

## HOUSING IN ALEXANDRA: TRANSFORMING THE LEGACY OF DECADES OF AN OPPRESSIVE HOUSING SCHEME

(By Ngwako Raboshakga)\*

### A. INTRODUCTION

Few have seen a long-time housing oppression more severe than in Alexandra Township, Johannesburg, South Africa. Established in 1912, Alexandra is one of the oldest urban dwellings created for and occupied by black people<sup>1</sup> in South Africa. Black people began buying land on a freehold basis in Alexandra in 1912 through the 1940s. That Alexandra was closely surrounded by areas in which white people lived or did business and that black people of Alexandra owned the land they occupied, did not sit well with the white community and the government of the time. As a result the authorities sought to find ways to effect total control of the black people of Alexandra by literally dispossessing Alexandra away from them. This was decades-long project characterised by uncertainty, oppression, deplorable living conditions and neglect. Living conditions in Alexandra began changing in the dawn of democracy; although the changes were late and insufficient to undo decades of neglect. The democratic government thus had its work cut out for it. In the twenty years of democracy, unprecedented government investment has gone into development of the township, managing only to succeed in part.

In this paper I seek to expose the systematic manner in which the colonial and apartheid governments in South Africa caused suffering of people of Alexandra from 1912 to the 1980s. I find that the central to the conduct of the then governments in respect of Alexandra, was the dispossession of secure title over the land away from black people. Their "fault" was to settle too close to the dominant race and to hold the same property rights as those of the dominant race. The state of dispossession and resultant suffering persisted up to the time of entering into a democratic era and continues to be a major challenge twenty years into democracy. As the foundation of the challenges faced by people of Alexandra today, the issue of dispossession of free-hold title cannot be ignored and that it needs to be taken seriously in finding solutions to the housing situation of Alexandra. The democratic era governments have gone for long without resolving this issue, and as a result it has become even more complex to deal with. In this paper I explore constitutionally fitting solutions for the unique land/housing situation of Alexandra. Learning from the housing

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<sup>1</sup> The term "black people", when used in a legal sense in South Africa generally refers to indigenous African people, coloured (mixed race) people and Asian people (including Indian and Chinese people). For purposes of this paper I will use this term to refer generally to indigenous African and coloured peoples, particularly those who live or lived in Alexandra.

jurisprudence developed in the past twenty years, I explore the question of what should be done to overcome decades of the dispossession project and the suffering that followed it.

In the second section of the paper I give an account of the history of land and housing in Alexandria. I do so I focus on the policies and actions of the colonial and apartheid governments aimed at dispossessing property owners of their rights and the consequent suffering of the people of this community between the 1950's and 1980s. In the third section I consider the persistent (or yet unresolved) state of dispossession of free-hold title over property in Alexandria. In particular I explore the constitutional implications of the failure to restore such free-hold titles, taking into account the reasons for the failure and the complex nature of the situation. In last section, I render suggestions on what the way forward should be, guided by the some of the jurisprudence of the constitutional court on the right to housing.

Note: As stated above in the past twenty years, unprecedented government investment has gone into development of the township, into housing development. However, this investment has largely gone on to development new housing in the effort, mainly, to rid Alexandria of informal settlements. This paper is not about these new developments but in the area known as Old Alexandria where the first settlers purchased property and lived.

## B. A HISTORICAL ACCOUNT OF HOUSING IN ALEXANDRA

In the early 1900s Hebert B Papenfus had tried and failed to establish a white residential area on the land where Alexandria is today situated, then a farm called Cyferfontein.<sup>2</sup> The farm Cyferfontein was unattractive to white property buyers and only a few plots were purchased. Papenfus then re-divided the land into small parts (144 x 82 foot lots) for purposes of developing a township for the so called natives and coloured persons (collectively black people). This move proved attractive as black people began buying lots and erecting houses on the land in 1912. The selling of the lots and the administering of the township became the responsibility of the Alexandria Township Company, in which Papenfus was the major shareholder.<sup>3</sup>

It is significant that Papenfus established Alexandria as a black and coloured township on the eve of the passing of the Natives Land Act of 1913 ("**1913 Land Act**"). The 1913 Land Act had the effect of prohibiting the purchasing of land by natives outside of the scheduled native areas. Section 8(1)(i) of the Act provided: "Nothing in this Act contained shall be construed as, . . . prohibiting the acquisition by natives from any person whatever of land or interests in land in any township lawfully established prior to the commencement of this Act, provided it is a condition of the acquisition that no land or interest in land in such township has at any time been or shall in future be, transferred except to a native or coloured person."<sup>4</sup> As Alexandria was

<sup>2</sup> Between 1909 and 1961 South Africa was a union of four former settler colonies. Together they comprised a British Colony. Although South Africa was a colony, it had wide characteristics of independence to the Britain. It was governed through a Westminster type Constitution and embraced a parliamentary supremacy similar to that of Britain. See Iain Currie and Johan de Waal *The New Constitutional & Administrative Law* (2001) at 39-77.

<sup>3</sup> Phillip Bonner & Noor Nieftagodien *Alexandra: A History* (2008) at 20-21.

<sup>4</sup> The word "native" is defined as "any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are natives."

already established as a native and coloured township when the 1913 Land Act came into commencement, black could purchase and own land in the township. Other than that the land bought by natives could only be subsequently sold to other natives, there was no other restriction on the ownership of land by black people in Alexandra.

By 1929, Alexandra had grown, with 1200 houses erected and 7200 people living there; although a little less than half of the land was still for sale.<sup>5</sup> Alexandra was fast becoming highly populated. Influx of black people into places like Alexandra at the time was largely as a result of increased labour demands by white farmers across the country on their labour tenants (blacks), and also by the reduction of the amount of stock (for self-use) that could be held by such labour tenants in white farms. Some of the black people who had the means would sell their stock and take up urban life by purchasing land in places like Alexandra. The trend of buying land in Alexandra through loans raised from building societies began to develop in the 1940s.<sup>6</sup>

The significant growth of the population in Alexandra was also an unintended consequence of the fact that the Native Urban Areas Amendment Act of 1930 did not apply to Alexandra, as a free-hold township. The latter statute was an influx control legislation that sought to restrict the movement of natives into urban areas, resulting in many people who were removed from other urban areas seeking refuge in Alexandra. For example it is recorded that between 1931 and 1935, five thousand ex-slum dwellers from the inner Johannesburg moved into Alexandra.<sup>7</sup> By 1943, the population of Alexandra is said to have reached between 40 000 and 45 000. It is estimated to have reached 100 000 by 1949.<sup>8</sup>

The surge in population in this era was caused by the explosion of industrial production in South Africa, the heart of which was in and around the area of Johannesburg. Overcrowding became a major problem. Property owners were erecting up to fifteen and more rooms (many of them cheaply and poorly built) in their stands (backyards) to rent-out to new arrivals. On average there were about 10 people per building in 1938, most of which were in a grim state.<sup>9</sup>

Alexandra became the gateway into Johannesburg for people from all over the country. It was attractive to migrant labourers and their families. It has been observed that Alexandra was “a staging post, ‘a sort of half-way station’ to use Simon Noge’s words, for would-be immigrants to Johannesburg who moved on when they found work.”<sup>10</sup> Therefore the numbers of people coming into Alexandra were always large. However, clearly, there were more people coming in than going out. Notwithstanding the influx control measures of the government, the population of the township kept growing. By 1955, the population of Alexandra had grown to 135 000.<sup>11</sup>

<sup>5</sup> Bonner (note 3 above) at 23 and 29.

<sup>6</sup> Bonner (ibid) at 25-28 and 84

<sup>7</sup> Ibid at 30.

<sup>8</sup> Ibid at 60.

<sup>9</sup> Ibid at 63 and 84..

<sup>10</sup> Ibid at 109.

<sup>11</sup> Ibid

Provision of services, governance and administration in Alexandra (at a most elementary level) were sub-contracted to the Alexandra Health Committee, established in terms of a Proclamation of the Transvaal Provincial Government in 1916. The Alexandra Health Committee comprised of representatives of the Alexandra Township Company and the coloured and native persons. It collected rates from residents. Accordingly, Alexandra had a somewhat vulgarised system of self-governance. Involvement by the government was minimal, if not non-existent.

The As far back as the 1930s, the conditions were described as: 'badly washed-out roads, and impossible sluits [deep gullies formed by heavy rain] ... inadequate transport, . . . insufficient sanitary pails and no tools or plant worth mentioning'. In order to solve these problems, extra land was needed for purpose of additional cemetery and dumping ground, for both human and other waste. The government would not assist in the acquiring such extra land. Papenfus, feeling the brunt of the Alexandra Township Company assisting to service Alexandra and wanting to make profit, sought favour with the government develop new legislation for the governance of free-hold black townships, and when that failed, for incorporation of Alexandra into Johannesburg.<sup>12</sup>

Thus, one of the characteristics of Alexandra which contributed to dire leaving conditions is the expectation by the government that Alexandra must be economically self-sufficient. That is its residents must bear responsibility for all services and amenities relating to housing, including: public infrastructure, water, sanitation, refuse removal, roads, electricity, etc. This is despite of the unfavourable economic standing of its residents, as overwhelmingly, most of the people of Alexandra were a source of labour for the white residents of the nearby neighbourhoods, farms or developing industries in Johannesburg. The insistence on self-sufficiency was sustained for decades until late 1980's. All the three spheres of government (the national Department of Native Affairs, the Transvaal Provincial Government and the Johannesburg Municipality) were not prepared to assume responsibility over Alexandra. The biggest stumbling block appears to have been Alexandra's title as a free-hold area for black people. This free-hold status had the effect that the government would have limited control over. In a sense the people were being punished for living on land on which they had full ownership rights. It is this free-hold status that earned Alexandra on the name "Township", when other townships were generally referred to as "locations".<sup>13</sup> The word "location" generally refers to urban residential areas designated for black people wherein black people were allocated houses which they rented from the Government. They did not own any such properties.<sup>14</sup>

The idea of a free-hold black township did not sit well with the authorities from the early days. In 1931, the Transvaal Provincial Executive resolved to "disestablish Alexandra and recommended to the [Secretary for Native Affairs] that the [Department of Native Affairs] take control in terms of section 30 of the Native Administration Act of 1927."<sup>15</sup> This did not materialise. In 1935, rejecting the proposal of incorporating

<sup>12</sup> Ibid at 46-49.

<sup>13</sup> For a long time, and probably still the case among the elder members of the black community, Alexandra was simply referred to "Township" or "Alexandra Township".

<sup>14</sup> See generally Bonner (note 3 above) at 39.

<sup>15</sup> Ibid at 49.

Alexandra into Johannesburg, the Johannesburg Municipality argued that the central government had allowed Alexandra to develop. The Municipality instead proposed “the total expropriation of Alexandra and the re-housing of its residents in the new township of Orlando, which would then make the area of north-east of Johannesburg [where Alexandra is situated] more attractive to white occupation”.<sup>16</sup> Since Alexandra was not under the direct control of Johannesburg Municipality (as a free-hold township), its residents were given last preference in any benefits accruing to the public, including jobs.<sup>17</sup>

Overlooking the recommendations of the Fleet Commission<sup>18</sup> not to disestablish Alexandra, the National Departments of Public Health and Native Affairs, the Provincial Government and the City Council of Johannesburg, respectively, convened a conference in 1938 on how to proceed regarding Alexandra.<sup>19</sup> One of the major pushing factors for the removal of Alexandrians from this piece of land was the pressure from nearby white suburbs: as it has been satirically reported, that “they wanted this open space for breathing purposes”.<sup>20</sup> The conference resolved to investigate the costs of either disestablishing the Township, or retaining it and providing it with essential services.<sup>21</sup> The former was favoured in the investigation and a ‘complete abolition’ of Alexandra was recommended; although compensation had to be paid to those dispossessed of their land.<sup>22</sup> Decision on this stalled, as most of the resources were being reserved for the South Africa’s participation in World War II. In 1944 a decision was taken not to disestablish Alexandra, and instead to transfer its administration to the Transvaal Peri-Urban Areas Health Board, whose purposes was to administer freehold townships situated outside municipal areas, with the particular aim controlling such areas to the satisfaction of the government.<sup>23</sup> This meant that Alexandra was still “nobody’s baby”.<sup>24</sup> The call for the expropriation of land from blacks in Alexandra would continue over the years, until it was eventually achieved from 1958 onwards. The attempt by the three spheres of government to inconclusively pass the bug to one-another continued for decades. Indeed, neither the national government, the Transvaal Provincial Government and Johannesburg Municipality ever assumed responsibility over the township until democracy

When the National Party took over governance in South Africa in 1948, it began to tighten influx control laws on Alexandra, which laws would have a major impact on living in Alexandra. A collective of laws were enacted at this period, including: the Race Classification Act, the Group Areas Act, the Abolition of Passes and Documents Act. With these, “[t]he government tried to shut all further African immigration to towns and

<sup>16</sup> Ibid at 50.

<sup>17</sup> Bonner at 107.

<sup>18</sup> The Fleet Commission was established by the Transvaal Provincial Government to make recommendations of the future of the Township. See Bonner (ibid) at 51.

<sup>19</sup> Ibid at 62.

<sup>20</sup> Ibid at 64-65.

<sup>21</sup> Ibid at 62.

<sup>22</sup> Ibid at 63.

<sup>23</sup> It is telling that the government called the entities which administered these townships “health boards’ or “health committees”. Clearly, the idea is that these areas not be governed by a proper legally empowered local government, but by boards/committees which had to ensure that these areas hazardous to white South Africa.

<sup>24</sup> Bonner (note 3 above) at 66.

channelled all new investment in black communities into the African homelands or into hostels that would support the migrant labour system".<sup>25</sup>

During his tenure as the Minister of Native Affairs, H.F. Verwoerd sought to finally bring about the disestablishment of Alexandra. He established the Mentz Committee to make recommendations in this regard. Without much justification, the Mentz Committee recommended that: "Alexandra should not be allowed to grow any further and that its population should be reduced to so that it ultimately was comprised of residents working in the [white] northern suburbs."<sup>26</sup> This culminated into a plan, implementation of which began in 1958. The measures taken can be summarised as follows:

- (a) Transvaal Peri-Urban Areas Health Board ("**PUAHB**") would replace the partly elected Alexandra Health Committee as the administrative body of the Township. The PUAHB would not have representations of the community. It was thus an all-white committee of officials of the central and provincial governments, respectively.
- (b) Better services would be provided to the community, the costs of which would be covered by increase in rates payable by the people of Alexandra.
- (c) Mass removals: the population of Alexandra had to be reduced to about 30 000. Indeed this was followed on. By 1963, about 45 000 residents had been forcefully removed to Soweto and other black locations. This was a mass expropriation of land. The property owners lost their land and instead became tenants of the government in Soweto.<sup>27</sup> Compensation paid to the property owners had no rational basis. "PUAHB had limited its offers to two-thirds of the market price, while the actual price paid had been well below that . . ."<sup>28</sup> Property owners had no option of refusing to move if they were not happy with the compensation offered. Between 1959 and 1963, the average price compensated per property was R2700.<sup>29</sup> After 1963 removals were slowed down significantly; not out of change of desire, but due to the government running out of money to build more alternative housing in other black locations.<sup>30</sup> By 1973, 70 000 people had been relocated to other black locations, Soweto and Tembisa in particular.<sup>31</sup>

(c) Strict influx control was to be implemented in Alexandra, with the aim of restricting letting of rooms by those property owners who remained. The thinking was that those who resisted moving was that they would be facing the loss of their tenants<sup>32</sup> and increased rates, and would thus be forced to sell their houses to the PUAHB for as little money as possible. The PUAHB would then buy the houses and turn them into single sex hostels. The idea was that Alexandra would be turned into an ordinary location, like other black urban areas,

<sup>25</sup> [Footnote to be confirmed]

<sup>26</sup> Bonner (note 3 above) at 171.

<sup>27</sup> Coloured people were similarly moved, albeit to the exclusively coloured locations of Eldorado Park and Noordgesig. See Bonner (ibid) at 178.

<sup>28</sup> Ibid at 184.

<sup>29</sup> In today's terms, this amounts to about \$248.45. See Bonner (ibid) at 184.

<sup>30</sup> Ibid at 184.

<sup>31</sup> Ibid at 192.

<sup>32</sup> The PUAHB also imposed restrictions on extending buildings in one's property.

where all housing would be rented from the government and the latter would have fuller control over it. The impacts of these removals were huge, especially on school going children. It is reported that “families were broken up and divided [and that] family feuds started, children began to fight for a share of the proceeds of the sale.”<sup>33</sup> In the effort to gain better control of free-hold townships, Alexandra being the main, Parliament enacted the Better Administration of Designated Areas Act 51 of 1963. This Act granted authorities in charge of free-hold townships, such as the PUAHB, some of the powers akin to those which municipalities had over black locations in their jurisdiction. One the powers granted to such authorities was to raise money from selling “Bantu beer” (also then referred to as “kaffir beer”).<sup>34</sup> With insufficient financial support of the government, the PUAHB (and its successors in title), raised much of its revenue in this way.<sup>35</sup>

Also as a measure to effect influx control and to ensure “impermanency” of black people in urban areas, the Government pressed ahead with the plan to build single sex hostels.<sup>36</sup>

By 1967, the population had been reduced to 30 000 people, most of which were families of free-hold property owners.<sup>37</sup>

With a new Bantu Administration Board (the West Rand Administration Board [WRAB]) having taken over the administration of Alexandra in 1973, an expropriation notice was made to all the remaining property owners in Alexandra. They were to vacate their properties on or before 1 January 1975. If they did not vacate, their properties would be expropriated anyway and they would be charged rent by the WRAB. The WRAB offered property owners no more than half of the worth of their properties. There does not seem to be a rational basis for the amounts of money paid as compensation, other than that’s what the WRAB felt it could afford. Some residents who refused to move were jailed or fined significant amounts. The houses of those who were removed were either demolished or rented out to by the WRAB.<sup>38</sup> In the end, however, the plan to wipe-out Alexandra as it was and to turn it into a town of only single-sex hostels (housing servants of white people of the northern suburbs) failed. The main reasons for this failure were (a) the insufficient funds to compensate property owners; (b) insufficient funds to build new accommodation in other locations where people were being moved to; and (c) community resistance to government’s plans.<sup>39</sup>

After much campaigning by the Alexandra Liaison Committee (later re-named the Save Alexandra Party), Alexandra received a so-called “reprieve” in 1979. The government had changed its stance. Alexandra would

<sup>33</sup> Bonner (note 3 above) at 171-175.

<sup>34</sup> See section 3(1)(c) of the Better Administration of Designated Areas Act 51 of 1963.

<sup>35</sup> [Reference to be confirmed]

<sup>36</sup> To give reference, the features of the first single sex hostels built in Alexandra were as follows:

“Rooms in the hostels would have a bed, a mattress and a cupboard, but no central heating or electricity outlets. The hostels would be divided into controllable units of 150 people, divided by electrically operated steel doors . . . . There were 112 washing tubs and 32 electricity points for about 3000 residents, 1 bath per 25 residents, 1 shower per 35 and 1 hand basin and toilet per 20. In the kitchen 5 people would have to share 1 gas burner. The hostel had 40 single rooms, 98 double rooms and 412 rooms for four people.” [Reference to be confirmed]

Sadly the situation is largely still the same today.

<sup>37</sup> Bonner (note 3 above) at 191.

<sup>38</sup> Ibid at 192-196.

<sup>39</sup> Ibid at 220-222.

remain and possibly become re-developed as a residential area for black families.<sup>40</sup> It is also telling that the reprieve came soon after the 1976 student uprising and tragedy. There was some realisation that ‘High Apartheid’ was leading to crises and inspired revolt by black people.

At the time of the reprieve, there were three main challenges facing the governance of Alexandra: “poor local administration”, “financial shortfalls” and population influx (i.e. increasing overcrowding).<sup>41</sup> People of Alexandra had come to resent (reaching complete stage of distrust) the government imposed all white WRAB. There was insufficient investment by the government into the township: “the main sources of financing township administration and development were profits from beer and liquor sales”.<sup>42</sup> Leaving conditions people of Alexandra were in a state of dire — “[u]nlike other townships that were established in the 1950s and 1960s Alexandra did not benefit from investment in housing and infrastructure, except for the erection of hostels [and] as a result, by the end of the 1970s basic infrastructure was hopelessly outdated and in varying states of disrepair.” At that time, Alexandra was not electrified<sup>43</sup> — still known as the “Dark City” — and the bucket system was in use. There was no storm water drainage; only one road was tarred; a handful of houses had to share a single water tap; and there was only one clinic and two crèches. The population was growing at a staggering rate – calculated to have grown by 50% in three years. At the time, “Most people . . . occupied rooms in a house (75 per cent) and the rest staying in outside rooms or shacks . . . . About 80 per cent of households lived in either one or two rooms [and] the average size of the household was six.” Thus: “By 1980 every facet of life in Alexandra was in dire need of improvement”.<sup>44</sup>

After the announcement of the reprieve, the apartheid government, in consultation with the Alexandra Liaison Committee (led by leaders of the Save Alexandra Party) sought to put together a redevelopment plan. This culminated in the 1980 Master Plan. In 1982, Parliament passed the Black Local Authorities Act 102 of 1982, with the aim of creating formal local government for black areas, led by black people. (This was a set up for failure, of course, as such authorities had to be financially self-sufficient.) Being popular at the time, having negotiated the reprieve, leaders of the Save Alexandra Party participated in and won BLA elections in Alexandra. Reverend Sam Buti became the mayor of Alexandra, leading an institution that became to be known as the Alexandra Town Council. They planned to push forward with the Master Plan.<sup>45</sup>

The Master Plan “put forward an impressive set of objectives” – aimed particularly at developing/refurbishing public infrastructure and building houses. It was estimated that a R100 million was required for its implementation. Paradoxically (and despite the reprieve), the Master Plan sought to annihilate property ownership in Alexandra. The remaining property owners had to sell their properties to the local authority in order to develop the township. Redeveloped houses would only be held on the basis of a 99-year leasehold

<sup>40</sup> Ibid at 223-227.

<sup>41</sup> Ibid at 229.

<sup>42</sup> Ibid at 229 and 241.

<sup>43</sup> Only a handful of houses had electricity, including that of Rev Sam Buti.

<sup>44</sup> TRC Hearing (Obedi Bapela) <http://www.justice.gov.za/trc/hrvtrans%5Calex/bapela.htm> See also Bonner (note 3 above) at 231-234.

<sup>45</sup> [Reference to be confirmed].

scheme. This created tension between property owners and supporters of the Master Plan. The Government refused to finance the redevelopment set out in the Master Plan. The government's approach was that black townships had to be "financially self-sufficient". The WRAB beerhalls had demised and at this time the only source of income for the local authority was rent payable by residents in what were now largely government owned properties. The Master Plan could no longer work for another reason: it was based on approximate population of Alexandra being 60 000. By 1986, the population Alexandra had reached 100 000. As a result, it was no success: there were barely any improvements.<sup>46</sup> Overcrowding made matters worse and Alexandra was slowly becoming a squatter township.<sup>47</sup> The community turned against Rev Sam Buti and his team; heightened by the politics of the time aimed at dismantling apartheid. They received no support from the government.<sup>48</sup>

*What good did the so-called reprieve negotiated by the Save Alexandra Party bring though? Nothing. Aother than that Alexandra was not wiped-out.*

When the Alexandra Town Council collapsed, the government appointed an administrator, Steve Burger (a whiteman), to take over administration of Alexandra. The government put together what was to be known as the Alexandra Urban Renewal Plan, to be implemented by Steve Burger. Important concessions were made by the Burger Administration insofar as housing was concerned: (a) the layout of Alexandra would be retained and houses which were not dilapidated would not be demolished; and (b) free-hold title would be restored to black people. However the trick with the latter is that those who wanted their property titles restored had to buy them back at market prices. (There is indication that government did not really intend to sell properties back; that they made this announcement only to buy public support.) Significantly fewer former property owners bought back their properties. This was compounded by the fact that the original stands had been re-divided and the WRAB had filled many houses with its own tenants and given them "residential permits".<sup>49</sup> Some of the tenants of the WRAB (some of them former property owners) were also (probably illegally) subletting these properties to others (mainly new arrivals) — creating what I call the challenge/phenomenon of "tenants' tenants". Restoration of properties could thus pose its own challenges and significant tension in the community.

It was during Burger's administration that the government, for the first time, invested in public infrastructure in Alexandra, resulting in "the upgrading of the water supply, streets, storm water drains, electricity and ablution facilities." The private sector was brought in to build houses which would be made available for sale. Hundreds of houses and flats were built as part of this project — most of which were built on new land east of Alexandra (Eastbank). However, this scheme was almost exclusively for the middle class, which was a

<sup>46</sup> Some houses were built by the private sector on the urging of the Alexandra Liaison Committee and later the Alexandra Town Council. However these benefited only a few middle class residents who could afford to buy or rent those houses. See Bonner (note 3 above) at 246. Unemployment stood at 47%. There was still no electricity; no storm water drainage; the bucket system was still in use; there was still only one clinic with a clinic patient ration of 1:60 000; and roads remained untarred [Reference to be confirmed].

<sup>47</sup> Bonner (note 3 above) at 234 to 239 and 267.

<sup>48</sup> Ibid at 295-299.

<sup>49</sup> Ibid at 305-308.

rarity in the black community. This would only make a dent on the development of Alexandra. There was no plan for the poor people of Alexandra (Old Alexandra), many of which were new arrivals setting up shacks and renting in backyards. By the end of the 1980s, there were close to 300 000 people in Alexandra.<sup>50</sup> The government, with its Alexandra Urban Renewal Plan, was, perhaps, too little too late, to make a significant difference in Alexandra — after decades of neglect and oppressive housing and land scheme.

During the late 1980s and into the 1990s, Alexandra continued to become densely populated. Informal settlements developed and yards became congested with extra rooms or shacks being built. Every available space was being filled in an area of no more than 1.5 square miles. In 1991, the average dwelling density was 400 people per hectare and in 1992 six to eight people lived in a single shack. Eighty percent of the residents were without electricity, sewage and water in their homes. Alexandra became the most crowded are in the country.<sup>51</sup> Accordingly, when democracy dawned, measures which were both envisaged by our Constitution and designed specifically to overcome the housing challenges of Alexandra, were desperately needed. A project to transform Alexandra was a necessity.

The new democratic government's answer to the desperate need for transformation was a project known as the Alexandra Renewal Project. It was a flagship Presidential project with a seven year life span, at the least. It came to being when it was officially declared by President Thabo Mbeki. Its stated targets included "increased local employment, a healthier environment, affordable and sustainable services, cutting crime by 50 percent, and upgraded and additional housing in conjunction with de-densification in some areas." The national government allocated R1.3 billion for the project.<sup>52</sup> Alexandra Renewal Project has had significant successes. Their major success is the building of the New Alexandra where thousands of houses, free [so-called RDP houses] and rental, have been built. They also managed to move thousands of people from the dangerous informal/squatter settlements on the banks of the Jukskei River to more secure housing — albeit some thirty-plus kilometres away.<sup>53</sup> In Old Alexandra they have also upgraded road, sanitation and electricity infrastructure. However, what has been done here is not nearly enough. The houses/dwellings occupied herein (both main houses, backyard housing and houses built in open spaces) are in extremely poor shape. There has not been any upgrading any of these by the Alexandra Renewal Project. It is extremely overcrowded and the services provided are insufficient to cater satisfactorily for the people. I argue below that the consequences of the prevailing dire state of housing (and related issues) in Old Alexandra is largely as a result of the government's failure to deal with the DISPOSSESSION issue. It is to this that I now turn.

### C. THE PERSISTENT STATE OF DISPOSSESSION OF FREE-HOLD TITLE TWENTY YEARS AFTER DEMOCRACY

<sup>50</sup> See Bonner (ibid) at 305-310. In 1986 the government abolished the influx control policy, which led to an increased number of people entering townships from the rural areas.

<sup>51</sup> [Reference to be confirmed]

<sup>52</sup> <[http://www.joburg.org.za/index.php?option=com\\_content&do\\_pdf=1&id=177&limitstart=4](http://www.joburg.org.za/index.php?option=com_content&do_pdf=1&id=177&limitstart=4)>

<sup>53</sup> See the Alexandra Renewal Project website: <http://www.alexandra.gov.za/>>

*“Since the 1960s, residents of Alex have been fighting for freehold title. The new government is perpetuating apartheid land policies by denying freehold title to former property owners in Alex.”<sup>54</sup>*

Fast-track to 2014, those who purchased property on a free-hold basis in Alexandra (or their successors in title), are still waiting their *reprieve* which they thought would come with a constitutional democracy. The first major legislation to deal with historical dispossession of land in South Africa was the Restitution of Land Rights Act 22 of 1994. In terms of this Act, persons who were dispossessed of a right in land after 19 June 1913 (i.e. after the 1913 Land Act came into commencement) as a result of past racially discriminatory laws or practices (or such persons’ successors in title) are entitled to “restitution of a right in land”. An application for such restitution of a right in land must be made to the Commission on Restitution of Land Rights. When the Act came into force, the cut-off date for lodging the application was 31 December 1998. In terms of the Restitution of Land Rights Amendment Act 15 of 2014, this date has now been extended to 30 June 2019. The Act provides for an investigation of claims, mediation and negotiation process culminating in a settlement (out of court) and/or settling of claims by the Land Claims Court.<sup>55</sup> I should add at this point that this paper is not so much about the restitution of land rights process but about the implications of the non-resolution or delays in resolving issues around restoration of free-hold (ownership) title in Alexandra on the right of access to housing of those affected by the said non-resolution.

As clearly set out above, the reasons for the dispossession of free-hold title in Alexandra were mainly for effecting influx control of black people in an area deemed unsuitable for occupation by them and to ensure that blacks did not have title in land similar to that of white people in an area deemed for white people. The implementation of this policy affected almost all property owners in Alexandra. After the enactment of the Restitution of Land Rights Act, approximately 1200 of people who were dispossessed of free-hold title in Alexandra (or their successors in title) applied for restoration of their free-hold titles in terms of the Restitution of Land Rights Act. In what was seemingly an attempt at a quick-fix approach, without any apparent detailed plan on the side of the government for resolving the claims, the then Minister of Land Affairs offered an amount of the R50 000 to each of the claimants who were entitled to restoration of rights in land in Alexandra.<sup>56</sup> The R50 000 pay-outs were seemingly accepted by approximately 900 people. Despite accepting the R50 000 pay-outs, no-one was immediately required to vacate any property.

The then chairperson of the Alexandra Land and Property Owners' Association (ALPOA), Peter Maroleni said the occasion was “a jubilant one” and that “people are very happy and we will be having a meeting with those who have not yet been paid out”.<sup>57</sup> Notwithstanding what Maroleni said at the time, the happiness of those dispossessed of free-hold title is now in dispute. In 2013, the Alexandra Land and Property Owners Association argued that the said the R50 000 pay-out is a way to trick them out of their land. They say that

<sup>54</sup> Laura Grube ‘Land reform: Going nowhere slowly in Alexandra’ 2009

<<http://www.freemarketfoundation.com/issues/land-reform-going-nowhere-slowly-in-alexandra#sthash.DtwSsSYD.dpuf>>

<sup>55</sup> See sections 6, 12, 13, 14 and 35 of the Restitution of Land Rights Act.

<sup>56</sup> <http://www.pmg.org.za/minutes/19990921-land-claims-commission-briefing>

<sup>57</sup> <http://alexnews.co.za/15255/alex-residents-want-land-money/>

the people of Alexandra did not want to be paid compensation, but the return of the free-hold titles.<sup>58</sup> The Association said that about 900 people had been tricked into accepting the compensation and these people had not gotten their land back.<sup>59</sup> They have also argued that they perceive the R50 000 to have been compensation for their humiliation and other suffering they experienced at the hands of the colonial and apartheid governments, and not so much as compensation for the dispossession of their rights in terms of Restitution of Land Rights Act.<sup>60</sup> The government has never given clarity on what the R50 000 was for; however what seems clear is that they thought that this would give the government licence to redevelop the township as it deems fit. In what seemed like a major concession, the Commission of Restitution of Land Rights' Ellen Moletsane gave the impression that it was the intention of government to both pay compensation AND restore free-hold title or provision of alternative land (albeit at a later stage).<sup>61</sup>

Whatever the government intended the R50 000 to be for, this was clearly a haphazard approach, as there remains confusion about it from all quarter. To this date there is no clarity on a number of essential questions: Was the amount meant to be a final settlement on the claims made? Was it part settlement? On what basis was the standard amount of R50 000 was arrived at? Was an investigation undertaken to consider circumstances of each case (including the improvements made)? Were there mediations and/or negotiations with affected parties? Where the values of each property taken into account? Were the amounts of compensation paid to the original owners upon expropriation by the apartheid government taken into account and appropriately offset? What of the fact that those dispossessed of their free-hold title during apartheid became tenants of the government paying monthly rent to the local authority? Are those who accepted the said amount obliged to vacate the properties concerned? What about those who had not lodged claims or did not accept the R50 000 offer (now taking into account that the period for lodging land claims has been extended to 2019)? The list of answered questions goes on beyond just these.

What the above questions mean is that the decades-long dispute over free-hold title in Alexandra remains unresolved. Under these conditions, how can the government effectively realise the obligation to achieve progressive realisation of the right to housing in Alexandra (particularly Old Alexandra)? There is no doubt that these questions would be a hindrance to housing development in the Old Alexandra, and in particular to overcoming the prevailing housing challenges there. This is best demonstrated by an order of court obtained by the ALPOA, interdicting the government from developing any of the land which is the subject of land claims in Alexandra.

In 2005, on reasonable suspicion that the government planned to implement a public housing scheme involving demolishing of existing properties in Alexandra, ALPOA approached the courts relief.<sup>62</sup> Thus in addition to having been dispossessed of free-hold title, the original owners would also lose control over what

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Conversation with Mr Jackie Segopa of ALPOA.

<sup>61</sup> <http://alexnews.co.za/15255/alex-residents-want-land-money/>

<sup>62</sup> Indeed, the Alexandra Renewal Project has plans to redevelop Old Alexandra, block by block, to build free or low cost housing for the indigent people of Alexandra. [Reference to be confirmed].

happens to the affected properties and possibly be physically dispossessed of those properties. ALPOA, representing its members, approached the Land Claims Court on an urgent basis for an interdict restraining the government from undertaking development of properties until the issue of their free-hold titles had been resolved by that court. The Land Claims Court, in chambers, ordered that:

“The Respondents [the government] and any other party are interdicted from demolishing, destroying, structuring or restructuring, developing or rezoning the Applicants’ offices, houses of any other property which is subject matter of the dispute pending the finalization of the principal case.”

About five months later, the Mayor of the City of Johannesburg approached the Land Claims Court seeking to have the above order rescinded. He was unsuccessful, as the City could not show good cause for the delay in applying for the rescission. He was also unsuccessful on the merits to have the order rescinded.<sup>63</sup>

To date, some nine years since the above interdict was granted, the dispute of the restoration of free-hold titles in Alexandra remains unresolved, and thus the said order remains effective. So, what about this falls short of the prescripts of the South African Constitution? There are at least four instances, directly related to the non-resolution of issue of title over properties in Alexandra, which affect fundamental rights — particularly the right to housing.

#### *General security of tenure*

Security of tenure is an important aspect of the right to housing. The Centre of Housing Rights and Evictions has submitted that: “[s]ecurity of tenure is one of the cornerstones of the right to adequate housing. Worldwide, some two billion people live in homes without adequate security of tenure, leaving them vulnerable to arbitrary forced eviction, harassment and other threats.”<sup>64</sup> The Constitutional Court in *Abahlali BaseMjondolo Movement SA and others v Premier of the Province of Kwazulu* effectively found that section 26 of the Constitution (right to have access to adequate housing) “was in part adopted with the express purpose of protecting the rights of people with insecure land tenure”.<sup>65</sup> Insecure land tenure has a broad meaning which can include lack of proper title over property occupied by one. It is generally accepted that the definition of the term “adequate housing” includes “legal security of tenure”. Although this does not necessarily mean ownership, it means that there must be “protection against forced eviction, harassment or other threats”.<sup>66</sup>

<sup>63</sup> *ALPOA and Others v Department of Land Affairs and Others* (LCC82/04) [2009] ZALCC 1 (13 January 2009)

<sup>64</sup> The Centre of Housing Rights and Evictions has submitted that: “Security of tenure is one of the cornerstones of the right to adequate housing. Worldwide, some two billion people live in homes without adequate security of tenure, leaving them vulnerable to arbitrary forced eviction, harassment and other threats. Most informal settlements and communities lack legal security of tenure.” < <http://www.cohre.org/topics/security-of-tenure>>.

<sup>65</sup> Bret Thiele ‘Security of Tenure: Legal and Judicial Aspects’ (2012) — This was a Research Paper prepared for the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Raquel Rolnik, to inform her Study on Security of Tenure.

<sup>66</sup> See Kirsty McLean ‘Housing’ in Woolman et al *Constitutional Law of South Africa* 2<sup>nd</sup> ed OS 07-06 at 55-34 to 55-35. This wording is from the International Covenant of Economic Social and Cultural Rights, and has been adopted in the National Department of Housing *National Housing Code* (2000).

We also know from the *Grootboom* judgment<sup>67</sup> that adequacy of housing requires “the availability of land”. The Constitutional Court held that “access to land for purposes of housing is therefore included in the right of access to adequate housing in section 26”.<sup>68</sup> The judgment does not state the terms under which land must be available, only that land tenure must be secure. What is conceivable from this is that the terms which make access to land secure for purposes section 26 will depend on the circumstances of each case. Thus adequacy of housing, particularly that of land tenure concerned, will have varying degrees depending on the circumstances of a particular case.<sup>69</sup> The *Grootboom* judgment goes further to state that “the state must create conditions for access to adequate housing for people at all economic levels of our society.”<sup>70</sup>

The difficulty with the current conditions under which original property owners of Alexandra occupy their houses is the lack of clarity on the legal basis of their occupation, or the comfort of knowing that their entitlement to the properties they occupy is secure. There are only two things that we know really: (a) that those dispossessed of freehold title, who still occupy their original properties in Alexandra, are likely to possess residential permits granted by the local authority at the time (either PUAHB or WRAB); and (b) that, in terms of the above interdict, no-one may demolish, destroy, structure or restructure, develop or rezone the properties affected by land claims in Alexandra. However this is insufficient to constitute security of tenure. Security of land tenure denotes one knowing what their true relationship with a property is.<sup>71</sup> It can take different forms, for example: ownership (freehold), leasehold or statutory concessions of permits.<sup>72</sup> Where a house is occupied on the basis on any of these forms of tenure, the section 26 right of access to housing demands that such tenure is secure.

The permits mentioned in (a) above were issued in terms of the Better Administration of Designated Areas Act 51 of 1963, read with Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Relevant Matters GNR 1036 of 14 June 1968. The permits are undetailed and, in summary, set out only: that a stated person is permitted to reside in a specified stand number in respect of which a particular monthly amount is payable as rent. It also recognises the name of the “wife” of the permit holder and lists those dependants who may reside with the permit holder.<sup>73</sup> The Better Administration of Designated Areas Act has now been repealed. However, the residential permits granted in terms of that Act remain valid in terms of section 6 the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988. Section 6 of the latter Act determines that the residential permit holder should be deemed as a lessee of the local authority concerned. In the case of Alexandra today, the relevant local authority is the City of Johannesburg Metropolitan Municipality. Unless a residential permit is converted into a “Leasehold”<sup>74</sup> or “Ownership” in

<sup>67</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46.

<sup>68</sup> *Ibid* at para 45.

<sup>69</sup> See David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 192.

<sup>70</sup> *Grootboom* at para 45.

<sup>71</sup> LAWSA ‘Rights in Land’ Vol 14(1) PAR 8.

<sup>72</sup> LAWSA ‘Rights in Land’ Vol 14(1) PAR 12.

<sup>73</sup> Some of the permits also state the number of dogs which may be kept by the permit holder.

<sup>74</sup> The term “Leasehold” refers to a registrable 99 year lease over property owned by the government. A holder of a Leasehold has broad rights including the right to (a) erect and improve buildings or to alter and demolish buildings or

terms of the latter Act, the above-mentioned residential permits remain to be the basis upon which someone occupies property in Old Alexandra.<sup>75</sup> In order for conversion of residential permits to be possible, a township register has to be opened in terms of section 46(4) of the Deeds Registry Act, 1937 (see section 2(1) of the Conversion of Certain Rights into Leasehold or Ownership Act). A conversion of properties to “Leasehold” or “Ownership” in terms of the Conversion of Certain Rights into Leasehold or Ownership Act is determined by a Director-General of Housing in a province after conducting a necessary inquiry. To my knowledge the township register for Old Alexandra has to date not been opened, hindering the conversion of process provided for in the Conversion of Certain Rights into Leasehold or Ownership Act. It should be added that it is not clear whether a residential permit such that issued in terms of the Better Administration of Designated Areas Act forms part of the definition of “affected site” in respect of which a conversion to leasehold or ownership may be caused. This is because the definition of the term “affected site” does not spell out that such a site includes a site subject to a residential permit granted in terms of the Better Administration of Designated Areas Act.

Whatever the reason may be, it is clear that the conversion of properties to “Leasehold” and “Ownership” has hardly taken place. Accordingly, the right of occupation of properties in Old Alexandra is determined by a mere residential permit granted in terms of the Better Administration of Designated Areas Act.

There does not appear to be sufficient security of tenure for a residential permit holder, as it can be terminated easily. Section 6(2)(c) of the Conversion of Certain Rights into Leasehold or Ownership Act provides that the permit will be deemed to be cancelled if the “holder has abandoned his or her rights in terms of the residential property concerned or has entered into a transaction in terms of which such rights have been ceded, sold or disposed of in any other way”.<sup>76</sup> The City of Johannesburg’s officials in charge of housing in Alexandra have largely interpreted this to mean that if a residential permit holder leaves, even temporarily, and another person occupies it, the relevant residential permit will be cancelled. In my work I have come across several people who have alleged that their residential permits were cancelled by the authorities because they had “temporarily” moved elsewhere for work purposes or another reason. Under these circumstances it cannot be said that the original property owners and/or their descendants enjoy security of tenure demanded by section 26 of the Constitution. The requirement in the *Grootboom* judgment that “the state must create conditions for access to adequate housing for people at all economic levels of our society” signifies that those people in Alexandra who occupy their previously owned properties in terms of a residential permit enjoy constitutional protection even though they may not be indigent people qualifying for free housing by the state. Their dignity is also significantly impacted by government’s delays in the restoration of their titles or provision of alternative appropriate relief.

structures; (b) occupy the buildings or structures and the site; (c) encumber the leasehold; and (d) dispose of the leasehold to another competent person. See section 53(5) of the Black Communities Development Act 4 of 1985.

<sup>75</sup> It should be added that it is not clear whether a residential permit such that issued in terms of the Better Administration of Designated Areas Act forms part of the definition of “affected site” in respect of which a conversion to leasehold or ownership may be caused. This is because the definition of the term “affected site” does not spell out that such a site includes a site subject to a residential permit granted in terms of the Better Administration of Designated Areas Act.

<sup>76</sup> See Gauteng Conversion of Certain Rights into Leasehold or Ownership Amendment Act 7 of 2000.

The extent of the insecurity of the apartheid era tenure (which largely persists today) is illustrated in the High Court judgment in the case *Fifane and Others v Fifane and Others* (2361/2010) [2011] ZAECPHC 47 (8 November 2011). In this case Mrs Fifane died while holding a 99 year lease (tenure which is in fact much more secure than a residential permit) in relation to property in New Brighton Township, Eastern Cape. The property was subject to the Conversion of Certain Rights into Leasehold or Ownership Act. However Mrs Fifane died without applying for conversion to ownership in terms of this Act. Upon her death, Mrs Fifane's sole descendant (her daughter, Lorna) claimed transfer of ownership of the property to herself in terms of the Law of Succession. It then appeared that at some point after Mrs Fifane's death, the Nelson Mandela Bay Municipality sold the property to one of Mrs Fifane's other daughters (Patricia), who had by now also died. As Mrs Fifane had not applied for the conversion of her leasehold to ownership, the court found that the Municipality was entitled to sell the property, effectively disinheriting her estate of the property. Thus the only people who could lay claim to ownership of the property were Patricia's descendants. This case demonstrates the insecurity of the apartheid era tenures which unfortunately are the order of the day in Alexandra.

#### *Benefits of ownership*

There is little doubt that those people whose properties were expropriated between 1958 and the 1980s are entitled to relief in terms of the Restitution of Land Rights Act. The original owners of property in Alexandra, or at least ALPOA and APOR's members, have made it clear that their preferred relief is restoration of their free-hold titles. If this issue is finally decided by the Land Claims Court, it is possible that their preferred relief could be granted. This is especially the case for those who presently occupy or part-occupy the properties concerned. The longer the issue remains unresolved, the more the affected individuals are denied benefits that accrue to being owner. In South African law, there are at least five entitlements of ownership, being: (a) entitlement to control and physically keep the property; (b) entitlement to use and benefit from the property; (c) entitlement to grant limited real rights in respect of the property; (d) entitlement to transfer the property to someone else; and (e) entitlement of the owner to claim the property from another person.<sup>77</sup>

- (a) *Entitlement to control and physically keep the property and entitlement to use and benefit from the property* potentially mean the power to determine who enters or may stay in the property concerned. As stated above, when properties in Alexandra were expropriated, some of the families of the original owners were either moved elsewhere or they became tenants of the government. Those who were moved have no way of exercising any control over their old properties in Alexandra. The other reality is that the government in some instances re-divided and in some instances issued multiple residential permits per house/yard. Thus even those who stayed, many do not have control over the whole of the property. Another issue is that of back-yard dwellers in the relevant properties. Originally brought by property owners charging them rent, many back-yard dwellers have now ceased to pay such rent having realised that the land in fact is owned by the government and not the

<sup>77</sup> AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* 4<sup>th</sup> ed (2002)

original owner. Many have gone on to build their own structures in such backyards. Lacking ownership, the original owners have no title to legally compel such backyard dwellers to vacate. This challenge/phenomenon of “tenants’ tenants” is a source of huge conflict in Alexandra.<sup>78</sup>

- (b) For many township residents, “*entitlement to use and benefit from the property*” entails the ability to have let parts of your property (usually backyard rooms) to people who are in need of accommodation for a monthly rental fee. Indeed many unemployed people in Alexandra survive in this way. There is no indication at all from the relevant legislation or the residential permits themselves, that residential permit holders have the authority to let parts of the properties they occupy. It can thus be taken that unlike people in other townships or the free housing (RDP) section of Alexandra, people in Old Alexandra may not legally let back yard rooms. It seems unfair that many of the people whom government has provided free housing in Alexandra (so-called RDP houses) own those properties and may let rooms, but those people who remained in the old properties do not enjoy this benefit. This creates dual land tenure in the township, which seemingly discriminates against the one group without ownership title.
- (c) *Entitlement to grant limited real rights in respect of the property means*, inter alia, that one may use one’s property as security for obtaining loans or credit from banks or other credit providers. Without title such as ownership, this would not be possible. This tends to affect entrepreneurs who need to raise capital from banks and parents who would like to secure study loans for their children.
- (d) *Entitlement to transfer the property to someone else*. Needless to say, without ownership title, one has no authority to alienate the property. This has created an unfortunate situation in Alexandra. Despite the law disallowing, many people in Alexandra who occupy properties do so on the basis that they bought such properties from the original property owners. They do so either because they are ignorant of the law or they simply defy the law as they feel that they do not have any other choice. These types of transactions tend to create conflict, as those who “sell” the properties often fail to deliver occupation to the buyer. Buyers would then approach the authorities or lawyers seeking to enforce the “contract” they concluded with the “seller”. Sadly, they are then advised that the “seller” had no authority to “sell” the property and thus the transaction is not legally binding. By this time, the “seller” may have already used the money and is unable to refund the buyer. (The terms “buyer”, “seller”, “sell”, “buy”, “contract” and “transaction” are used loosely in this regard.)
- (e) *Entitlement of the owner to claim the property from another person*. Once an affected property is occupied by another person, in a place like Alexandra, it is very difficult for a residential permit holder to do anything about it. This often happens when a residential permit holder finds a job in another town or temporarily moves to another town (usually because one is sick and goes away to be cared by relatives residing elsewhere). Such a person may have asked someone to stay in their place until they are back. However often the latter refuses to vacate the property. When the former approaches

<sup>78</sup> For facts relating to backyard dwelling in Alexandra, see Growth Management Strategy: Growth Trends and Development Indicators Report 2010 / 2011.  
<[http://joburg.org.za/index.php?option=com\\_content&task=view&id=3185&Itemid=114&limitstart=1](http://joburg.org.za/index.php?option=com_content&task=view&id=3185&Itemid=114&limitstart=1)>

the authorities (the City of Johannesburg), he/she is informed that he/she has forfeited the property because they had vacated it.

Accordingly, ownership can have significant constitutionally protected advantages for vulnerable people in Alexandra and thus it should not be unreasonably withheld by the state.

#### *Law of succession*

Personal rights such as residential permits cannot form part of a deceased's estate. Ownership of property can be a requirement. Thus, many of the original owners of property (or their descendants) in Alexandra lack the comfort of bequeathing these properties to whomsoever they wish to leave it for when they die.

#### *Infrastructural improvements*

As mere residential permit holders, occupiers of property in Old Alexandra have no entitlement to improve those properties. Notwithstanding the disentitlement to alter the houses concerned, due to the fact the government has not undertaken any maintenance of these houses, the occupants have nevertheless invested huge amounts of money to maintain the properties. Many have even extended the houses in order to accommodate their growing families. Due to high incidents of crime, many would have also invested in safety infrastructure such as a concrete wall around the yard.

It seems to me that one major flaw of the Alexandra Renewal Project was the focus on de-densification of the township without dealing with key foundation of the housing changes in Alexandra, being the dispossession of free-hold title and its consequences.<sup>79</sup> The result of this approach is that, because of the failure resolve the issue of free-hold titles, the government is unable to implement any housing development scheme in Old Alexandra — thus failing to meet its obligation to achieve the progressing realisation of the right of access to housing. In not resolving the issue of free-hold title in Alexandra, the government perpetuated overcrowding, which is one of the foremost challenges of Alexandra today. Since the people who occupy properties in Old Alexandra are not empowered to exercise control over those properties, people have found it easy to settle and build in the area (particularly in the back-yards) without consequence.

Overcrowding brings about further challenges, including poor living conditions, overstrain public infrastructure such as water supply, sanitation, refuse removal, electricity — to name but a few. Overcrowding impacts the environmental well-being of the community. Because of overcrowding we find that services installed in the township are not coping with the demand. This resulting in the unfortunate situation

<sup>79</sup> Reducing or keeping the population of the township to a particular number was always a main focus of the colonial and apartheid governments. Dispossessing people of their free-hold title was one way to achieving population control in Alexandra. The present government's focus on de-densification of the township, to the exclusion of resolving land rights, perpetuates the flaws of the policies of the pre-democratic governments. On what the focus of the Alexandra Renewal Plan is, see *Unlawful Occupiers of the School Site v City of Johannesburg* (036/2004) [2005] ZASCA 7; [2005] 2 All SA 108 (SCA) (17 March 2005) at para 4.

It also appears that the focus on de-densification was focused on the informal settlements that had developed around Alexandra, and so much in the backyards of Old Alexandra. See a document titled 'Government Proposals Alexandra', produced in 2012 by the office of the HOD, Gauteng Department of Local Government.

that the bucket is still in use in many parts of Old Alexandra — twenty years after democracy. Further, many people in backyards and informal settlements have connected to the electricity grid illegally and dangerously. People have also build structures on sites not fitting for human settlements.<sup>80</sup> Overcrowding of this magnitude is obviously inconsistent with the rights of access to adequate housing (section 26), a healthy environment (section 24) and human dignity (section 10), which are enshrined in the South African Constitution. Without finally and appropriately resolving the issues concerning the claim by the original property owners of their free-title, this challenge of overcrowding (consequently of housing and environment) will not be resolved.

The Constitutional Court in *Grootboom* sets out clearly what the test is for whether government has met its constitutional obligations under section 26(2) of the Constitution. The court held: “the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable”. In summarising what is meant by reasonable measures, Bilchitz provides: “Reasonable measures involve the establishment and implementation by the state of a coherent, well-coordinated, and comprehensive programme directed towards the progressive realisation of the right of access to adequate housing.”<sup>81</sup> The *Grootboom* court also held that:

“In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and *historical context* and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. *A programme that excludes a significant segment of society cannot be said to be reasonable.*”<sup>82</sup>

The government has not yet, at least publicly, set out what can be regarded as “a coherent, well-coordinated, and comprehensive programme” programme on how to deal with the housing challenges in Old Alexandra. The haphazard manner in which the government has dealt with the claims for restoration of free-hold title, can be interpreted as having excluded “*a significant segment of society*”. Fortunately, government has now begun a negotiation process with ALPOA and APOR, organisations representing interests of the original property owners of Alexandra. This is the last issue I address in this paper.

#### D. WAY FORWARD

In the past couple of years the City of Johannesburg has held a series of meetings with ALPOA and APOR. The meetings have culminated in a committee that meets from time to time which calls itself the ‘Alexandra Land Task Team’. It all began in 2010, when the Gauteng Province Department of Local Government and

<sup>80</sup> This is my own observation from exploring Alexandra. See also C Vogal ‘Sustainable urban environments: a case of Alexandra’ *GeoJournal* 1996 at page 52.

<sup>81</sup> Bilchitz at 141. See *Grootboom* at paras 31-44.

<sup>82</sup> *Grootboom* at para 43.

Housing's Head of Department penned a letter<sup>83</sup> that committed the Department to resolving the Alexandra land issue. The letter acknowledges that "the land ownership issues affecting the Alexandra community are long overdue and need to be resolved collectively". The letter also sets out that:

"The Department hereby commits, through the land audit's results, land restoration, wherever feasible, will be done while where it may not be feasible, the information gathered through the land audit will be used in negotiating different solutions between property owners/role players assisting to oversee the entire process, the City of Johannesburg and the Department of Local Government and Housing. The negotiations shall be handled at a political instead of administrative level, to conclude a way forward as part of the negotiations."

In a meeting of 31 December 2012, three possible solutions were discussed. These are set out in the above-mentioned letter and can be summarised as follows:

- (a) Provision of title deeds, starting with uncontested stands. In those properties where there are informal dwellers or tenants, alternative accommodation will be provided to them in order to effect transfer to the original property owners.
- (b) Land parcel offers to original property owners in an area surrounding or close to Alexandra in order for those original owners to develop their own houses.
- (c) Incorporating original land owners into a housing project as a partner. The original owners affected would benefit, for example, from rent paid by those who are accommodated upon the completion of the project.

In fact, in 2014, the government extended an olive branch to the original property owners by advertising eighteen properties (of the almost 3000 properties) in respect of which free-hold titles would be restored unconditionally. As part of the said negotiations and in light of the concessions/proposals made by the government so far, the government has proposed that ALPOA withdraw its court case against the government. ALPOA, has refused to do so until government has made binding commitments in for all their members.<sup>84</sup>

This negotiation process is an important step towards resolving the issues concerning the claims for restoration of property rights in Alexandra, and ultimately in the progressive realisation of the right of access to adequate housing for the people of Old Alexandra. However, it should not be overlooked that those who stay in the in the yards of the affected properties without residential permits have similar and probably worse security of tenure issues.<sup>85</sup> Therefore in any housing measure taken by the government, their rights to

<sup>83</sup> The version I have seen is unsigned.

<sup>84</sup> Conversation between the author and Mr Jackie Segopa of ALPOA.

<sup>85</sup> Being a backyard dweller in the affected properties without a residential permit probably makes such a person an illegal occupier. This is because holders of residential units do not have the authority to let the properties or parts of the properties they occupy. It has been suggested that in 2005 approximately 70% of households in Alexandra were living in backyard dwellings. See Yasmin Shapurjee and Sarah Carlton SM 2013 'Transforming South Africa's low-income housing projects through backyard dwellings: intersections with households and the state in Alexandra, Johannesburg'

housing must equally be secured. This brings us to the issue of the involvement of thousands and thousands of backyard dwellers in the above-mentioned negotiation process, and whether and how their interests are safeguarded.

Although seemingly a just outcome of in the decades an oppressive housing scheme, restoration of free-hold titles to the original property owners could have a catastrophic effect negative on backyard dwellers — particularly if those who are restored with free-hold elect to exercise their right to exercise their rights to evict or charge rent to back-yard dwellers. That government could provide alternative accommodation to such many people in a short period of time, is improbable. Another issue to consider is whether property owners whose free-hold titles are restored will have the ability to take control of the properties concerned. They may well face back-lash from the back-yard dwellers. It should be remembered that many of those who are back-yard dwellers have in fact, at their own cost, build and or improved the rooms they occupy. Those restored with free-hold title may thus need assistance from the government in order to take control of their properties.

An appropriate balance has to be found between the rights of the original property owners and those of the back-yard dwellers. In doing so there are two main judgments of the Constitutional Court which provide some guidance, namely *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA). This case *Occupiers of 51 Olivia Road* involved the eviction of more than 400 occupiers of certain buildings in the inner city on of Johannesburg on reasons of the safety and health of those who continued to reside therein. The High Court declined to grant an eviction order against the residents. It found that the City's housing programme was inadequate to the housing needs of the affected persons and that this had to be remedied. The Supreme Court of Appeal upheld the appeal by the City and granted eviction, subject to the City providing alternative accommodation to those rendered homeless by the eviction. On application for leave to appeal in the Constitutional Court, the court employed a novel remedy. It issued an interim order directing the City and the affected residents to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in [the] application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.” The parties also had to engage on how the buildings concerned could be made as safe and as conducive to health as is reasonably practicable. The engagement process resulted in a settlement agreement by the parties that entailed a detailed plan forward. The City would cease the evictions and upgrade the buildings while providing temporary accommodation. The parties would continue to engage on a more permanent solution. In giving reasons for the engagement order, the court found that meaning engagement by the parties was mandated by the various provisions of the Constitution, sections 26(2) and 10 (the right to human dignity) of the Constitution.

Although the prevailing property situation in Alexandra involves more than just evictions — it is a combination of claims for free-hold titled, coupled with implications of the latter on the right to housing of both the claimants and others who occupy the affected properties — a meaningful engagement process is fitting for the circumstances and appears to be the only way that the issue of land claims can be brought to finality. An engagement process would also be in line with mediation/negotiation approach to land claims contemplated in the Restitution of Land Rights Act. An engagement process is particularly important in order to allow all voices of the affected to be heard. All those involved must be treated as human beings in this process. An immediately identifiable hurdle is the sheer number of people affected. Unlike in *Occupiers of 51 Olivia Road*, in the case of Old Alexandra there are potentially tens of thousands people affected. The original property owners seem to be well represented by the ALPOA and APOR. The interests of back-yard dwellers are at the moment seemingly represented by the Alexandra branch of the South African National Civics Organisation. However, more will have to be done to ensure that the back-yard dwellers, as the less organised group, have a more direct influence of the negotiation process.

In *Modderklip Boerdery (Pty) Ltd* about 400 people had moved onto privately owned land because of overcrowding in a nearby settlement. This number kept growing. Modderklip (the owner of the land) sought co-operation of the municipality in dealing with the illegal occupation of his property, but received no co-operation from the municipality. Modderklip eventually sought and granted an eviction order against the occupiers, which order he was unable to enforce as the cost of doing was now more the value of the property. At this time the population of the occupied area had grown to 40 000. Modderklip then approached the courts for an order directing the government to bear the costs of the eviction, arguing that “the state had breached its obligations in terms of sections 26(1) and (2) of the Constitution, read with section 25(5), to take reasonable steps within its available resources to realise the right of the occupiers to have access to adequate housing and land.”<sup>86</sup> The Constitutional Court found that the state “is . . . obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.”<sup>87</sup> It was neither just that the property owner should bear the responsibility of 40 000 due to lack of availability of land and housing nor was it just that so many people be evicted with nowhere to go. The court concluded, *inter alia*, that (a) Modderklip Boerdery (Pty) Ltd was entitled to payment of compensation by the government in respect of the occupied land; and (b) the residents are entitled to occupy the land until alternative land has been made available to them by the government.<sup>88</sup>

Were the original property owners to have free-hold titles restored to the in Alexandra, such would place tens of thousands of back-yard dwellers at the mercy of those whose ownership is restored. Some owners may elect to apply for eviction orders against the back-yard dwellers (or those residential permit holders who are not original property owners). Indeed this will be within their legal entitlements as owners. However, because

<sup>86</sup> *Modderklip Boerdery (Pty) Ltd* at para 15.

<sup>87</sup> *Ibid* at para 42.

<sup>88</sup> *Ibid* at para 68.

of the sheer numbers of the people involved, it may be unreasonable to expect the new owners to bear the sole responsibility of dealing with back-yard dwellers. The solution that accords with the Constitutional Court's jurisprudence in *Modderklip Boerdery (Pty) Ltd* would be for the government to ensure that there is a plan to protect both interests of the new owner and the occupiers of their properties in each property affected. If people are to be moved, there must be a clear plan for alternative accommodation. Where the moving of people could result in "large-scale disruptions in the social fabric", this should be avoided and the owner should rather be compensated or be provided with alternative land. Thus in some instances restoration of free-title may not be a just outcome. Compensation may be a more just outcome.

It is perhaps comforting to conclude the paper by noting that the government seems to be alive to constitutional principles and values advanced by the Constitutional Court in *Occupiers of 51 Olivia Road* and *Modderklip Boerdery (Pty) Ltd*. This is evidenced by the fact that the government has committed itself to a negotiation/engagement process with the original owners, and to some extent, with the backyard dwellers and others in Alexandra. One hopes that this process will be meaningful in the spirit of the judgment of the court in *Occupiers of 51 Olivia Road*. Lastly, the options which appear to be on the table in the present negotiation/engagement process, indicate awareness that a balanced approach (advanced in *Grootboom* and *Modderklip Boerdery (Pty)*) must be followed in resolving the immovable property situation in Alexandra. For emphasis, I will restate these:

- (a) Provision of title deeds, starting with uncontested stands. In those properties where there are informal dwellers or tenants, alternative accommodation will be provided to them in order to effect transfer to the original property owners.
- (b) Land parcel offers to original property owners in an area surrounding or close to Alexandra in order for those original owners to develop their own houses.
- (c) Incorporating original land owners into a housing project as a partner. The original owners affected would benefit, for example, from rent paid by those who are accommodated upon the completion of the project.

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