport is essential for the interconnection of people, economic activity, and business.

The issue of transport has popped up throughout this Thesis as another central tool for spatial equity and good transport in a city can counteract a lot of the consequences of spatial disparities entrenched during the apartheid system. Nevertheless, transport is also a functional area that has not been devolved to local government. Thus, municipalities cannot fully use their transport functions to complement housing and spatial planning functions. Further research needs to ascertain how the devolution of transport function can complement the devolution to the local government of housing and spatial planning powers and how these functions must be exercised in tandem. An integrated public transport, when implemented with a focus on equity, can be a powerful tool for creating a more just and inclusive urban environment.

4.3 Gender-based spatial discrimination

The three most familiar forces that shape spatial discrimination in towns and cities are class, race, and gender.⁵⁵ In the South African context, literature focuses mainly on the unequal distribution of resources, opportunities, and services anchored on the premises of race and class. The components of affordability and accessibility of urban real estate markets do not often address the housing needs of diverse social groups, particularly poor black households who intend either to rent or purchase a house in urban centres.⁵⁶ Nonetheless, a steadily emerging and increasing number of middle-class and affluent black households are breaking the systemic barriers of spatial discrimination based on race and class.⁵⁷ The logic of spatial inequalities is shifting from racial segregation to class segregation.

⁵⁴ Peter Wilkinson 'Reframing Urban Passenger Transport as a Strategic Priority for Developmental Local Government' in Mirjam Van Donk et al (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) at 203.

⁵⁵ Edward W Soja 'The city and spatial justice' (2009) 1 *JSSJ* at 3

⁵⁶ Wendy Wilson and Cassie Barton 'What is affordable housing?' (2019) at 7.

⁵⁷ Amy Kracker Selzer and Patrick Heller 'The spatial dynamics of middle-class formation in post apartheid South Africa: enclavization and fragmentation in Johannesburg' in Julian Go (ed) *Political Power and Social Theory* (2010) at 149; Robert Mattes 'South Africa's emerging black middle class: A harbinger of political change?' (2014) at 4.

Notwithstanding this positive emergence, gender-based spatial discrimination equally requires a critical approach to address the injustice that perpetuates spatially structural barriers that women encounter in terms of accessing adequate housing in well-located areas. Contemporary literature neglects to explore the odds and prospects of a poor or low-income black woman in accessing well-located urban land through housing. Therefore, critiquing the effects of gender-based spatial discrimination and devising solutions thereto in post-apartheid South Africa would highlight the quest to redress all forms or forces that shape spatial discrimination.

This Thesis has explicitly emphasised the forms of spatial discrimination of race and class. Therefore, further research remains in relation to the aspect of gender. Accordingly, for the purpose of achieving spatial equity, inclusive of women's elevation and benefit, local government's spatial planning and housing powers or functions can be wielded with a gender lens to eliminate systemic barriers of gender-based spatial discrimination while simultaneously addressing all forms of discrimination based on race, class, and gender. Other intersectional factors such as age, disability, sexuality etc, similarly require exposition in order to address discrimination while promoting and protecting the rights of these segments of society.

4.4 Countering urban real estate market forces

The planning system resolves competing claims over land use, including the protection of sensitive ecosystems and natural environments such as forests, wetlands, etc.⁵⁸ In all forms of land use, residential zones (for housing) have the largest impact on urban land transformation.⁵⁹ A major problem that local government spatial planning needs to tackle is the negative influence and consequences of the urban real estate market forces, encompassing housing, land, and commercial property. The property markets continue to overshadow and contradict the current strategic approach to planning which aims to establish more equitable spatial outcomes in South Africa.⁶⁰ According to Turok et al:

⁵⁸ Ruobing Lv et al 'Urban historic heritage buffer zone delineation: the case of Shedian' (2022) 10(64) *Herit Sci* at 1; Somayeh Alikhani et al 'Urban wetlands: A review on ecological and cultural values' (2021) 13 *Water* at 1.

⁵⁹ Ivan Turok 'Housing and the urban premium' (2016) 54(3) *Habitat International* at 234. See also Ivan Turok 'Mass housing or better cities?' (2016) 14(2) *HSRC Review* at 40-41.

⁶⁰ Lorryn Steenkamp and Tanja Winkler 'Linking Spatial Planning and Land Use Management in the City of Cape Town: The case of the package of plans' (2014) 25 *Urban Forum* 335 at 355.

Social housing has the potential to contribute to economic inclusion and urban integration if it is well-located. However, this is complicated by economic forces that shape land and property markets and constrain the ability of social housing organisations to afford suitable sites for development on the open market.⁶¹

Restrictions from the urban real estate market makes well-located land in urban areas to be very expensive. Thus, hampering the affordability of housing construction at scale. Consequently, most housing developments constructed by the government take place in peripheral townships and informal settlements outside urban areas. As a result, there are limited attempts to redress the spatial legacy of apartheid in urban areas. Instead, there is a continuation of urban sprawl along with informal settlements on the far outskirts of cities and towns.⁶²

Cities' changes in the spatial form are largely driven by direct and indirect structural market forces. Unfortunately, local planning is more market-oriented, and housing accessibility becomes largely dependent on household finances.⁶³ Accordingly, bearing in mind households who do not qualify for government-subsidised housing or afford the requirements of housing markets, municipalities bear the primary task of countering the influence and impacts of urban real estate market forces by promoting affordable housing. To achieve this, municipalities may consider various ways such as efficient housing subsidies, cost-benefit analyses to leverage the current system of essential service subsidies, and progressive property rates policies. There is a need to ensure that market forces do not impose stringent eligibility requirements to qualify for housing and prohibit or limit the ability of certain social groups that cannot meet the minimum incomes, credit scores, formal employment, and residency permits.

4.5 Enhancing spatial equity through local government's service delivery functions

Another area for further research is the enhancement of spatial equity through the improvement of urban services in the current outlying areas. Spatial disparities affect

⁶¹ Ivan Turok et al 'Can social housing help to integrate divided cities?' (2022) 15 *Cambridge Journal of Regions, Economy and Society* at 93.

⁶² Stuart Wilson *Human Rights and the Transformation of Property* (2021) at 36.

⁶³ Rebecca Cavicchia 'Housing accessibility in densifying cities: Entangled housing and land use policy limitations and insights from Oslo' (2023) 127 *Land Use Policy* at 2.

peoples' accessibility to essential services based on the factor of location.⁶⁴ The disparities apply at both the regional scale (between cities and isolated rural areas) and the metropolitan scale (between the Central Business Districts (CBDs) and the main townships).⁶⁵ From a spatial perspective, Li et al explored the prospect of equity pertaining to public service delivery among regions.⁶⁶ They concluded that inequality in resources leads to disparities in the level of public service delivery among regions and this largely influences the overall regional inequality.⁶⁷

Therefore, there is a need to ensure that, even in peripheral areas, there are better-located schools, clinics, and bulk infrastructure. Efficient and optimal service delivery across the municipal jurisdiction, including peripheral townships and informal settlements, provides all residents, with access to essential amenities, owing to geographical distribution, location of services, and subsidised essential services. Access to indispensable public facilities promotes "equality in sustainable urban development and high quality of life".⁶⁸ According to Tshazi:

Public amenities should be provided with understanding of the association between amenity distribution and the population that needs the amenities. Public amenities should then be distributed with the aim of achieving spatial equity. To achieve spatial equity, the number of amenities that are provided in all areas should meet the population's needs and demands.⁶⁹

Local government plays a vital role in planning and developing infrastructure projects to reduce spatial inequalities and promote social inclusion.⁷⁰ Good quality of life can be enjoyed by the rich and poor when the allocation of resources, including infrastructure and public services such as better-located basic municipal services, health care, public spaces, schooling

⁶⁴ Tijs Neutens et al 'Equity of urban service delivery: A comparison of different accessibility measures' (2010) 42(7) *Environment and Planning A: Economy and Space* at 1613. See also Hangwelani H Magidimisa and Lovemore Chipungu *Spatial Planning in Service Delivery: Towards Distributive Justice in South Africa* (2019) 3.

⁶⁵ J Budlender and L Royston 'Edged Out: Spatial mismatch and spatial justice in South Africa's main urban centres' (2016).

⁶⁶ Ling Li et al 'Equity analysis of public service delivery among regions from temporal and spatial perspectives' (2023) 57(5) *Regional Studies* at 935.

⁶⁷ Ibid.

⁶⁸ Yongling Li et al 'Accessibility-based equity of public facilities: a case study in Xiamen, China' (2021) 14 *Applied Spatial Analysis and Policy* at 948.

⁶⁹ Qhamani N Tshazi 'Why a blanket approach to redressing spatial inequity is flawed' (2020) available at <https://tinyurl.com/5enft9e6> (accessed on 09 August 2022).

⁷⁰ Kevin Wall 'The right to functioning urban infrastructure - A review' (2021) 79 *Town and Regional Planning* at 55.

facilities, and social services, over time and space, prioritises disadvantaged or under-served areas.

Local governments have a closer connection to their communities and can engage directly with residents. Hence, through community engagement, local governments can actively involve citizens in decision-making.⁷¹ This inclusive approach helps in identifying the specific needs and priorities of different areas, ensuring that service delivery is tailored to local requirements and promoting spatial equity.

4.6 Cultural adequacy pertaining to housing projects and spatial equity

The aspect of cultural adequacy which forms part of baseline factors that determine if certain forms of shelter can constitute “adequate housing”,⁷² is another interesting area for further research. Cultural identity and diversity must be mainstreamed in housing projects.⁷³ Nonetheless, this aspect does not receive substantial attention in international, regional, and domestic legal frameworks.

There is a clear need to unpack the meaning of cultural identity and diversity in housing projects and to unpack in greater detail how cultural identity and diversity can assist in the achievement of spatial equity. Thus, the evaluation of culturally appropriate design elements should address several pertinent questions, including the following:

- (a) how can housing design incorporate elements that cater to diverse cultural practices and preferences related to living spaces, communal areas, and religious needs?
- (b) How can the meaningful participation of residents from diverse backgrounds be integrated in the planning, design, and management of housing projects?
- (c) How can housing projects be located and designed to promote access to essential services, amenities, and economic opportunities, considering cultural needs and preferences?

⁷¹ Local Government Group ‘Integrating community engagement and service delivery – pointers to good practice’ (2010) at 6. See also Gilbert Siame and Vanessa Watson ‘Co-production and the issue of urban up-scaling and governance change in the global south: The case of Uganda’ (2022) 21(3) *Planning Theory* at 269.

⁷² The United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para 8(g).

⁷³ Farida Shaheed ‘Human rights are essential tools for an effective intercultural dialogue’ (2010) available at <https://www.ohchr.org/Documents/Issues/CulturalRights/Statement_cultural_diversity21052010.doc> (accessed on 14 May 2023).

- (d) How can housing projects be designed and managed to foster a sense of belonging and cultural continuity for residents over time?
- (e) How can technology be used to create flexible and adaptable housing units that cater to diverse cultural requirements?

Importantly, global case studies of successful culturally-sensitive housing projects⁷⁴ can serve as benchmarks of how South Africa can efficiently and effectively incorporate the aspect of cultural adequacy in the realisation of the right to adequate housing and the achievement of spatial equity.

5 Overall Conclusion

The consequences of colonial and apartheid spatial planning and housing laws, policies, programmes, and practices have left a repugnant legacy of spatial inequalities across South African society. Since the advent of constitutional democracy in 1994, measures to overcome spatial inequalities and housing inadequacies have produced varying degrees of successes and failures. Regardless of the various efforts and policy developments, the South African municipal planning system is still besieged by failure to adapt to and implement the promising principles of spatial justice;⁷⁵ spatial sustainability;⁷⁶ efficiency;⁷⁷ spatial resilience;⁷⁸ and good administration.⁷⁹ These principles are indispensable ingredients for the achievement of spatial equity through realisation of the right of access to adequate housing.

Challenges of the municipal planning system are similarly reflective of the broader grappling nature in which local government in general is struggling to achieve its developmental goals. Metropolitan cities face obstacles. These include the rapid urbanisation process, limited decision-making and resources, competing priorities (especially on land), scarce skills and

⁷⁴ Tasoulla Hadjiyanni et al 'Toward culturally sensitive housing — Eliminating health disparities by accounting for health' (2012) 39(2) *Housing and Society* at 149. See also Karla N Penna et al 'Indigenous engagement: Towards a culturally sensitive approach for inclusive economic development' (2022) 16(8) *International Journal of Humanities and Social Sciences* at 447.

⁷⁵ The principle of spatial justice is aimed at redressing the past spatial development imbalances and improving access to and use of land, see Section 7(a)(i) of SPLUMA.

⁷⁶ Ibid Section 7(b).

⁷⁷ Ibid Section 7(c).

⁷⁸ Ibid Section 7(d).

⁷⁹ Ibid Section 7(e)(i).

capacity in managing human settlements, expensive well-located land, and poor policy and implementation.⁸⁰

Specifically, the rapidly increasing urbanisation process presents immense challenges, such as the lack of adequate housing and the ever-mushrooming informal settlements.⁸¹ The fragmentation of urban governance stems from a variety of factors such as ineffective land use management, the poor provision of services and infrastructure, and an inequitable public transportation system.⁸² A cursory glance at the obstinate spatial inequalities, terrible shortages of housing stock, and infrastructure backlog as well as the lack of access to basic amenities, indicates that South Africa is still floundering in indirect racial discrimination.⁸³

The future of South African cities is connected to how cities address these predicaments.⁸⁴ The policy of pushing the poorer households to the margins requires rectification through the development of government-subsidised housing in well-located urban land. The ambitions of spatial equity are clear. The interaction between spatial planning, development, and equality requires that the aspirational MSDFs, IDPs, land use schemes, and social housing development programmes must be driven by the desire to best serve the interests of the black poor masses. Unless the role of local government is properly reconceptualised, it will be difficult to achieve spatial equity. Therefore, it is crucial to correctly align local government's spatial planning and housing powers, functions, and responsibilities.

All things considered, this Thesis sought to ensure that local government can fulfil its constitutional developmental role and contribute to the achievement of spatial equity. Key solutions to these challenges are the establishment of viable co-operative governance that effectively devolves housing powers and functions to local government; co-ordinated rapid release of well-located land for housing developments; countering the negative influence and impacts of urban real estate market forces; and legal, institutional and structural commitment

⁸⁰ South African Cities Network 'Urban Shelter: Citizen Rights – Understanding the role of cities' (2014) at 8.

⁸¹ Warren Smit 'Urban governance in Africa: An overview' (2018) 10 *International Development Policy* at 55.

⁸² Ibid.

⁸³ Paul Mudau 'Western Cape High Court sets a new benchmark for promoting spatial equity, access to land and housing' (2020) 15(3) *Local Government Bulletin*.

⁸⁴ Ashley Gunter and Ruth Massey 'South Africa's Urban Future: Challenges and Opportunities' in Ruth Massey and Ashley Gunter (eds) *Urban Geography in South Africa: Perspectives and Theory* (2020) at 283.

to place government-subsidised housing developments in well-located areas within the urban cores.

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