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## Judicial enforcement of the right to adequate housing against local government through the lens of General Comment 4 of the Committee on Economic, Social and Cultural Rights: A South African perspective

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**Summary:** *Based on a critical analysis of relevant case law and desk-based comprehensive legal research, this article examines the judicial enforcement of the right to adequate housing against local government in South Africa. The article focuses on how courts hold local government accountable in fulfilling the right measured against the baseline factors outlined in General Comment 4 of the United Nations Committee on Economic, Social and Cultural Rights. The factors that determine whether a certain form of shelter amounts to 'adequate housing' encompass seven integral components: security of tenure; availability of*

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*services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. General Comment 4 specifically expounds on the right to adequate housing as enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights. South Africa is a state party to ICESCR. Domestically, the right to access adequate housing, as guaranteed by section 26(1) of the Constitution of the Republic of South Africa, 1996, imposes a legally binding duties on the state. These duties are varyingly shared by the three spheres of government: the national, provincial, and local governments. However, Schedule 4A of the Constitution allocates the functional area of housing as a 'concurrent competency' of the national and provincial governments. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and powers by the national and provincial governments. Nonetheless, with an overstretched fiscus, municipalities are hesitant to assume housing delivery roles. Key findings reveal that numerous court cases bind municipalities by assigning to them increased rights-based responsibilities that they may not be adequately equipped or empowered to implement. Thus, despite courts not explicitly referencing General Comment 4, judicial enforcement of the right is consistent with the baseline factors.*

**Key words:** *adequacy; ESCR Committee; General Comment 4; ICESCR; local government; right to adequate housing; South Africa*

## 1 Introduction

South Africa is acclaimed for its robust and progressive housing laws, policies, programmes and jurisprudence.<sup>1</sup> This acclamation largely emanates from its transformative Constitution,<sup>2</sup> which is at the intersection of the country's legal, social and political life.<sup>3</sup> The Constitution contains an expansive Bill of Rights which is the cornerstone of the country's democracy. The Bill of Rights 'enshrines

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

2 Transformative constitutionalism refers to a critical approach to constitutional law that seeks to transform society by aiming to address systemic inequalities and promoting social justice. This concept is rooted in the country's transition from apartheid to democracy, and is reflected in the South African Constitution, which seeks to address the injustices of the past and create a more equitable society. It prioritises social and economic rights, such as the right to access adequate housing, health care and education, etc; KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

3 C Albertyn '(In)equality and the South African Constitution' (2019) 36 *Development Southern Africa* 752.

the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom'.<sup>4</sup> The constitutional recognition and protection of fundamental rights and freedoms has also heralded the insertion of fully justiciable socio-economic rights.<sup>5</sup>

Predominantly, discussions around human rights and social development are related to housing delivery.<sup>6</sup> 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'.<sup>7</sup> Although socio-economic rights (which require positive action and resources) may be binding on natural persons and corporate entities,<sup>8</sup> 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.<sup>9</sup> These obligations pertain to both civil and political rights, and economic, social and cultural rights, which include the right to access adequate housing as provided by section 26(1) of the Constitution.<sup>10</sup> Accordingly, the rights in the Bill of Rights, including the right to adequate housing, impose duties on the state, a notion that includes local government.<sup>11</sup>

It should be noted that the functional area of housing is listed as a 'concurrent competency' of the national and provincial governments in Schedule 4A of the Constitution. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and

4 Sec 7(1) Constitution of the Republic of South Africa, 1996.

5 Sec 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 addition, the judiciary plays a pivotal role in shaping spatial planning policy, often balancing competing interests and constitutional imperatives; P Mudau 'Judicial delineation of local government spatial planning powers in South Africa' (2025) *Journal of Law, Society and Development* 1.

6 M Sobantu & N Noyoo 'Housing, human rights and social development in South Africa' (2022) 12 *African Journal of Development Studies* 233.

7 I Turok & A Scheba "'Right to the city" and the New Urban Agenda: Learning from the right to housing' (2019) 7 *Territory, Politics, Governance* 494.

8 Sec 8(2) of the Constitution provides for an explicit horizontal application of the Bill of Rights on individuals and private institutions. Thus, socio-economic rights are also binding on natural persons and corporate entities. Individuals have the obligations to respect and protect the socio-economic rights of others. Businesses and other organisations have the responsibilities to respect and promote socio-economic rights and must consider the impact of their actions on the realisation of these rights. P de Vos & W Freedman *South African constitutional law in context* (2021) 29.

9 Sec 8(1) of the Constitution.

10 The provision stipulates: '(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.'

11 NS Nag 'Government, governance and good governance' (2010) 36 *Indian Journal of Public Administration* 123.

powers by the national and provincial governments.<sup>12</sup> Nonetheless, with an overstretched fiscus, municipalities are hesitant to assume housing delivery roles. Subject to the prerequisite for competently administering national housing programmes, local government may ultimately be assigned to fulfil housing functions and powers by the national and provincial governments.<sup>13</sup>

In ensuring that these duties are fulfilled, the courts play a key role in interpreting and enforcing the Bill of Rights, taking into account the broader international legal framework that informs the protection of socio-economic rights. The courts are required by the Constitution to consider international law when interpreting the Bill of Rights.<sup>14</sup> Hence, the United Nations (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966,<sup>15</sup> the interpretations and General Comments of the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee)<sup>16</sup> 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.<sup>17</sup> Even prior to the ratification of 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.<sup>18</sup>

According to General Comment 4,<sup>19</sup> the significance of the 'adequacy' concept regarding the right to housing underlines baseline factors that determine whether a certain form of shelter amounts to

<sup>12</sup> Sec 156(4) of the Constitution.

<sup>13</sup> T Chonco 'The accreditation of municipalities to administer housing programmes' in MR Maziwisa & J de Visser (eds) *Local government in South Africa: Responses to urban-rural challenges* (2021) 18.

<sup>14</sup> Sec 39(1)(b) of the Constitution.

<sup>15</sup> United Nations International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, entered into force from 3 January 1976. The purpose of ICESCR is to give legal effect to the United Nations Universal Declaration of Human Rights, adopted on 10 December 1948. The Universal Declaration is the first international human rights instrument to recognise the right to adequate housing.

<sup>16</sup> United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) is entrusted with the primary responsibility to oversee the effective implementation of ICESCR. In accordance with arts 21 and 22 of ICESCR, the Committee's mandate is assigned by the United Nations Economic and Social Council (ECOSOC). ECOSOC monitors the reporting obligations of states under Part IV of ICESCR.

<sup>17</sup> I Currie & J de Waal *The Bill of Rights handbook* (2016) 571.

<sup>18</sup> ESCR 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) 4.

<sup>19</sup> ESCR Committee General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant), 13 December 1991 para 1.

'adequate housing' as per ICESCR.<sup>20</sup> In part, the determination of adequacy may be based on economic, social, cultural, ecological, climatic and other factors. Yet, paragraphs 8(a)-(g) of General Comment 4 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.

In 2018 the ESCR Committee, in its Concluding Observations on the initial report of South Africa, expressed several concerns in relation to the realisation of the right to access adequate housing.<sup>21</sup> Among the issues raised encompass the large number of people living in inadequate housing, without access to basic services. With over 67 per cent of the population as a whole already residing in urban areas by 2017,<sup>22</sup> rapid urbanisation triggers the growth of informal settlements. More so, the state's failure to increase the provision of social housing units contributes to inadequate housing. Another major concern was 'the illegal evictions and the excessive use of force during evictions, as well as evictions taking place without municipalities offering suitable alternative accommodation'.<sup>23</sup>

Against this backdrop, this article critically analyses the nature and extent to which South African courts have adjudicated and imposed rights-based responsibilities on local government as per the baseline factors. Cognisant of the challenges of enforcing housing rights in South Africa, the article uses critical analysis of relevant case law and desk-based comprehensive legal research to compare the

20 ESCR Committee General Comment 4 para 8. The purpose of General Comment 4 can be explained as follows: (a) Authoritative interpretation: It provides an authoritative interpretation of the right to adequate housing as outlined in 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 fulfil 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 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 ESCR Committee 'Concluding Observations on the initial report of South Africa' (2018) para 58.

22 Statistics South Africa 'South Africa: Urbanisation from 2009 to 2019' 14 February 2025, <https://tinyurl.com/4xtzr4v2> (accessed 4 April 2025).

23 ESCR Committee (n 21) para 58.

application of these baseline factors with the South African housing jurisprudence. Primarily, the article analyses how South African courts have adjudicated the constitutional right to access adequate housing against local government and hold the latter as one of the litigants accountable in its role to fulfil the right to access adequate housing.

The article is structured in seven parts. The first part provides the introduction and background to the article. The second part outlines the seven baseline factors as ensconced by ICESCR. Third, the article deals with the global patterns of local government's housing rights-based obligations. The article proceeds to offer a synopsis of local government's constitutional and legal housing roles, powers, functions and responsibilities pertinent to the right to adequate housing in South Africa in the fourth part. Fifth, the article focuses on the judicial enforcement of constitutional right to adequate housing while assessing the state of compliance with the seven baseline factors contained in General Comment 4. The sixth part is the conclusion, and the seventh part provides the article's recommendations.

## 2 International Covenant on Economic, Social and Cultural Rights

ICESCR is deemed to be the most important international legal source relating to socio-economic rights, in general,<sup>24</sup> and, particularly, the right to adequate housing.<sup>25</sup> South Africa is a state party to ICESCR.<sup>26</sup> ICESCR imposes obligations on South Africa that cast 'an increasingly significant impact on the development of South Africa's socio-economic rights jurisprudence'.<sup>27</sup> Article 11(1) of ICESCR enshrines the right to adequate housing as 'the most comprehensive and perhaps the most important of the relevant provisions'.<sup>28</sup> The clause stipulates as follows:

The States Parties to the present Covenant recognise 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 realisation of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

24 Currie & De Waal (n 17) 570.

25 Office of the United Nations High Commissioner on Human Rights (OHCHR) 'Women and the right to adequate housing' (2012) 6.

26 In October 1994, South Africa signed ICESCR and only acceded to the instrument 20 years after the signature on 15 January 2015.

27 The ratification means that, under international law, ICESCR is legally binding on South Africa. See Currie & De Waal (n 17) 570.

28 General Comment 4 para 3.

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.<sup>29</sup> In contrast, the appropriate lens to view the right to housing involves the right to live somewhere 'in security, peace, and dignity'.<sup>30</sup> In this respect, General Comment 4 advances two arguments for this approach. First, the right to housing is integrally associated to other fundamental human rights and principles contained in ICESCR. The interpretation of the term 'housing' requires the full consideration of a confluence of factors that epitomise 'the inherent dignity of the human person', irrespective of income or access to economic resources. Second, the right to housing conferred by article 11(1) of ICESCR should not merely be confined to housing *per se* but the reference should encompass 'adequate housing'.

Under article 2(1) of ICESCR, with a view to progressively achieving 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.<sup>31</sup>

Apart from adopting legislative measures,<sup>32</sup> 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.<sup>33</sup> Moreover, General Comment 3 underscores the need to consider as part of the appropriate measures,<sup>34</sup> 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.

29 General Comment 4 para 7.

30 As above.

31 Currie & De Waal (n 17) 572.

32 General Comment 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant), 14 December 1990 para 5.

33 General Comment 3 para 7.

34 General Comment 3 para 5.

## 2.1 Integral components of the right to adequate housing: General Comment 4

### 2.1.1 *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. Importantly, General Comment 7 defines 'forced evictions' as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.<sup>35</sup>

International practice validates that in the housing arena, security of tenure is especially vital to poor households.<sup>36</sup> Nonetheless, the prohibition on forced evictions is not applicable to evictions that are implemented in conformity to the relevant law and international covenants on human rights.<sup>37</sup>

In 2014, under the then Special Rapporteur on Adequate Housing, Raquel Rolnik, the Guiding Principles on the security of tenure for the urban poor<sup>38</sup> 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'.<sup>39</sup> 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. General Comment 4 includes emergency housing, lease, public and private rental accommodation, cooperative housing, owner-occupation, informal settlements and occupation of land or property. Apart from these types of tenure, every individual must have security of tenure that

35 General Comment 7: The Right to Adequate Housing (art 11.1 of the Covenant), 20 May 1997 para 3.

36 S Fitzpatrick & H Pawson 'Security of tenure in social housing: An international review' (2011) 3.

37 General Comment 7 para 7.

38 The Guiding Principles on security of tenure for the urban poor (2014).

39 Fitzpatrick & Pawson (n 36) 1.



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.<sup>40</sup> Indeed, access to land provides space for housing and the enjoyment of the right to adequate housing depends largely on having secure access to land.<sup>41</sup>

### ***2.1.2 Availability of services, materials, facilities and infrastructure***

Following the examination of legal security of tenure, this part shifts focus to another pivotal aspect of the right to adequate housing, namely, the availability of services, materials, facilities and infrastructure. This component is fundamental to ensuring that housing is not only secure but also liveable and conducive to the well-being of its occupants. The availability of these essential services plays a significant role in defining the adequacy of housing, impacting the health, safety and quality of life of residents. By exploring the legal and practical dimensions of service availability, this part aims to provide a comprehensive understanding of its importance in the broader context of the right to adequate housing.

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.<sup>42</sup> For housing to meet the adequacy requirement, it must contain facilities that are indispensable for human health, security, comfort and nutrition.<sup>43</sup> To this end, General Comment 4 provides that

[a]ll 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, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.<sup>44</sup>

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

40 General Comment 4 para 8(a).

41 General Comment 26 (2022) on land and economic, social and cultural rights (24 January 2023) para 1. 'Without such access, people could be subject to displacement and forced eviction, which could violate their right to adequate housing'; see General Comment 26 para 7.

42 K Mchunu & S Nkambule 'An evaluation of access to adequate housing: A case study of eZamokuhle township, Mpumalanga; South Africa' (2019) 5 *Cogent Social Sciences* 5.

43 General Comment 4 para 8(b).

44 As above.

pattern analysis reveals that the level of concentration of facilities, infrastructure, materials and services varies significantly across different areas (for instance, a city, region or country).<sup>45</sup> 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.

With the importance of availability of services, materials, facilities and infrastructure established, the next critical aspect of the right to adequate housing is affordability. Ensuring that housing costs are reasonable and manageable for individuals and families is essential for achieving housing adequacy. This article next examines the component of affordability, its implications for housing policy, and the challenges faced by households in securing affordable housing.

### 2.1.3 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 that do not often address the housing needs of diverse social groups, particularly poor households that intend either to rent or purchase a house.<sup>46</sup>

Spatial segregation is also intensified by systemic barriers to accessing social housing programmes.<sup>47</sup> 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 non-housing expenditures.<sup>48</sup> As eloquently stated by Cavicchia, when local planning is more market-oriented, housing accessibility becomes largely dependent

45 JA Parry and others 'Spatial analysis on the provision of urban amenities and their deficiencies – A case study of Srinagar City, Jammu and Kashmir, India' (2012) 2 *Research on Humanities and Social Sciences* 192-193.

46 W Wilson & C Barton 'What is affordable housing?' (2019) 7. See also EM Musvoto & MM Mooya 'Addressing challenges in the South African affordable housing market: A critical realist perspective' (2018) 8 *Journal of Construction Project Management and Innovation* 2198.

47 United Nations Human Rights Council 'Spatial segregation and the right to adequate housing' 4 March 2022 A/HRC/49/48 (2022) 12.

48 General Comment 4 para 8(c).

on household finances.<sup>49</sup> 'As a consequence, generating inequalities based on income and wealth differences and on intergenerational justice issues.'<sup>50</sup>

General Comment 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 are able to succeed owing to various forms of housing finance that satisfactorily reflect their housing needs. Thus, it is important to ensure that tenants are appropriately protected against unreasonable rent increases.

After dealing with affordability, the next crucial aspect of the right to adequate housing is habitability. This next part of the article explores the essential elements of habitability, including structural integrity, safety features and environmental factors, highlighting their significance in ensuring that housing meets the needs of its occupants.

#### **2.1.4 Habitability**

The fourth element that General Comment 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. Habitability refers to the physical conditions and characteristics of housing that make it safe, secure, and suitable for occupation. 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 that 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'.<sup>51</sup>

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

49 R Cavicchia 'Housing accessibility in densifying cities: Entangled housing and land use policy limitations and insights from Oslo' (2023) 127 *Land Use Policy* 2.

50 As above.

51 General Comment 4 para 8(d). Housing challenges form 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 jeopardises children's health living in sub-Saharan Africa. See LS Tusting and others 'Housing and child health in sub-Saharan Africa: A cross-sectional analysis' (2020) 17 *PLOS Medicine* 1.

are strong links between housing, planning and health.<sup>52</sup> 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.<sup>53</sup> These principles, prepared by the World Health Organisation (WHO), 'view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses'.<sup>54</sup>

### 2.1.5 Accessibility

The understanding of accessibility in this part 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 services.<sup>55</sup> 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.<sup>56</sup> Such a spatial pattern reduces the travelling distances to work or shop, and so forth.

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 that 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. This, 'accessibility leads to independence, increased mobility, access to the labour market and, consequently, a better quality of life'.<sup>57</sup>

52 J Gbadegehin and others 'Housing, planning and urban health: Historical and current perspectives from South Africa' (2020) 48 *Bulletin of Geography. Socio-Economic Series* 23.

53 World Health Organisation 'Health Principles of Housing' (1989).

54 As above. The principles related to health deal with the following: protection against communicable diseases; 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.

55 DJ du Plessis 'Land-use mix in South African cities and the influence of spatial planning: Innovation or following the trend?' (2015) 97 *South African Geographical Journal* 220.

56 Economic Commission for Europe 'Spatial planning: Key instrument for development and effective governance with special reference to countries in transition' (2008) 9.

57 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) 4.

Interestingly, General Comment 4 specifically enumerates an array of disadvantaged groups,<sup>58</sup> without clearly mentioning the landless and economically poor persons in the list. Nevertheless, the wording of General Comment's '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'.<sup>59</sup>

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'.<sup>60</sup> 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 the reconstruction of human settlements.

### 2.1.6 Location

The fundamental aspect of adequacy pertains to whether housing developments are in either urban peripheries or inner-city areas or places closer to essential public amenities. In addition, the location of housing should not be in polluted and dangerous areas, which is integrally linked to the adequacy component of habitability.

A specific location gives poor households the opportunity to receive the same marginal benefit from the 'locational amenities'.<sup>61</sup> 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

58 Disadvantaged groups listed in General Comment 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.

59 General Comment 4 para 8(e).

60 As above.

61 WH Hoyt & SS Rosenthal 'Household location and Tiebout: Do families sort according to preferences for locational amenities?' (1997) 42 *Journal of Urban Economics* 159.

service provision.<sup>62</sup> 'The essence of urban planning is to provide adequate and equitable services to all groups.'<sup>63</sup> Location is closely linked to other housing adequacy elements such as legal security of tenure, availability of services and affordability.<sup>64</sup> 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, healthcare services, schools, childcare centres, and other social facilities'.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> Cognisant of the location aspect, this entails spatial equity-based land use planning and mechanisms such as zoning and urban planning that implement housing programmes in well-located areas to address spatial discrimination and to realise the right to adequate housing.

Having examined the significance of location in ensuring access to essential services, opportunities and resources, the next part deals with the final aspect of the right to adequate housing: cultural adequacy. Cultural adequacy recognises the importance of housing being congruent with the cultural identity, practices, and values of its occupants. This dimension acknowledges that housing is not merely a physical structure, but also a space that reflects and supports the cultural heritage and lifestyle of individuals and communities. Exploring the concept of cultural adequacy assists to better

62 As above. In addition, see AJ Aderamo & OA Aina 'Spatial inequalities in accessibility to social amenities in developing countries: A case from Nigeria' (2011) 5 *Australian Journal of Basic and Applied Sciences* 316.

63 Hoyt & Rosenthal (n 61) 192-193.

64 K Marnane & K Greenop 'Housing adequacy in an informal built environment: Case studies from Ahmedabad' (2023) 38 *Journal of Housing and the Built Environment* 2062.

65 General Comment 4 para 8(f).

66 Y Li and others 'Accessibility-based equity of public facilities: A case study in Xiamen, China' (2021) 14 *Applied Spatial Analysis and Policy* 947.

67 United Nations Human Rights Council (n 47) 12.

understand how housing policies and practices can be designed to respect and promote the cultural rights of diverse populations.

### 2.1.7 *Cultural adequacy*

In the list of baseline factors that determine whether certain forms of shelter can constitute 'adequate housing' (as enumerated in General Comment 4), the aspect of cultural adequacy is also included. The component of cultural adequacy in the context of housing emphasises the importance of respecting and promoting the cultural identity, practices and values of individuals and communities. However, this principle can be challenging to implement in practice, particularly in multi-cultural societies where diverse cultural groups may have competing interests and needs.<sup>68</sup> Hence, it can be difficult to balance the need for cultural sensitivity with the requirement for universal standards of housing quality and safety. For instance, cultural practices or traditions may be cited as reasons for tolerating poor living conditions or lack of access to basic services.<sup>69</sup> Therefore, it is essential to approach cultural adequacy in a meticulous manner, recognising the importance of cultural diversity while also ensuring that housing meets minimum standards of quality, safety and dignity.

Article 15(a) of 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.<sup>70</sup> The aspect of cultural adequacy in relation to the right to 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.<sup>71</sup>

For the ESCR Committee, in General Comment 21, culture encompasses, among others, natural and man-made environments as well as a shelter through which individuals and communities may

68 JC Mubangizi 'Building a South African human rights culture in the face of cultural diversity: Context and conflict' (2012) 5 *African Journal of Legal Studies* 1; Council of Europe 'Competences for democratic culture: Living together as equals in culturally diverse democratic societies' (2016) 15.

69 SM Albert 'Impact of cultural, social, and community environments on home care' in S Olson *The role of human factors in home health care: Workshop summary* (2010) 247; European Commission 'The role of culture in preventing and reducing poverty and social exclusion' (2005) 3-4; CL van Scheepers 'Ethnicity, cultural diversity and poverty in South Africa: Archaeological perspectives from Iron Age Palestine' (2010) 23 *Old Testament Essays* 161.

70 M Özden & S Brunschwig *Cultural rights* (2013) 3.

71 V Sukhwani and others 'Enhancing cultural adequacy in post-disaster temporary housing' (2021) 11 *Progress in Disaster Science* 2.

express their humanity and meaning to their existence.<sup>72</sup> General Comment 4 alludes to the fact 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’.<sup>73</sup>

Cultural adequacy forms part of the core principles of sustainable housing<sup>74</sup> outlined by the Geneva UN Charter on Sustainable Housing.<sup>75</sup> The principle of cultural adequacy requires that ‘housing policy should take into consideration questions of cultural identity, value, and emotional wellbeing’.<sup>76</sup> Accordingly, this should be addressed through the following:<sup>77</sup>

- (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) emphasising 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.

Accordingly, cultural identity and diversity must be mainstreamed in housing projects.<sup>78</sup> All spheres of government are expected to integrate cultural rights into their housing policies.<sup>79</sup> Development or modernisation activities should preserve the cultural dimensions of housing through the usage of the appropriate technological facilities.<sup>80</sup> Nawa states that ‘local government has been identified as a locus where culture-led development best finds expression’.<sup>81</sup>

<sup>72</sup> The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity; see General Comment 21: The Right of Everyone to Take Part in Cultural Life, 21 December 2009 para 13.

<sup>73</sup> General Comment 4 para 8(g).

<sup>74</sup> The other principles are (i) social inclusion and participation; (ii) economic effectiveness; and (iii) environmental protection.

<sup>75</sup> The Geneva UN Charter on Sustainable Housing: Ensure access to decent, adequate, affordable and healthy housing for all (2015).

<sup>76</sup> Geneva Charter (n 75) para 16.

<sup>77</sup> As above.

<sup>78</sup> F Shaheed ‘Human rights are essential tools for an effective intercultural dialogue’ 21 May 2010, <https://tinyurl.com/3teayx39> (accessed 13 June 2024).

<sup>79</sup> D Petrova ‘Diverse cultural identities: The challenges of integrating cultural rights in policies and practices’ (2010) 2.

<sup>80</sup> General Comment 4 para 8(g).

<sup>81</sup> LL Nawa ‘Municipal cultural policy and development in South Africa: A study of the City of Tshwane Metropolitan Municipality’ PhD thesis, University of South Africa, 2012 2.



Therefore, the infusion of cultural rights and practices in local government housing policies may express cultural identity and diversity in the housing processes and products.

Having explored the essential components of the right to adequate housing, the article next focuses on the critical role of local governments in upholding the right. Local governments are uniquely positioned to address housing needs, given their proximity to communities and understanding of local contexts. This part examines global patterns in local government obligations, highlighting best practices, challenges and innovative approaches to realising the right to adequate housing.

### 3 Obligations of local government: Global patterns

'The real effect of human rights is experienced locally.'<sup>82</sup> The typical nature of local government functions amplifies the exercise and enjoyment of fundamental rights.<sup>83</sup> 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'.<sup>84</sup> The discourse for human rights orientation at local government level has also propelled the emergence of the phrase 'human rights city'.<sup>85</sup>

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.<sup>86</sup>

82 Columbia Law School Human Rights Institute 'Bringing human rights home: How state and local governments can use human rights to advance local policy' (2012) 5.

83 CM 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* 151.

84 P. Vormittag 'Human rights mobilisation in São Paulo's policy response to COVID-19' in JE Nijman and others (eds) *Cities and global governance: Urban politics of human rights* (2023) 5.

85 MF Davis 'Introduction' in MF Davis and others (eds) *Human rights cities and regions: Swedish and international perspectives* (2017) 4.

86 J 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; FT Khaile and others 'The role of local government in promoting a sense of belonging as an aspect of social cohesion: A document

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 realised locally – local implementation gives meaning to human rights. Human rights treaties are intended to be implemented at the local level.'<sup>87</sup> Global patterns demonstrate that local governments can incorporate international human rights standards in their programmes of action.<sup>88</sup>

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'.<sup>89</sup> For instance, through the United Cities and Local Governments (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.<sup>90</sup> 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'.<sup>91</sup>

All things considered; international human rights treaties seldom provide specific obligations that would apply to local governments. As part of the state, local governments are equally bound by human rights obligations. In addition to binding international legal instruments, soft laws, which operate as gap fillers, add to local governments' international obligations. This consolidation of imposed human rights obligations may require local governments to fulfil the right of access to adequate housing.

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analysis' (2021) 10 *African Journal of Governance and Development* 8; OHCHR 'Implementing the right to adequate housing: A guide for local governments and civil society' (2021) 4.

87 OHCHR (n 86) 4.

88 Columbia Law School Human Rights Institute (n 82) 1.

89 Columbia Law School Human Rights Institute (n 82) 5.

90 Eg, 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.

91 HP Aust & A du Plessis 'Introduction: The globalisation of urban governance – Legal perspectives on Sustainable Development Goal 11' in HP Aust & A du Plessis (eds) *The globalisation of urban governance: Legal perspectives on Sustainable Development Goal 11* (2019) 5.

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'.<sup>92</sup> 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 grassroots level. In its General Comment 16, the ESCR 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'.<sup>93</sup>

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.<sup>94</sup> The Special Rapporteur acknowledges the significance of assigning crucial responsibilities relating to the right to adequate housing to local governments.<sup>95</sup> 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.<sup>96</sup> Local governments enjoy close proximity to affected communities. They 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. UN-HABITAT states that the role governments should be playing involves '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'.<sup>97</sup>

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

92 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) 5.

93 General Comment 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 para 42.

94 As above.

95 General Comment 16 (n 93) para 59.

96 As above.

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

right of access to adequate housing. General Comment 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.<sup>98</sup> 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 the fact that local governments are assigned the obligation to realise the right to housing without the commensurate allocation of resources, knowledge, capacity and accountability mechanisms.<sup>99</sup>

Local governments must ensure that there is an adequate supply of housing that meets the needs of all who require this. 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.

Local governments may integrate human rights into their by-laws, policies and practice through several strategies.<sup>100</sup> First, they may adopt resolutions that affirm local commitments to the realisation of human rights. Second, as reflected in these resolutions, local governments can reframe local concerns to inform their responses to issues such as the lack of adequate housing. Third, through greater public participation, local government can address the identified local concerns by aligning, formulating and implementing the appropriate policies and programmes.<sup>101</sup> Fourth, 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.<sup>102</sup> In the same vein, the fifth action plan of the Municipalist Declaration of Local Governments for the

98 General Comment 4 para 12.

99 United Nations Human Rights Council (n 47) para 60.

100 Columbia Law School Human Rights Institute (n 82) 7.

101 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.

102 Columbia Law School Human Rights Institute 'Human rights recommendations to the United States: A desk reference for state and local human rights agencies' (2016) 5.

Right to Housing and the Right to the City calls for city governments to effectively cooperate with both national and international supra-municipal bodies to share knowledge and the best practices in urban and residential policies.

Having examined the global patterns of local government obligations in housing, the article now shifts focus to the domestic legal framework governing local government's roles, powers, functions and responsibilities in South Africa. This overview delves into the constitutional and legislative frameworks that shape the mandate of local government in addressing housing needs and delivering housing services. By exploring the domestic legal landscape, this part of the article aims to provide an understanding of the legal foundations underlying local government's housing roles, powers, functions and responsibilities in South Africa.

#### **4 An overview of the domestic legal framework for local governments' housing roles, powers, functions and responsibilities**

Part B of Schedules 4 and 5 of the Constitution lists functional areas over which a municipality has executive authority and the right to administer local government matters.<sup>103</sup> Schedule 4A of the Constitution lists housing as concurrent competency of national and provincial governments. Nonetheless, the national and provincial governments may still assign housing powers and functions to local governments.<sup>104</sup> However, the assignee municipality must have the competent capacity to best effectively administer the function locally.

The 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.<sup>105</sup> The national minister or the provincial member of executive committee (MEC) responsible for housing, who initiates the assigning legislation or agreement, must take appropriate steps to provide sufficient funding and capacity-building initiatives to the assignee municipality.<sup>106</sup> These measures assist the municipality in effectively performing the assigned housing function or power.<sup>107</sup> It must be noted that there is

<sup>103</sup> Secs 156(1) & 156(2) of the Constitution.

<sup>104</sup> Sec 156(4) of the Constitution.

<sup>105</sup> Act 32 of 2000.

<sup>106</sup> Sec 10(3) Municipal Systems Act.

<sup>107</sup> Before assignment of the housing functions or powers, a municipality is first accredited to administer national housing programmes. Accreditation is a capacitation measure towards the assignment and has been recognised on

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 and powers.

Despite the fact that the Constitution does not confer on local government the primary responsibility to implement the right to housing,<sup>108</sup> 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. However, even though several of the listed functions and powers relating to housing, 'they do not place the primary obligation to take the requisite measures for the fulfilment of the right to housing on local government'.<sup>109</sup>

Where housing is a constitutional right, the provision of housing is one of the fundamental duties of the state.<sup>110</sup> Section 7(2) of the Constitution imposes four different types of duties on the state, namely, 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.<sup>111</sup> 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 access 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.<sup>112</sup> Under the duty to 'promote', the state must adopt educational and informational programmes 'designed to enhance awareness and understanding of fundamental human rights'.<sup>113</sup> 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.

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paper, since 2009. See Department of Human Settlements 'Simplified guide to the National Housing Code' (2009) 5; K Tissington 'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa' (2013).

108 De Visser (n 86) 205.

109 As above.

110 Global Strategy for Shelter to the Year 2000 para 13.

111 K Tissington 'A resource guide to housing in South Africa 1994-2010: Legislation, policy, programmes and practice' (2011) 11.

112 Individuals and private entities are regulated by the state to prevent interference with the rights of individuals and groups; De Vos & Freedman (n 8) 796.

113 De Vos & Freedman (n 8) 797.

The constitutional right of access to adequate housing is given effect by several statutes that also allocate housing roles and responsibilities to local government. The Housing Act<sup>114</sup> provides municipalities with limited roles and responsibilities in social housing developments. Every municipality must 'ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis',<sup>115</sup> and that housing development provides individuals and communities with a variety of choices of housing and tenure options.<sup>116</sup>

The Social Housing Act requires a municipality to create conducive conditions that preserve the health and safety of residents and to ensure economically efficient services of water, sanitation, electricity, roads, stormwater drainage and transport.<sup>117</sup> South Africa's initial state report to the ESCR Committee also notes the following: 'Municipalities must ensure that the right to housing is progressively realised in their jurisdiction. They must also identify and designate land for housing and ensure that water, sanitation, electricity, roads, storm water drainage and transport are provided.'<sup>118</sup>

The Act provides that, through collaboration with the social housing institutions and national and provincial governments, the local government must support the development of low to medium-income communities by providing housing with proximity to transport, markets and employment.<sup>119</sup> The national, provincial and local spheres of government must promote the suitable location of social housing stock in respect of employment opportunities.<sup>120</sup> Housing development must prioritise the poor,<sup>121</sup> meet the special housing needs of persons with disabilities,<sup>122</sup> marginalised women and other disadvantaged groups facing unfair discrimination,<sup>123</sup> including children, child-headed households, persons with disabilities and older persons.<sup>124</sup>

114 Act 107 of 1997.

115 Sec 9(1)(a)(i) Housing Act.

116 Sec 2(1)(c) Housing Act.

117 Secs 9(1)(a)(ii) & (iii) Social Housing Act 16 of 2008.

118 ESCR Committee (n 18) para 98.

119 Sec 2(1)(b) Social Housing Act.

120 Sec 2(1)(e)(viii) Social Housing Act.

121 Sec 2(1)(a) Housing Act.

122 Sec 2(2)(e)(viii) Housing Act.

123 Sec 2(2)(e)(x) Housing Act.

124 Sec 2(1)(a) Social Housing Act.

## 5 Adjudicating the constitutional right to adequate housing

In its monitoring report, the ESCR 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.<sup>125</sup> Among all socio-economic rights enshrined in the Constitution, the most frequently litigated is the right of access to adequate housing.<sup>126</sup>

The case of *Government of the Republic of South Africa & Others v Grootboom & Others*<sup>127</sup> is viewed as the paramount litigation for socio-economic rights jurisprudence in South Africa. It is the first matter in which the right to access to adequate housing was entertained by the Constitutional Court.<sup>128</sup> It was held that the fulfilment of obligations imposed by the right to access to adequate housing requires proper and effective cooperation between the different spheres of government,<sup>129</sup> a breach of which would amount to a transgression of the right.<sup>130</sup> Subsequent cases that adjudicated on this right have also reaffirmed its justiciability against the local government.<sup>131</sup> 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:<sup>132</sup>

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

125 ESCR Committee (n 18) para 4.

126 Chenwi (n 1) 74.

127 2001 (1) SA 46 (CC).

128 M Pieterse 'Balancing socio-economic rights: Confronting COVID-19 in South Africa's informal urban settlements (2021) 39 *Nordic Journal of Human Rights* 41; P de Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258; L Chenwi 'Housing for persons with disabilities in South Africa' (2021) 21 *International Journal of Housing Policy* 324.

129 *Grootboom* (n 127) 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.

130 Currie & De Waal (n 17) 34.

131 *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* 2004 (3) All SA 169 (SCA) (*Modderklip* (SCA)); *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC). 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; M Pieterse 'Procedural relief, constitutional citizenship and socio-economic rights as legitimate expectations' (2012) 28 *South African Journal on Human Rights* 360.

132 *Grootboom* (n 127) para 82.



of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.

Moreover, meaningful engagement is of paramount importance for a court to assess if the eviction is just and equitable. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>133</sup> the Constitutional Court stated that '[t]here 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.'<sup>134</sup>

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 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'.<sup>135</sup>

In *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*<sup>136</sup> 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)'.<sup>137</sup> 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 coordinated 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

133 2010 (3) SA 545 (CC).

134 *Joe Slovo* (n 133) para 238.

135 *Joe Slovo* (n 133) para 244.

136 2008 (3) 208 (CC).

137 *Olivia Road* (n 136) para 17. The Court also declared as unconstitutional sec 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; paras 47-51, 54(5) & (6).

procedural mechanism.<sup>138</sup> 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.<sup>139</sup> 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'.<sup>140</sup>

However, in the context of evictions jurisprudence, Liebenberg also argues that the Constitutional Court has been inconsistent in its application of the meaningful engagement principle.<sup>141</sup> According to Liebenberg, the Court has sometimes been too lenient in its assessment of the state's compliance with this principle, while at other times it has been overly rigid. For instance, in *Olivia Road* the Court 'emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason'.<sup>142</sup> This inconsistency has significant implications for the protection of socio-economic rights in South Africa. If the state is not held to a consistent standard of meaningful engagement, it may undermine the effectiveness of these rights and perpetuate inequality and injustice.

Following the analysis of adjudicating the constitutional right to adequate housing, the article delves into the judicial enforcement of this right in South Africa, guided by baseline factors of General Comment 4. These factors provide a framework for assessing the effectiveness of the judiciary in upholding the right to adequate housing, considering the housing crisis and its implications, relevant legislation and case law, landmark cases and their impact, and courts' ability to enforce housing rights.

## 5.1 Legal security of tenure

The most detrimental manifestation of tenure insecurity is vulnerability to eviction. Even the ESCR Committee expressed grave concerns about the rampant nature of illegal evictions and the excessive use

138 Z Saul 'Developing a community engagement model as a normative framework for meaningful engagement during evictions' LLD thesis, University of the Western Cape, 2016 7.

139 S Liebenberg *Socio-economic rights: Adjudication under transformative constitution* (2010) 302.

140 *Olivia Road* (n 136) para 407.

141 S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 28-29.

142 Liebenberg (n 141) 19. See also *Olivia Road* (n 136) para 30.

of force during evictions in South Africa.<sup>143</sup> Hence, recommending that South Africa should ensure that the implementation of evictions is a measure of last resort, without the use of force and in conformity to international human rights standards.<sup>144</sup>

*Grootboom* remains an instrumental benchmark in terms of upholding the right to housing in relation to evictions or removals.<sup>145</sup> 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'.<sup>146</sup> In particular, local governments must enforce laws and policies that protect tenure rights, such as registration and titling systems; providing secure tenure options, and establish mechanisms for resolving tenure disputes while protecting vulnerable and disadvantaged groups.

In *Despatch Municipality v Sunrize Estate and Development Corporation (Pty) Ltd*<sup>147</sup> the Court declared that section 3B of the Prevention of Illegal Squatting Act,<sup>148</sup> which permitted land owners 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'.<sup>149</sup>

In *Port Elizabeth Municipality v Various Occupiers*<sup>150</sup> the Constitutional 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.<sup>151</sup> In *Fischer v Persons Unknown*<sup>152</sup> the City of Cape Town was ordered to construct

143 ESCR Committee (n 18) para 58.

144 ESCR Committee (n 18) para 59.

145 BO Mmusinyane 'Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India' PhD thesis, University of South Africa, 2015 290.

146 *Grootboom* (n 127) para 51.

147 1997 (4) SA 596 (SE).

148 Act 52 of 1951.

149 *Joe Slovo* (n 133) para 409.

150 2005 (1) SA (CC).

151 *Joe Slovo* (n 133) para 12.

152 2014 (3) SA 291 (WCC).

the informal structures that had been demolished and to provide temporary habitable dwellings that afford residents shelter, privacy and amenities.

These judgments marked significant victories for the rights of informal settlement dwellers, vulnerable and disadvantaged communities. For instance, in *Fischer v Persons Unknown*,<sup>153</sup> by ordering the City to reconstruct the demolished structures and provide temporary habitable dwellings, the Court upheld the constitutional rights to adequate housing, dignity and security of the person. This decision highlights the judiciary's role in holding municipalities accountable for their obligations to provide housing and protect the rights of vulnerable communities.

However, the implementation of the Court's order poses practical challenges. The City's ability to provide suitable temporary dwellings that meet the required standards of habitability, shelter, privacy and amenities may be limited by resource constraints. Moreover, the judgment raises questions about the long-term sustainability of temporary solutions and the need for comprehensive housing policies that address the root causes of informal settlements. Ultimately, the effectiveness of the Court's order will depend on the City's commitment to implementing it and working towards more durable solutions for the affected communities.

Therefore, local governments must implement policies and practices that protect residents from arbitrary evictions, forced displacement and tenure insecurity. The right to legal security of tenure can be fulfilled through various forms of tenure, such as title deeds, leases or occupancy rights, and by ensuring that evictions are carried out only as a last resort, in accordance with the law, and with adequate compensation or alternative housing. By securing tenure rights, local governments can promote stability, dignity and security for residents, particularly vulnerable groups, and prevent homelessness and displacement.

Building on the importance of legal security of tenure as a fundamental part of adequate housing, below the focus falls on another critical aspect: the availability of essential services, materials, facilities and infrastructure. This component is vital for ensuring that housing is not only secure but also liveable and conducive to a dignified life.

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153 As above.

## 5.2 Availability of services, materials, facilities and infrastructure

The sustainable access to services, materials, facilities and infrastructure is essential for health, security, comfort and nutrition. Informal housing with minimal amenities causes people to suffer great material inadequacies.<sup>154</sup> Each sphere of government must accept responsibility for the implementation of specific parts of the social housing programme.<sup>155</sup> In *Grootboom* the Court stated that the right to access to adequate housing obliges the government to provide access to services such as water, sewage, electricity and roads.<sup>156</sup> 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'.<sup>157</sup> These facilities and services have a bearing on spatial planning as well as land use and management. When a municipality provides services to residents in temporary residential units, it is fulfilling its statutory and constitutional obligations.<sup>158</sup>

Similarly, in both *Grootboom*<sup>159</sup> and *Joe Slovo*<sup>160</sup> 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 several conditions listed by the Court. The specifications in the list include basic services, materials, facilities and infrastructure that are indispensable for adequate housing.<sup>161</sup>

154 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) SA 104 (CC) para 363.

155 *Grootboom* (n 127) para 40.

156 *Grootboom* (n 127) para 37.

157 *Grootboom* (n 127) para 82.

158 *Grootboom* (n 127) paras 29 & 39. Sec 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'. According to sec 152(1)(d) of the Constitution, the local government must 'promote a safe and healthy environment'. Sec 73(1)(c) of Municipal Systems Act 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. Eg, *Grootboom* (n 127) paras 44 & 82-83.

159 *Grootboom* paras 44 & 82-83.

160 *Joe Slovo* (n 133) para 209.

161 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

Local governments must therefore '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'.<sup>162</sup> Indeed, local governments' duties 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 of 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.

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.<sup>163</sup> In *Thubakgale*<sup>164</sup> 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.'<sup>165</sup> 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.<sup>166</sup> In *Grootboom* it was 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.'<sup>167</sup> 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'.<sup>168</sup>

Accordingly, local governments must ensure residents' access to essential services such as clean water, sanitation, electricity and waste management. This involves investing in infrastructure development, maintaining existing services, and providing affordable and reliable

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communal ablution facility; toilet facilities with water-borne sewerage; and fresh water; *Joe Slovo* (n 133) para 10.

162 Amnesty International 'Poor service delivery deprives people of dignity and their basic human rights' 5 July 2021, <https://tinyurl.com/yxzfur85> (accessed 13 June 2024).

163 De Vos & Freedman (n 8) 815.

164 [2021] ZACC 45 paras 86-89 & 109.

165 *Thubakgale* (n 164) 164.

166 E de Wet *The constitutional enforceability of economic and social rights: The meaning of the German Constitutional Model for South Africa* (1996) 118.

167 *Grootboom* (n 127) para 46.

168 Currie & De Waal (n 17) 581.

access to these necessities. These services, materials, facilities and infrastructure are essential to create healthy and safe living environments, support residents' well-being, and promote dignity, ultimately contributing to the realisation of the right to adequate housing for all.

Following the discussion on the availability of essential services, materials, facilities and infrastructure, the following part explores major aspects of affordability. This part touches the various factors that influence housing affordability, including income levels, housing prices, rental costs and government policies.

### 5.3 Affordability

Affordability ensures that housing costs do not compromise an individual's or household's ability to meet other basic needs, such as food, health care and education. 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.<sup>169</sup> Hence, it is critical to identify strategies to make housing more accessible and sustainable for all, particularly vulnerable populations. Primarily, discrepancies in housing affordability are largely influenced by urban real estate markets. The Constitutional Court in *Grootboom* elaborated on housing affordability as follows:<sup>170</sup>

[T]here 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 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.

The plight of the poor who struggle to afford adequate housing in the urban cores was also highlighted in *Adonisi & Others v Minister for Transport and Public Works Western Cape & Others*.<sup>171</sup> According to the Court:<sup>172</sup>

169 E Govender 'The impact of housing costs on household income across primary and secondary areas in South Africa' Master's dissertation, Stellenbosch University, 2020 1.

170 *Grootboom* (n 127) para 36.

171 *Adonisi & Others v Minister for Transport and Public Works Western Cape & Others; Minister of Human Settlements & Others v Premier of the Western Cape Province & Others* [2021] 4 All SA 69 (WCC) para 34.

172 As above.

The 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.

The *Adonisi* judgment also implicated the local government in the provision of affordable housing. It was held that 'all levels of state are to provide affordable housing'.<sup>173</sup> Accordingly, local government has the obligation to formulate and implement policies and programmes that allow everyone to afford housing, either for rental or purchasing, irrespective of income or access to economic resources.

The judgments highlight the necessity of local governments to implement policies and programmes that promote reasonable housing costs and without compromising residents' ability to meet other basic needs; therefore, implementing suitable subsidies, rent control measures and incentives for developers to build affordable housing. Additionally, local governments must prioritise mixed-income housing developments and community land trusts to maintain affordability and prevent gentrification, ultimately making housing accessible to low-income and vulnerable populations and promoting equitable access to safe and secure living environments.

#### 5.4 Habitability

The Constitutional 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.<sup>174</sup> Indeed, the provision of justiciable socio-economic rights in the Constitution is a powerful tool for advancing human dignity, equality and social welfare of marginalised and disadvantaged groups.

In relation to habitability, the Court in *Joe Slovo* exposed several issues that constitute non-compliance with the established adequacy standards.<sup>175</sup> 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.

<sup>173</sup> *Adonisi* (n 171) para 75.

<sup>174</sup> *Adonisi* (n 171) para 197.

<sup>175</sup> *Joe Slovo* (n 133) para 191.



The Constitutional Court's engagement order in *Olivia Road* 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'.<sup>176</sup>

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 & Others v Ekurhuleni Metropolitan Municipality*<sup>177</sup> the municipality discovered the development of sink holes 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* the Constitutional Court conceded that social justice within a stable constitutional democracy is contingent upon the quest for a roof over one's head.<sup>178</sup> The municipality was ordered to provide temporary emergency accommodation to occupiers, including the victims evicted by private land owners.<sup>179</sup>

The habitability aspect requires local governments to ensure that housing developments meet basic standards of safety, health and comfort. This includes enforcing building codes and regulations to guarantee structurally sound and weather-tight dwellings, providing access to clean water, sanitation and waste management services, and implementing measures to prevent overcrowding and promote adequate ventilation and lighting; hence, protecting residents from health hazards and creating living environments that support physical and mental well-being, ultimately contributing to the realisation of the right to adequate housing.

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176 *Olivia Road* (n 136) para 44.

177 2012 (2) SA 598 (CC).

178 *Blue Moonlight* (n 154) para 2.

179 *Blue Moonlight* (n 154) para 87.

## 5.5 Accessibility

'Accessibility' has been associated with the term 'progressive realisation' in *Grootboom* as the Court stated the following:<sup>180</sup>

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.

The progressive realisation of the right of access to housing refers to the gradual process by which local governments fulfil their obligation to ensure that everyone has access to adequate housing. It acknowledges that achieving this goal might take time and resources, but a continuous effort is required. The notion about the gradual fulfilment of the right to access to adequate housing does not mean that everyone immediately gets a home. 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 that local governments' 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 to *in situ* upgrading, which refers to the improvement of existing informal settlements, that are generally located in peripheral areas, where people already live.<sup>181</sup> Apart from providing secure land tenure for residents, upgrading infrastructure such as 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.

<sup>180</sup> *Blue Moonlight* (n 154) para 49.

<sup>181</sup> H Wang 'Consolidating informal settlements through upgrading? The temporary implications of in-situ electrification from Thembelihle in Johannesburg, South Africa' (2022) 59 *Journal of Asian and African Studies* 425; Isandla Institute 'Participatory informal settlement upgrading in South Africa: Moving from theory to practice' (2014) 6-7.

In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd & Others*<sup>182</sup> 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'.<sup>183</sup> 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:<sup>184</sup>

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 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.

The government has a constitutional obligation towards landless people and those who suffer deplorable living conditions.<sup>185</sup> 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'.<sup>186</sup> 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.<sup>187</sup>

A minority judgment of the Constitutional Court in *Thubakgale v Ekurhuleni Metropolitan Municipality & Others*<sup>188</sup> touched on the issue of 'adequacy' as one of the primary components of the right to housing. 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'.<sup>189</sup> 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'.

By designing and constructing housing that is physically accessible to all, including persons with disabilities, the elderly

182 [2005] 8 BCLR 786 (CC) para 49.

183 *Modderklip Boerdery* (n 182) para 49.

184 *Modderklip Boerdery* para 36.

185 *Joe Slovo* (n 133) para 214.

186 As above.

187 *Joe Slovo* (n 133) para 5.

188 [2021] ZACC 45 at paras 86-89 and 109.

189 *Thubakgale* (n 188) para 115.

and other vulnerable groups, local governments can promote equitable accessibility and realise the right to adequate housing. The incorporation of universal design principles, such as wheelchair ramps, wide doorways and adaptable interior spaces, into housing developments is crucial. Additionally, local governments must prioritise the allocation of accessible housing units to those who need them most, and ensure that housing developments are situated in areas with accessible public transportation and community facilities, thereby promoting equal access to opportunities and services for all residents.

## 5.6 Location

Access to land is a fundamental element of the realisation of the right to adequate housing. 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'.<sup>190</sup> Among the predicaments are restrictions from the urban real estate market which causes 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.<sup>191</sup> Instead, the implementation of these programmes, through municipal planning, 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.

The government may provide housing, but if the developments are planned and implemented in poorly located areas, this hampers efforts to achieve spatial equity. Hence, the courts play a significant role in the quest to address the ramifications of apartheid spatial planning, land use and housing laws and practices.<sup>192</sup> When all avenues have been exhausted, 'judicial recourse (as a measure of last resort) offers a solution to marginalised communities who reside in socially and economically disadvantaged areas'.<sup>193</sup>

190 M Shandu & M Clark 'Rethinking property: Towards a values-based approach to property relations in South Africa' (2021) 11 *Constitutional Court Review* 41.

191 QN Tshazi 'Why a blanket approach to redressing spatial inequity is flawed' 19 August 2020, <https://tinyurl.com/5enft9e6> (accessed 5 April 2025).

192 J 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* 31.

193 P Mudau 'Western Cape High Court sets a new benchmark for promoting spatial equity, access to land and housing' (2020) 15 *Local Government Bulletin* 1.

In *Olivia Road*<sup>194</sup> 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, the Court's judgment in *Olivia Road* is silent on the question of the location of the alternative accommodation. Chenwi 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.'<sup>195</sup>

Nonetheless, through meaningful engagement, the parties in *Olivia Road* agreed that the provision for alternative accommodation must be within the city. In both *Joe Slovo*<sup>196</sup> and *Thubakgale*<sup>197</sup> 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:<sup>198</sup>

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.

The Court deemed the Joe Slovo informal settlement to be well-located, as it is located halfway between Cape Town international airport and the central business district (CBD).<sup>199</sup> Thus, it was stated that '[w]here 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'.<sup>200</sup> The Court in *Joe Slovo*

194 *Olivia Road* (n 136) para 43.

195 L 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 S Woolman and others *Constitutional Court review* (2009) 2 (2009) 387.

196 *Joe Slovo* (n 133) paras 107 & 254.

197 *Thubakgale* (n 188) para 169.

198 C 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* 110.

199 *Joe Slovo* (n 133) para 373.

200 As above.

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.<sup>201</sup> 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 included basic services, materials, facilities and infrastructure that are indispensable for adequate housing.<sup>202</sup>

In *Pheko*<sup>203</sup> the applicants also identified suitable land in the vicinity of Bapsfontein to which they could be relocated. 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 to access to adequate housing.<sup>204</sup> 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'.<sup>205</sup>

While the cases of *Grootboom*, *Blue Moonlight* and *Joe Slovo* emphasise that the state's housing policy must accommodate the emergency housing needs of the most vulnerable members of society, the *Adonisi* judgment,<sup>206</sup> although it was subsequently overturned by the Supreme Court of Appeal,<sup>207</sup> extended beyond the temporary housing option and sought a durable solution to the lack of access to urban land, makeshift housing and spatial inequalities.<sup>208</sup>

201 *Joe Slovo* (n 133) paras 33, 46 & 260.

202 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.

203 As above.

204 *Pheko* (n 177) para 50.

205 As above.

206 *Adonisi* (n 173) paras 201-202.

207 *Minister for Transport and Public Works: Western Cape & Others v Adonisi & Others* (522/2021 & 523/2021) [2024] ZASCA 47 para 4.

208 *Adonisi* (n 207) paras 201-202.

The Western Cape High Court read sections 26(2) and 25(5) of the Constitution in conjunction with the analysis of reasonableness employed in *Grootboom* to address the state's failure to 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. The Court's judgment attempted to clarify the enforcement of rights and opportunities for judicial oversight over spatial transformation-related issues.<sup>209</sup>

The Court nullified the sale of a well-located property under the ownership of the Western Cape provincial government.<sup>210</sup> 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 of 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.<sup>211</sup>

Hence, the Court imposed a constitutional obligation derived from a joint reading of the rights to access 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'.<sup>212</sup> While commenting on the positive implications of the *Adonisi* judgment, Willems viewed the proceeds of the sale of the well-located property could not be used to construct affordable housing on less expensive land that is situated in the urban peripheries.<sup>213</sup> This move would amount

<sup>209</sup> Mudau (n 187).

<sup>210</sup> *Adonisi* (n 207) para 75.

<sup>211</sup> As above.

<sup>212</sup> T Coggin "'They're not making land anymore": A reading of the social function of property in *Adonisi*' (2022) 138 *South African Law Journal* 697.

<sup>213</sup> S 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' University of Cape Town, 2022 43.

to a violation of the right to access to adequate housing. 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 a desire to preserve the lucrative real estate market. The Court in *Adonisi* encapsulated that there is a tendency to adhere to a policy of not developing government-subsidised housing in the CBD.<sup>214</sup> The Court further held:<sup>215</sup>

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 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.

However, Cotton expressed concern pertaining to adherence to the rule of law after the *Adonisi* judgment.<sup>216</sup> '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.'<sup>217</sup> The slow pace was obviously due to the fact the provincial and local governments lodged an appeal against the Court judgment, which was upheld by the Supreme Court of Appeal.<sup>218</sup> This Court ruled that the applicants improperly relied directly on the Constitution instead of the Housing Act and Social Housing Act, which give effect to the asserted constitutional rights. In addition, the Court held that no proper case was made for the province and municipality's obligation to provide social housing in central Cape Town.

Despite the municipalities' rights-related obligations in relation to housing as witnessed in *Grootboom*<sup>219</sup> and *Adonisi*,<sup>220</sup> the municipalities are reluctant to provide government-subsidised housing in well-located areas found in the inner city or adjacent spaces. The general

214 *Adonisi* (n 208) paras 302, 364, 400 & 440.

215 As above.

216 S Cotton 'Legal geographies of "community" in South Africa and the Tafelberg case (a children's story)' 22 January 2022, <https://tinyurl.com/45w2rwww> (accessed 13 June 2024).

217 As above.

218 *Adonisi* (n 208) para 4.

219 *Grootboom* (n 127) para 29.

220 *Adonisi* (n 173) para 75.



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 the absence of a focused and intentional practical implementation of the desired spatial transformation in the cities and towns, all the impressive laws, policies and programmes at the national, provincial and local levels will remain in vain.

All things considered, local governments in South Africa must prioritise housing developments in areas with access to essential services, such as schools, healthcare facilities, public transportation and employment opportunities. This requires also careful land use planning and zoning regulations to ensure that housing is situated in safe and healthy environments, away from environmental hazards and pollution. By considering the location of housing developments, local governments can promote social and economic integration, reduce commuting times and enhance the overall quality of life for residents, ultimately contributing to the realisation of the right to adequate housing

### 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.<sup>221</sup> 'South Africa is a multi-cultured state and cultural diversity underlies the South African legal system.'<sup>222</sup> 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.<sup>223</sup> The Constitution also entrenches everyone's right to enjoy their culture, practise their religion and use their language.<sup>224</sup>

221 General Comment 4 para 8(g).

222 HC Roodt 'Cultural policy and the landscape of the law in South Africa' (2006) 12 *Fundamina* 203.

223 Sec 30 of the Constitution.

224 Sec 31 of the Constitution.

In South Africa, courts play a pivotal role in the promotion and accommodation of cultural identity and diversity.<sup>225</sup> Both the Housing Act<sup>226</sup> and the Social Housing Act<sup>227</sup> enjoin the local government to promote the expression of cultural identity and diversity in housing developments. However, there seldom is 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 pays attention to 'cultural policy as a tool in social, economic and physical development'.<sup>228</sup> 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.<sup>229</sup> The integrated development plans of most municipalities do not feature the aspect of culture as part of social, economic and physical development.<sup>230</sup> 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'.<sup>231</sup> 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.<sup>232</sup>

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 of the settlement. This offers an opportunity to express the cultural practices of their choice in the process. Although not specifically incorporating the aspect of cultural adequacy, the Constitutional

225 C Rautenbach 'Celebration of difference: Judicial accommodation of cultural and religious diversity in South Africa' (2010) 10 *International Journal of Diversity in Organisations, Communities and Nations* 117.

226 Sec 2(1)(e)(xi) Housing Act.

227 Sec 2(1)(i)(vii) Social Housing Act.

228 Roodt (n 222) 205.

229 As above.

230 Roodt (n 222) 3.

231 L Nawa 'Local cultural policy in South Africa: A tool for urban regeneration' (2016) 51 *Journal of Public Administration* 759.

232 Department of Arts and Culture 'Local cultural policy framework for South Africa: A guide for local authorities' (2010) 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.<sup>233</sup> Accordingly, this is an opportunity for engraining the aspect of cultural adequacy in the housing process and housing product.

Nonetheless, apart from waiting for judicial enforcement of this integral component, local governments in South Africa can integrate cultural adequacy in order to realise the right to adequate housing by proactively incorporating traditional and cultural practices into housing designs and community planning. They can consult with local communities and individuals to understand their cultural needs and preferences, such as incorporating traditional architectural styles, communal spaces and culturally significant features. In the process, local governments can create housing solutions that respect and promote the cultural identity of residents, ultimately enhancing the dignity and well-being of communities. This approach can also help to address historical injustices and promote social cohesion in post-apartheid South Africa.

## 6 Conclusion

General Comment 4 of the ESCR Committee outlines the integral components of the right to adequate housing. According to the Comment, adequate housing encompasses more than just four walls and a roof. It includes seven baseline factors that determine if a certain form of shelter amount to 'adequate housing', namely, security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.

These components are essential to ensuring that housing is not only physical shelter but also a foundation for human dignity, health and well-being. The security of tenure protects individuals from forced evictions and harassment; the availability of services, materials and infrastructure involves access to safe drinking water, sanitation and energy; affordability ensures that housing costs do not compromise other basic needs; habitability guarantees safe and healthy living conditions; accessibility prioritises vulnerable groups; location allows access to employment, health care and education; and cultural adequacy involves respecting cultural identity and diversity in the housing process and housing product. These aspects

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<sup>233</sup> *Grootboom* (n 127) para 36.

are crucial for state parties to respect, promote, protect and fulfil the right to adequate housing for all individuals.

Global trends indicate that the realisation of human rights, particularly the right to adequate housing, is significantly influenced by local governments due to their proximity to communities and their role in implementing policies and programmes. Local governments are crucial in deciding on housing developments, allocating housing subsidies and managing social housing and infrastructure. They have a direct impact on residents' housing rights and are viewed as the frontline for enabling equal access to low-income and affordable housing. International human rights treaties may not specify obligations for local governments, but as part of the state, they are bound by human rights obligations and can incorporate international human rights standards into local law, policy, and practice.

Local governments have various responsibilities in realising the right to adequate housing, including land use planning, upgrading informal settlements and regulating investor-driven markets. To fulfil these responsibilities, they should be empowered with adequate resources and housing strategies by national and provincial governments. Strategies for integrating human rights into local governance include adopting resolutions affirming human rights commitments, reframing local concerns, enhancing public participation, conducting human rights-based audits, and engaging in treaty-reporting processes. By adopting these strategies and working collaboratively with provincial, national and international bodies, local governments can effectively realise the right to adequate housing for their residents.

South Africa has progressive housing laws, policies, programmes and jurisprudence that conform to the baseline factors.<sup>234</sup> 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. Commendably, in varying degrees of impact, the phenomenon of judicial enforcement of the right to adequate housing consistently gives effect to the various integral components that are necessary to uphold the required standards of housing adequacy as underlined by General Comment 4.

In the process, local governments must ensure that housing is accessible to all, including persons with disabilities, old persons and

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234 Chenwi (n 197) 68.

other vulnerable groups. 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.<sup>235</sup> Housing must be of adequate quality, and should involve the essential services, materials, facilities and infrastructure.<sup>236</sup> It must be structurally sound and safe for habitation.<sup>237</sup>

In this regard, the constitutional and legislative obligations imposed on local governments are aimed at promoting and protecting the rights and interests of socially and economically disadvantaged urbanites that oftentimes languish in urban peripheries. Therefore, the courts have established new benchmarks for judicial enforcement of access to land, housing and the achievement of spatial equity in urban areas.

## 7 Recommendations

Despite the courts' vigorous enforcement of the right to adequate housing, concerns remain in terms of the full realisation of the right. Hence, the article makes five recommendations. First, the judiciary should exercise continuous and robust oversight over local government's compliance with housing rights and hold them accountable for any violations.

Second, the national and provincial government should assign housing functions and powers to competent municipalities in order to accelerate the provision of increased housing units. The assignment process must be accompanied by ensuring that the assignee municipalities have sufficient resources in order to provide adequate housing developments and maintenance of services, materials, facilities and infrastructure. Accordingly, the national and provincial governments must increase budget allocation for housing to local governments.

Third, local government should prioritise the development of housing policies that cater to the needs of low-income and marginalised communities in well-located areas. These areas should allow these communities to have access to employment options, healthcare services, schools, childcare centres and other essential social facilities. Fourth, local government should engage with

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235 *Grootboom* (n 127) para 51.

236 *Grootboom* (n 127) para 37.

237 *Joe Slovo* (n 133) para 191.

communities in a meaningful and transparent manner to understand their housing needs and priorities, consistent with local governments' constitutional and legal obligations.

The last recommendation concerns the element of cultural adequacy, which seldom features in international, regional and domestic legal frameworks, literature and housing rights jurisprudence. The article has also argued that the Constitutional 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.<sup>238</sup> This serves as an opportunity for engraining the aspect of cultural adequacy in the housing process and housing product. The aspect of cultural adequacy is another interesting area for further research. Cultural identity and diversity must be mainstreamed in housing projects.<sup>239</sup> Importantly, global case studies of successful culturally sensitive housing projects<sup>240</sup> 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.

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238 *Grootboom* (n 127) para 36.

239 Shaheed (n 78).

240 T Hadjiyanni and others 'Toward culturally sensitive housing – Eliminating health disparities by accounting for health' (2012) 39 *Housing and Society* 149. See also KN Penna and others 'Indigenous engagement: Towards a culturally sensitive approach for inclusive economic development' (2022) 16 *International Journal of Humanities and Social Sciences* 447.