

Submission by the Centre for Applied Legal Studies

to

The Working Group on the Universal Periodic Review

regarding

The Republic of South Africa

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A) INTRODUCTION

1. About the Centre for Applied Legal Studies

- 1.1. The Centre for Applied Legal Studies (“CALs”) welcomes the opportunity to make submissions to the Working Group on the Universal Periodic Review (‘Working Group’) ahead of third cycle and review of the Republic of South Africa in March 2017.
- 1.2. CALs is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. Its vision is a socially and economically just country where human rights are promoted, respected, protected and fulfilled by the state, corporations, individuals and other repositories of power.
- 1.3. CALs seeks to actualise its vision by challenging the structural nature of poverty and inequality, the global dynamics that sustain it and the repositories of power that perpetuate it.
- 1.4. CALs operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. This submission focuses primarily on the realisation of socio-economic rights and racial equality as well as corporations’ human rights related responsibilities. The Basic Services Programme largely focused on the need for housing and the continuing problem of unlawful evictions in inner city Johannesburg. The Programme has since expanded to include work on access to water, sanitation, and electricity - where we have been able to ensure our clients get the free basic services to which they are entitled. Housing and evictions remain a major challenge, however, and CALs continues to represent client communities in this area. Of particular concern is the need for the state to provide temporary alternative accommodation to people left homeless when evicted.

2. 2012 Universal Periodic Review: South Africa.

- 2.1. In October 2012, the Human Rights Council adopted the outcome of the Universal Periodic Review on South Africa together with the views of South Africa concerning the recommendations and/or conclusions. The views of South Africa included its voluntary commitments and the replies presented before the adoption of the outcome by the plenary to questions or issues that were not sufficiently addressed during the interactive dialogue in the Working Group. This was on the basis of the review on South Africa conducted in May 2012.
- 2.2. Herein the Honourable Mr. Andries Nel, Deputy Minister of Justice and Constitutional Development emphasised that:

“The Constitution set[s] out the framework within which to overcome the legacy of apartheid, predicated on the country’s collective desire to heal the divisions of the past

and to establish a society based on democratic values, social justice and fundamental human rights and to progressively improve the quality of life for its people and to build a united democratic South Africa able to take its rightful place among the community of nations.” (paragraph 8)

- 2.3. CALS submits that South Africa can achieve the above by actively adopting a specific human rights approach or standard and therefore not only respecting but further protecting, promoting and fulfilling its human rights obligations in terms of international, regional and domestic law.

3. International Commitments

- 3.1. South Africa is subject to three levels of international law: global international law (through the United Nations, World Trade Organisation, and International Labour Organisation), regional international law (through the African Union (“AU”)) and sub-regional law (through the South African Development Community (“SADC”)).
- 3.2. CALS submits that the provisions of these international treaties must be considered when adjudicating matters related to socio-economic rights in order to ensure fundamental freedoms and people’s rights are not only respected but also protected, promoted and fulfilled. Therefore, the South African government must be mindful and take cognisance of treaties and conventions binding on South Africa. CALS submits that legislation providing for fundamental rights must be interpreted in a manner that is consistent with the international instruments that are applicable to and binding on South Africa. In these submissions, CALS deals with the applicable instruments of the United Nations, the African Union and the Southern Africa Development Community.
- 3.3. CALS submits that South Africa would be in breach of its international obligations if, having ratified the African Charter as it did, failed to incorporate its provisions into domestic law, as it has sought to do by means of legislation. We submit that it must follow that where those international instruments find reflection in domestic instruments, they are, and must be considered, enforceable domestically in individual courts.
- 3.4. International Covenant for Economic Social and Cultural Rights (“ICESCR”) and the Optional Protocol
 - 3.4.1 CALS commends the South African government for finally ratifying the International Covenant for Economic Social and Cultural Rights (“ICESCR”) in January 2015. This is groundbreaking as South Africa has shown its commitment to the realisation of socio-economic rights and its willingness to be held accountable at international level for their implementation.
 - 3.4.2 Article 1 provides for the right to self-determination. This right is linked to socio-economic rights which includes providing people with housing, water and sanitation, which restores dignity and allows people to exercise their own agency.

- 3.4.3 Article 11 provides for the right to an adequate standard of living, including adequate food, clothing and housing. South Africa has incorporated these standards of living and housing through various legislation and policies. Despite the progressive nature of the legislation, there are various shortcomings and lack of implementation. These will be discussed below.
- 3.4.4 The 2009 Optional Protocol to the ICESCR however has not yet been ratified. The Optional Protocol came into force in May 2013 to facilitate individual communications before the Committee on CESCR with a view to strengthening accountability mechanism towards the realisation of socioeconomic rights.
- 3.4.5 CALS submits that the South African government should ratify the Optional Protocol to the ICESCR because of its importance to the realisation of socioeconomic rights together with the elimination and reduction of poverty. This will demonstrate the government's commitment to advancing socioeconomic rights of the poor and indigent members of society.
- 3.4.6 CALS calls for such ratification on the basis that Articles 10 and 11 provide for inter-state communications and inquiry procedures, respectively. Ratifying the protocol will ensure that South Africa remains committed to being accountable in the international community in realising socio-economic rights and the eradication of poverty.

3.5. African Charter on Human and Peoples' Rights

- 3.5.1 The South African Government has signed and ratified the African Union's Constitutive Act and the African Charter on Human and Peoples' Rights in July 1996. As a signatory to the African Charter, South Africa committed to sustainable economic, social and cultural development (Articles 3(j) and 22 respectively). This commitment was confirmed by the ratification of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Women's Charter') and the African Youth Charter (Articles 19, and 10(1) respectively). It is binding on South Africa in terms of section 231(2) of the Constitution. The African Charter also enjoins the signatory states to take legislative and other measures to effect the rights, duties and freedoms therein (Article 1).
- 3.5.2 CALS commends the South African government for the continued effort "aimed at redressing the inequalities, imbalances and historical injustices, at restoring social justice to the people and at building a united, democratic, non-racial and non-sexist society." Presenting to the Working Group on the Universal Periodic Review the Honourable Mr. Andries Nel, Deputy Minister of Justice and Constitutional Development further stated that:

“The implication of that task entailed, among others, ensuring the progressive realization to food security, access to health services, quality education, social security, adequate housing, water and sanitation, rural development, land reform and land restitution, and electrification of rural and peri-urban areas— with very limited resources.”

3.5.3 Article 22 of the African Charter reads and further requires the following:

“1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

3.5.4 In light of the provisions above, CALS submits that the effort and task adopted by the South African government must ensure “the progressive realisation to food security, access to health services, quality education, social security, adequate housing, water and sanitation, rural development, land reform and land restitution, and electrification of rural and peri-urban areas..” as alluded to by the then Deputy Minister of Justice and Constitutional Development.

3.5.5 Despite the efforts to address poverty and social inequality for the past 22 years of democracy, South Africa remains a poverty stricken country with high levels of inequality. Poverty remains the foundation of the worst human rights challenges in the country.

3.5.6 Amongst others, Iraq and Lesotho had recommended that the South African government take effective measures to combat and eliminate poverty. It is worth mentioning that the South African government should focus on eliminating poverty and therefore realising socio-economic rights of the people.

3.5.7 In essence, poverty hampers the realisation of human rights. Former UN Secretary General, Kofi Annan has said the following on this point:

“People who live in poverty generally describe it as a vicious circle, since they are confronted by a wide range of misfortunes which are interlinked and hard to overcome. Indeed, being deprived of resources makes it impossible for anyone to afford the most basic human needs or to enjoy the most fundamental human rights specified in the Universal Declaration of Human Rights, such as the right to housing, to a decent standard of living, to education, to health, to work, to life, and to participate in social, cultural, civil

and political life, among others. Living in poverty involves the denial of human rights as a whole.”¹

- 3.5.8 CALS further acknowledges and submits that progressive realisation of socio-economic rights is but a vehicle for the eradication of poverty and ultimate development of the people. South Africa should measure poverty eradication and development of people through social outcomes such as “access to health services, quality education, social security, adequate housing, water and sanitation, rural development, land reform and land restitution, and electrification of rural and peri-urban areas”. The realisation of socio-economic rights and provision of basic services must be prioritised in order to eliminate poverty. Development through progressive realisation of socio-economic rights is instrumental to granting people their agency and their right to self-determination and therefore the reduction of poverty.
- 3.5.9 South Africa has ratified the Convention on the Elimination of all forms of Discrimination against Women (“CEDAW”) and have ratified or acceded to the Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa, which provides that states will take measures to prevent discrimination against women. Despite this however, women are still deprived full enjoyment of socio-economic rights particularly access to health services, quality education, social security, adequate housing, water and sanitation, rural development, land reform and land restitution.
- 3.5.10 The African Youth Charter provides that young people should be given the opportunity to take part in poverty reduction strategies² and the Women’s Charter provides that women should participate equally to men at all levels of decision-making as well as the conceptualisation, implementation and evaluation of development policies and programmes.³
- 3.5.11 The SADC Protocol on Gender and Development, signed by South Africa in August 2008 and ratified thereafter, stipulates that all “State Parties shall implement legislative and other measures to eliminate all practices which negatively affect the fundamental rights of women, men, girls and boys, such as their right to life, health, dignity, education and physical integrity.”. As is the case with UN and AU instruments, South Africa is bound by SADC instruments.
- 3.5.12 CALS submits that quite evidently, Article 4(2) of the SADC Protocol on Gender and Development obliges the state to take steps and to put in place measures that will promote the economic empowerment of the most vulnerable in society. The review must therefore be considered taking into account the obligation undertaken by South Africa under the Protocol on Gender and Development.

¹ K Annan, Poverty: An Obstacle to Human Rights, available at <http://www.un.org/rights/poverty/poverty5.htm>.

² Article 14(2)(e)

³ Articles 9(1)(c) and 19(b)

3.6 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("The Protocol on the Rights of Women in Africa")⁴ guarantees every woman respect for her life and the integrity and security of her person. Article 16 provides that women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment.

For the sake of brevity we detail the way in which access to housing impacts poverty and the manner in which the South Africa can enforce its legislation to ensure that socio-economic rights are not only respected but are protected, promoted and fulfilled by the state and that poverty is reduced. As stated above, the CALS' Basic Services Programme largely focused on the need for housing and the continuing problem of unlawful evictions in inner city Johannesburg. We hope that the example below will provide more clarity in addressing housing and evictions that remain a major challenge in South Africa.

4. South Africa's domestic landscape

South Africa is currently in its twenty third year of a democracy. It has built on its constitutional democracy by drafting progressive legislation and policy. Sections 26 and 27 of the Constitution protect communities' rights to access to housing, water and sanitation. The implementation of the various legislation and policies remains a challenge. The State has been held to account for failure to implement the law. The socio-economic rights in South Africa have seen the development of jurisprudence regarding access to housing, water and sanitation. The submission will be a discussion of the right to housing which is the core work of the basic services programme at CALS.

Housing

Section 26 has both horizontal and vertical application, meaning that the private parties⁵ and the state are prevented from interfering with one's right to adequate housing. The infringement to the right to housing has taken various forms and in various settings. Evictions by the state and private owners, from informal settlements⁶ and from inner city buildings⁷, houses been

⁴ Adopted by the 2nd Ordinary Session of the Assembly of the African 69 Living in security, peace and dignity Union (Maputo, 11 July 2003).

⁵ *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC).

⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (2004) 3 All SA 169 (SCA), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC)

⁷ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC);

mortgaged for small amounts of money owing to banks⁸ and landlord and tenant disputes⁹. The courts have also provided guidance on dealing with conflicting rights in respect of section 25 and section 26¹⁰.

Section 26(3) of the Constitution protects people from unlawful evictions. It states “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.” In order to regulate the section, the Prevention of Illegal Eviction from and Unlawful Occupation Act of 1998 (“PIE Act”), provides guidance on how eviction must take place. Importantly section 4¹¹ of PIE provides the procedures that owners must follow to effect a lawful eviction. Section 4(6) and (7) have made it mandatory for the court to take into consideration all personal circumstances including women-headed households, children, the elderly and disables when deciding whether it is just and equitable to evict.

It is against this backdrop that the South African jurisprudence has developed in protecting a community’s rights against illegal evictions and the obligation to ensure that the state provides a community with temporary emergency accommodation.

⁸ *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); and *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC);

⁹ *Maphango* supra note 3.

¹⁰ *Modderklip* supra note 4.

¹¹ 4. (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. 4 5 10 15 20 25 30 35 40 45 50 (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question. (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case. (5) The notice of proceedings contemplated in subsection (2) must— (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier; (b) indicate on what date and at what time the court will hear the proceedings; (c) set out the grounds for the proposed eviction; and (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid. (6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women. (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women. (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine— (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a). (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question. (10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question. (11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal. (12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.

Most of the housing jurisprudence emanated from the abuse of eviction processes and lack of planning in the inner city. The transitional era in South Africa impacted the housing landscape in Johannesburg. Many people emigrated from the outskirts of Johannesburg seeking job opportunities within the economic hub of the country. “White-owned” business fled the inner city leaving their buildings vacant. These buildings were usurped by imposters posing as the owner. Innocent people who emigrated paid rent to the “owner” and continued with their daily lives. A few years down the line, the new owner emerged requesting that the occupiers vacate the property. If they failed to do so, it led to either unlawful evictions or evictions through formal eviction proceedings. It was at the stage that legal organisations intervened to ensure that the rights of the occupiers were protected under law¹².

The jurisprudence of housing matters has also developed by the courts by enforcing communities’ rights under PIE. The judgments have also been advanced to develop the state’s obligations; it has initially ordered that the State has constitutional obligation provide temporary emergency accommodation to people facing eviction. It further provided guidelines on development of housing policy.¹³

The courts subsequently have enforced the role of the state to meaningfully engage with people facing eviction in order to find them suitable temporary emergency accommodation¹⁴. The nature of evictions changed from the state to mainly private owners who have purchased building in the inner city. The role of the state in the evictions instituted by private owners developed jurisprudence to ensure that the State’s obligations remained. The Constitutional Court in *Blue Moonlight* enforced the municipality’s obligation to provide temporary emergency accommodation to people evicted by a private owner.¹⁵ The aftermath of *Blue Moonlight* resulted in a constitutional challenge of the conditions of temporary emergency accommodation. The case of *Dladla*¹⁶ interrogated the conditions of temporary emergency accommodation by the City of Johannesburg. The implications of the conditions have affected children, women and families.

Current status

Since *Blue Moonlight*, it has been 5 years and the City of Johannesburg has failed to adequately address the crisis in the inner city. The City has reacted by bringing further litigation to suspend

¹² This is a scenario of cases that I have dealt with. These scenarios are also supported by Stuart Wilson ‘Litigating Housing Rights in Johannesburg inner City:2004-2008’ 2011 *SAJHR* 127, 131-133

¹³ *Grootboom* supra note 4; the court the policy should be comprehensive, flexible, have sufficient regard for social historic and economic context of poverty and deprivation, take into account the availability of resources, take a phased approach, by including short, medium and long-term plans, allocate responsibilities to all spheres of government, respond with care and concern to the needs of the most desperate and free of bureaucratic inefficiency.

¹⁴ *Olivia Road* supra note 7.

¹⁵ *Blue Moonlight* supra note 7; *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC).

¹⁶ *City of Johannesburg Metropolitan Municipality v Dladla and Others (SCA); Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ)

all litigation in the inner city until the outcome of *Dladla*, which is due to be argued at the Constitutional Court in February 2017.

The conditions are not sensitive to the plight of women and children. Women are left with no option but to vacate the shelters in the morning and return in the evenings. The conditions further impact on family life, and spouses rights to privacy and dignity.

Our ongoing cases includes, access to housing in informal settlements. The upgrading of informal settlements are dealt with in terms of the Upgrading of Informal Settlement Programme (“UISP”) included in the National Housing Code of 2009. The UISP is a policy that seeks to ensure that all spheres of government have a role to play in eradication of informal settlements.

Many communities living in informal settlement remain without adequate shelter, water and sanitation and in deplorable conditions. In all correspondence with the relevant stakeholders, we fail to receive adequate responses. The belligerence and lack of empathy manifests in the lack of response and failure to address the plight of communities.

Many communities have no option but to engage in service delivery protests. This is either conducted by complying with the procedures in terms of the Regulation of Gatherings Act of 1993 or not. The protests raises awareness of the issues within our society although it is met with antagonism from the state as it is viewed as barbaric.

The allocations of RDP housing has given rise to increased corruption. The councillor’s responsible for allocation furnish houses to people not living within the communities. The allocations are ad hoc and completed without any plan.

The conduct of the state illustrates that South Africa’s policies aims to include a standard of living that is appropriate for people. It is the lack of implementation of the policies that fail to uphold the international requirement of an “adequate standard of living”.

B) RECOMMENDATIONS

- 1. South Africa must sign and ratify the Optional Protocol of the International Covenant for Economic Social and Cultural Rights***
- 2. The State at all three spheres of government must ensure that they comply with their constitutional obligation in the provision of housing, water and sanitation and in doing so, that they eradicate poverty and instil equality and dignity to previously disadvantaged communities.***
- 3. The City of Johannesburg should be providing households with low income rental that is affordable and protective of people’s rights to dignity and privacy.***
- 4. The City of Johannesburg must ensure that all accommodation protects the rights of women and children, in that there is a safe environment and enhances family life.***
- 5. There must be political will applied to the cases and that court orders are implemented.***

C) CONCLUSION

In conclusion, we commend South Africa for signing and ratifying the international and regional instruments listed above. This has illustrated commitment for realising socio-economic rights and particularly addressing issues pertaining to access to housing, which is the foundation in eradicating poverty.

In doing so, South African courts have a constitutional obligation in terms of section 233, “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. There is an assurance that South Africa will incorporate the international instruments in interpretation of the law.

However, governmental stakeholders should inject political will and understand the plight of its people, this will accelerate service delivery and address the challenges that plague our country.

Court orders and policy must be implemented in order to ensure that people’s lives are improved and this is by ensuring realisation of their socio-economic rights.