

HOW TO STAY HOME WITHOUT A HOME: HOME, LAND AND TENURE ISSUES UNDER LOCKDOWN

Discussion document following the Part 1 engagement

The COVID-19 pandemic is likely here to stay, and we need to navigate life under its influence, including socially and economically, while managing the pandemic. With this in mind, the Centre for Applied Legal Studies (“**CALS**”) and the Nelson Mandela Foundation (“**NMF**”) convened a discussion under the above framework on Thursday 21 May 2020. The 24 participants to that discussion included community activists, social movement partners, legal practitioners and academics working in the land and tenure space.

The discussion focused on five sub-topics, namely evictions generally; the demolition of housing structures; rehoming the unhomed (including the provision of temporary emergency accommodation); rural communities’ access to land and tenure; and farm dwellers’ access to land and tenure. The aim of these initial discussions was to formulate the core issues under the ‘lockdown’ framework which are to be focused on and taken forward, identify which state entities/officials must be targeted in doing so and determine how best to do so.

This discussion document serves to highlight one of the core issues which emerged across each of the above sub-topic discussions, namely that of evictions in the context of ‘lockdown’, and the related notion of what constitutes a ‘home’. The document shall serve to inform the next step of this project, which will be the envisioned engagement with the relevant state entities and officials in raising – and resolving – the issue/s concerned.

1. The nature and purpose of the ‘lockdown’ framework

On 15 March 2020 the COVID-19 pandemic in South Africa was classified as a ‘National Disaster’,¹ and a National State of Disaster was then declared² pursuant to the Disaster Management Act 57 of 2002 (“**the DMA**”). On 23 March 2020 President Ramaphosa escalated the national response by announcing the implementation of a national ‘lockdown’, as –

“[T]he most effective way to prevent infection is through basic changes in individual behaviour and hygiene . . . Everyone must do everything within their means to avoid contact with other people.

¹ GN R 132, GG 43096 of 15 March 2020.

² GN R 313, GG 43096 of 15 March 2020.

Staying at home, avoiding public places and cancelling all social activities is the preferred best defence against the virus.”

This lockdown entailed *inter alia* that –

“Individuals will not be allowed to leave their homes except under strictly controlled circumstances, such as to seek medical care, buy food, medicine and other supplies or collect a social grant. Temporary shelters that meet the necessary hygiene standards will be identified for homeless people.”

The President also confirmed that “[t]he nation-wide lockdown is necessary to fundamentally disrupt the chain of transmission across society”.³ This must be understood to be the primary purpose of the national ‘lockdown’, and the recommendations we seek to make to the State are made in the spirit of this ultimate purpose. In any event, the DMA permits regulations and directions to be issued –

“only to the extent that this is necessary for the purpose of --

(a) assisting and protecting the public;

(b) providing relief to the public;

(c) protecting property;

(d) preventing or combating disruption: or

(e) dealing with the destructive and other effects of the disaster.”⁴

Importantly, the ‘lockdown’ framework has subsequently been revised to provide for a ‘risk adjusted strategy’ encompassing five ‘alert levels’ of lockdown, in which persons residing in South Africa are compelled (at Level 5) or at least persuaded (presumably at Levels 1 and 2) to ‘stay at home’. To date, the State has only communicated the broad legal frameworks applicable to Alert Levels 3, 4 and 5.

It is worth noting that the DMA and any state conduct undertaken in the context of a National State of Disaster do not allow for the suspension of constitutional rights. Rather, any limitation of rights sanctioned in furtherance of the National State of Disaster must be necessary, reasonable, proportionate, based on evidence and justifiable in terms of section 36 of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”) and the general standards set out by international human rights law.

³ President Ramaphosa, ‘Escalation of measures to combat Coronavirus COVID-19 pandemic’, 23 March 2020.

⁴ DMA section 27(3).

2. What constitutes a 'home'

The 'lockdown' framework has, from its genesis, been premised on the notion that all residents have access to a 'home' in which they can remain and practice 'social distancing'. This is, of course, a fallacy. The socio-economic realities of South African society necessitate greater scrutiny of the 'stay at home' message insofar as it is relevant, appropriate and applicable in our context.

In a letter to the Presidency and relevant state officials dated 20 March 2020, social justice movements and organisations noted the following in response to the institution of the national 'lockdown' –

“The current business as usual response, that is, issuing eviction orders, implementing their execution or removing people from their homes (even without an eviction order by means of an interdict, municipal by-laws or otherwise), does not consider the communicable nature of COVID-19 and how evictions and displacement will place a greater number of vulnerable people at risk. One cannot practice physical distancing should you find yourself and your belongings on the side of the road or in an open space and exposed to the public with no means of protection. One cannot practice a heightened level of hygiene by washing hands in the recommended manner where the only access to water is a communal standpipe and shared ablution facilities in an informal settlement or in a transitional relocation area.

. . . It cannot be disputed that the lack of stable housing is a major barrier to being healthy. In the context of a crisis of unknown proportions, housing is more important now than ever before and the State must take measures to prioritise protecting the most vulnerable by preventing evictions into homelessness . . .

Many studies have shown a proven link between precarious living situations, such as homelessness, rough sleeping, homeless shelters and other forms of temporary accommodation and the spread of infectious diseases . . . These realities are not unique to the urban context . . . The added threat of COVID-19 thus stands to make this untenable situation almost certainly fatal . . .”⁵

Reaffirming this position, UN Habitat notes,⁶

“As COVID-19 spreads around the world, billions of people have been told to stay at home, practice physical distancing, wash their hands regularly and wear masks. However, these simple preventive public health measures are almost impossible to follow for those who are homeless, or who live in unsafe or overcrowded conditions.

In the face of this pandemic, the lack of adequate housing has repercussions on society as a whole and is a direct threat to everyone's health and safety. Ensuring secure housing for all and the

⁵ 'Social justice movements & organisations call for a moratorium on evictions in light of COVID-19', 20 March 2020.

⁶ UN Habitat policy statement on the prevention of evictions and relocations during the COVID-19 crisis, 14 May 2020 available at <https://unhabitat.org/un-habitat-policy-statement-on-the-prevention-of-evictions-and-relocations-during-the-covid-19>.

provision of essential services are crucial components of national efforts to contain the spread of the pandemic and prevent the loss of life.”

The centrality of the notion of a ‘home’ to the lockdown framework raises pertinent questions, including: what does the South African legal system recognise as constituting a home; are the mechanisms for removing occupiers of land consistent with this definition; and do the various legal and policy mechanisms which provide shelter to unhomed persons meet the standard delineated in this definition.

This discussion document does not seek to answer these questions, which require broader discussion and a full analysis of the applicable legal framework. Instead, it flags these issues as relevant due to the centrality of the notion of a ‘home’ to the lockdown framework.

3. The prevailing legal framework on evictions under lockdown

With the advent of the national lockdown and after advocacy by civil society organisations, the South African Executive, through Regulations enacted in terms of the DMA , imposed a blanket moratorium on evictions.⁷ The Executive’s willingness to respond positively to advocacy in this regard is to be commended.

On the subsequent announcement of Alert Level 4 however, the government’s amended Regulations⁸ narrowed the scope of that moratorium to allow for eviction orders to be stayed and suspended “unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 4 period”.

In response to the Regulations pertaining to Alert Level 4, on 11 May 2020 CALS wrote to the State recommending an amendment and reversion to the prior blanket moratorium on all evictions.⁹ CALS’ submission was widely endorsed by civil society, law clinics and social movements working in the area of land and tenure.

On 27 May 2020, the Speaker of the National Assembly responded to the submission made by CALS, advising that –

⁷ Regulation 11CA of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, published as GN R 318 in *Government Gazette* 43107 of 18 March 2020, as amended (“***the Regulations pertaining to Alert Level 5***”).

⁸ Regulation 19 of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, published as GN R 480 in *Government Gazette* 43258 of 29 April 2020 (“***the Regulations pertaining to Alert Level 4***”).

⁹ Centre for Applied Legal Studies ‘Recommendation for amendment to COVID-19 Regulation 19 concerning evictions’, 11 May 2020.

“The question of evictions during the lockdown is a serious matter and I have therefore decided to refer your submission to the Portfolio Committee on Co-operative Governance and Traditional Affairs for consideration.”¹⁰

The executive then notified in terms of the Lockdown Regulations that Alert Level 3 of the national lockdown would be implemented from 1 June 2020. On 28 May 2020 the Regulations for Alert Level 3 were gazetted.¹¹ The Regulations pertaining to Alert Level 3 largely retain the framework for evictions which governed Alert Level 4, with Regulation 36 providing that –

“Prohibition on evictions

36. (1) Subject to subregulation (2), a person may not be evicted from his or her land or home during the period of Alert Level 3 period.

(2) A competent court may grant an order for the eviction of a person from his or her land or home in terms of the provisions of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998): Provided that an order of eviction may be stayed and suspended until the last day of the Alert Level 3 period, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 3 period.”

Moreover, Regulation 48(2) criminalises a violation of Regulation 36(1) in the form of the participation in the execution of an unlawful eviction in contravention of the prohibition on evictions, as follows –

“For the purposes of this Chapter, any person who fails to comply with or contravenes a provision of regulations [36(1)] of these Regulations commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.”

On 3 June 2020 Ndifuna Ukwazi wrote to the Presidency and other relevant State officials to call for the amendment of Regulation 36 of the Regulations pertaining to Alert Level 3, for being –

“at odds with the reality in most parts of the country. Not only does it fail to take into account the unchecked illegal demolitions by state actors and contracted private security as well as the persistent unlawful evictions of individual households, it also does not address the limitations on the enforceability of these regulations.”¹²

¹⁰ It is worth noting that the extent to which the Portfolio Committee is involved in the drafting of the COVID-19 Regulations is unclear.

¹¹ Amendment to the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002, published as GN R 608 in *Government Gazette* 43364 of 28 May 2020 (“**the Regulations pertaining to Alert Level 3**”).

¹² Ndifuna Ukwazi ‘Social justice movements & organisations propose amendments to Regulation 36 of the Alert Level 3 Lockdown Regulations regarding evictions’, 3 June 2020.

That call was endorsed by forty social justice movements and organisations.

4. Why the prevailing legal framework on evictions under lockdown is insufficient

Given that the premise of a national lockdown remains the *status quo* under Alert Level 3, the relaxation of the moratorium on evictions and the framing of Regulation 36 appears unjustified.

In particular, the following aspects of the Regulation as it is currently drafted are problematic.

Firstly, the Regulation appears to only recognise lawful evictions instituted under either the Extension of Security of Tenure Act 62 of 1997 or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. It is notable that other legislation may, in some circumstances, sanction a lawful eviction, including the DMA itself.

Secondly, any *execution* of an eviction order during Alert Level 3 of the national lockdown could never be deemed 'just and equitable' by a court; the continued restrictions on *inter alia* movement and transport are underscored by the need to 'stay at home', and thus necessarily render any eviction unjust in the current context. For this reason, the reference to this possibility in the Regulation is irrational and thus unlawful. Whether or not actual evictions proceed under Alert Level 3, this Regulation creates a serious threat of evictions which is arguably unlawful in terms of domestic and international protections of the right to adequate housing.

Even the *institution* of eviction proceedings during Alert Level 3 of the national lockdown would operate unjustly against the defendant; the continued – albeit lessened – restrictions on *inter alia* movement and travel operate to prevent defendants from accessing legal services to aid their defence during Alert Level 3. Any institution and hearing of an eviction application would thus violate the defendant's right of access to the courts. For this reason, the Regulation's implied reference to this possibility is irrational and thus unlawful.

Finally, Alert Level 3 of the national lockdown commenced on 1 June 2020. The government has not communicated the date on which Alert Level 3 shall conclude, nor does it appear possible to do so at this stage.¹³ It remains possible that this period will be succeeded by a further period of Alert Levels 4 or 5, rather than a relaxation into Alert Level 2.¹⁴ Furthermore, the Regulations pertaining to Alert Level 3 provide for the classification of different alert levels for different provinces, metropolitan areas and districts;¹⁵ such classification would cause confusion and uncertainty in the application of this aspect of

¹³ In a press briefing on 28 May 2020 to discuss the framework for Alert Level 3, COGTA Minister Dlamini-Zuma conceded that she was unable to estimate when Alert Level 3 would conclude.

¹⁴ In any event, the government has not yet publicised the framework for Alert Levels 2 or 1 of the lockdown, which might well extend the current general suspension on evictions.

¹⁵ Regulation 3(2) of the Regulations pertaining to Alert Level 3.

the Regulation. This uncertainty renders the Regulation's reference to a stay of eviction orders until 'the last day of the Alert Level 3 period' irrational and thus unlawful.

The Regulation as it is currently drafted is accordingly both unfit for purpose, and inconsistent with the permissible purpose of the lockdown, namely the purposes contained in DMA section 27(3). It furthermore perpetuates unfairness against tenants, exacerbating their serious vulnerabilities at an already uncertain time.

5. The situation on the ground: Evictions being conducted during the national 'lockdown'

The problems which are caused by housing insecurity across South Africa are not new, but they are especially urgent under the lockdown framework. Likewise, we note the intersectional nature of the evictions issue and its disproportionate effect on womxn, as follows –

*"[T]he effect that evictions and displacements have on womxn in both urban and rural areas are compounded by intersecting forms of discrimination and this makes womxn a particularly vulnerable group should they be evicted and displaced during this time. Womxn headed households and children will not only have an increased risk of contracting COVID-19 with a lack of access to health and sanitation, but will have an increased risk of violence if displaced during this stage of the pandemic where most organisations offering a safety net have had to close their doors in response to the national safety precautions."*¹⁶

Evictions by private landlords

As a result of the national lockdown, many tenants are either unable to work or are receiving a reduced salary, which directly impacts their ability to pay their monthly rental. Private landlords are responding by various means including threatening or conducting unlawful evictions, or forcing tenants out (constructive evictions) by cutting off services such as water and electricity.¹⁷ Landlords who practice such conduct do so in violation of the Rental Housing Act 50 of 1999 and the Regulations for Alert Levels 4 and 5, and without court orders. Tenants are often either unaware of the unlawfulness of this conduct or otherwise do not have access to appropriate legal and other assistance to prevent it.¹⁸ There are frequently no repercussions for the landlords' conduct.

This ongoing conduct has been brought to the attention of the South African Police Service in recognition of their law enforcement capacities, particularly pertaining to any contravention of the Lockdown

¹⁶ 'Social justice movements & organisations call for a moratorium on evictions in light of COVID-19', 20 March 2020.

¹⁷ It is worth noting that many private banks have offered their home loan customers a bond repayment holiday due to the national lockdown.

¹⁸ For example because many legal aid clinics are closed or inaccessible as a result of the lockdown.

Regulations as well as their purview over criminal offences as per legislation.¹⁹ SAPS officers appear not to comprehend their role in these matters.

These issues are exacerbated by the lack of affordable housing in the cities.

It is envisaged that the continued lockdown as well as the economic downturn will exacerbate this problem for months to come.²⁰ The issue is how to balance the landlords' rights to exploit their property for economic gain with the tenants' rights to shelter; the law requires that an equitable balance between housing and property rights be struck. In this effort, care must be taken not to perpetuate the extent to which the use of property as a commodity prevails over the right to housing.²¹

If such evictions continue to be widespread, the duty resting on the State to provide affordable housing and/or temporary emergency accommodation will increase, and the State may be incapacitated. The State should be proactive in preventing such repercussions.

Evictions and demolitions by the State

The State (particularly local government) often abuses by-laws to evict residents of informal settlements. This includes targeting 'housing structures' rather than homes, with the State purportedly being empowered to demolish the former; the State will obtain an interdict against occupiers and then destroy any shelters built in violation of the interdict, while also confiscating the materials used by the occupiers. This is an abuse of formalistic language to lend a veneer of lawfulness to what is effectively just an unlawful eviction.²²

These issues have been drawn to the attention of the relevant State entities,²³ to no apparent avail. This lack of action from decision-makers is concerning, creating an air of impunity for State actors violating both eviction/demolition laws and the Lockdown Regulations.

¹⁹ For example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Rental Housing Act 50 of 1999.

²⁰ We note that occupiers of State land under lockdown have already blamed their need for such occupation on their unlawful eviction by private land owners. We anticipate that this will only continue in the current climate. See P Luhanga, 'Dunoon explodes after shacks demolished', Groundup, 2 June 2020.

²¹ Per Mandisa Shandu, Ndifuna Ukwazi, meeting on 'Evictions, Resistance and Solidarity in the time of COVID-19, 30 April 2020.

²² For example, this is being done by the City of Cape Town.

²³ See Letter from Ndifuna Ukwazi to the Presidency, 'Unlawful demolitions in Empolweni informal settlement, Khayelitsha, in contravention of Regulations issued according to section 27(2) of the Disaster Management Act, 2002', 12 April 2020; Letter from Ndifuna Ukwazi to the Presidency, 'Unlawful demolitions in Empolweni informal settlement, Khayelitsha, in contravention of Regulations issued according to section 27(2) of the Disaster Management Act, 2002', 16 April 2020.

When the State conducts such evictions and/or demolitions, the occupiers have nowhere to go and are often compelled to rebuild on the same property. This is especially true in the context of the restrictions on travel under lockdown.

We must be clear in emphasising that we are not taking a position on the unlawful occupation of property, but rather insisting that the legal framework must (1) recognise the importance of ensuring that people's homes – whatever form they make take – are not being destroyed while the lockdown is in place, and (2) allow for a lawful process for challenging such occupation through the courts, and only once the lockdown is lifted.

The State utilises the services of private companies to conduct the evictions, such as the Red Ants, or otherwise has internal units focused on land invasions.²⁴ It is unclear why such companies/units are deemed to be 'essential services' under Alert Levels 5 and 4 of the lockdown framework. Their conduct is often violent and abusive, and causes long-lasting trauma.

The State also targets some communities specifically and continuously, such as members of Abahlali baseMjondolo,²⁵ resulting in some residents needing to be hospitalised due to brutality.

The State's failure to provide adequate temporary emergency accommodation

When the State evicts occupiers, it often fails to provide alternative accommodation.²⁶ This only exacerbates the problems of unhomed persons and forces the occupiers to seek shelter elsewhere.

The State is furthermore failing to provide adequate shelter for unhomed persons.²⁷ These persons are left on the streets and the support which would usually be available to them (such as soup kitchens, counselling) is diminished or totally eradicated due to the lockdown. This serves to exacerbate their vulnerability.

In some areas where temporary camps for unhomed persons were set up, this was merely a short-term plan and the camps were subsequently disbanded.²⁸ The planning and execution of this was clearly poorly thought-out, and the camps themselves were often in terrible condition. We must also consider whether

²⁴ Such as the Anti-Land Invasion Unit in the City of Cape Town.

²⁵ In the eThekweni Municipality.

²⁶ One such example occurred in Lawley, South Gauteng, and involved the Red Ants destroying housing structures on behalf of the City of Johannesburg. The affected occupiers brought three separate court applications against the City of Johannesburg, but through the intervention of the SAHRC the City conducted a verification process geared at assessing and offering temporary emergency accommodation to needy occupiers.

²⁷ For example, only one shelter has been created in Bloemfontein.

²⁸ A striking example of this is the Strandfontein temporary camp in the Western Cape. When the camp was disbanded, occupants were simply returned back to the street of the City of Cape Town.

the movement of unhomed persons to such camps itself constitutes an eviction,²⁹ and the plans – if any – for such persons once the lockdown is lifted and such camps are closed.

Where temporary emergency accommodation is provided, it is well-established that it must not be a retrogressive step. However, the exact required nature and standard of this accommodation is as yet unclear in law.

The State's policy of de-densification

In other areas, the National Department of Human Settlements has identified that it seeks to de-densify informal settlements in order to support the policy of social distancing. It is unclear whether this move is meant to replace the need for temporary emergency accommodation.

As civil society organisations noted in a letter dated 11 April 2020³⁰ –

“De-densification and relocation can equate to eviction and forced removal, unless the principle of informed consent is strictly adhered to. The issue of consent raises questions about what informed consent really means and what information people need to make a decision to relocate. Previous experience shows that even when consent is given, people change their minds, especially when the implications of the relocation become manifest. The national de-densification approach seems to acknowledge that consent is critical. The question remains what government will do when not enough people are willing to relocate to the identified sites, which then may legitimise evictions/forced removals.”

The extent to which de-densification is an appropriate response to the COVID-19 pandemic is also questionable, given the lack of clarity from the State on whether it will be the settlements more generally which are to be de-densified (i.e. moving houses) or the households themselves which will be de-densified (i.e. fewer persons living in one household).³¹ Furthermore, it remains unclear whether persons moved pursuant to this policy have a right to return to their former sites of residence once the lockdown is lifted.

Evictions of rural and mining-affected communities

²⁹ Relevant issues in this regard include the unhomed person's choice to continuously access shelter in a particular location, and the accessibility of a network of homelike structures nearby that location (such as soup kitchens, counselling services, public ablution facilities) which together constitute that person's home.

³⁰ 'An urgent call to rethink de-densification as the dominant proposed strategy in the context of COVID-19', 11 April 2020.

³¹ See comments by Axolile Notywala of the Social Justice Coalition on the webinar 'COVID-19: De-densification', hosted by The Forge, 27 May 2020, accessible at https://www.youtube.com/watch?v=T4gBH6tRau8&fbclid=IwAR1BWjxmSgGDSqxO5ZRp0R6p8HWpIIIp_Ish5PxPiY4uU71mqMoMW-_1Ujk.

Rural communities which subsist on the land rely on customary law to govern how natural resources are utilized. Under the restrictions imposed by the lockdown framework, no gatherings are permitted to discuss how land should be disposed of; a core feature of living customary law – being consultations between land rights holders – is thus stifled.

Likewise, compensation for any loss of livelihood as a direct result of insecurity of tenure cannot be safely negotiated³² during the lockdown. This has a cumulative effect that is tantamount to the constructive eviction of informal land rights holders, thereby continuing to deprive rural persons of their agency and their rights to property.

Under lockdown, community consultations (for example with mining and resource extraction companies) are being overrun and protective legislation³³ is being ignored, with the consultative requirements therein being disposed of. Traditional leaders – being designated as an ‘essential service’ under the Lockdown Regulations – are in an increased position of power to negotiate and conclude agreements without the communities’ free, prior and informed consent. Consequently, rural communities stand to lose their homes, livelihoods, grazing lands and their plough fields.

Furthermore, communities are unable to organise in response to pressure from extractive companies and those traditional authorities that collude with them, which is often their main defence against evictions and other unfair behaviour by the companies.³⁴ This exacerbates such communities’ vulnerabilities, and makes their eviction and loss of access to land more likely.

Evictions of farm dwellers

‘Farm dwellers’ refers to a broad category which includes farm workers, farm occupiers and labour tenants. The long-standing and problematic interconnectedness of farm dwellers’ work and employment with their access to land and shelter is only exacerbated under lockdown; a significant number of farm workers live with their extended families in accommodation provided by their employer or land owner. Farmers exploit the imbalanced power relations to constructively evict dwellers by denying them access to basic services (being located on their private land), making it seem preferable for the farm dwellers to rather move to nearby rural communities, where the municipality is supposed to provide such services.

The relationship between the dwellers’ work and access to land means that if their work is suspended they have no money to pay their rental, making their already insecure tenure even more precarious. This

³² See R Mahapa ‘Coal mine’s bid for KZN land puts compensation criteria to test’, Custom Contested, 1 June 2020.

³³ Such as the Interim Protection of Informal Land Rights Act 31 of 1996.

³⁴ For example, the company Tendela Coal in KZN has filed an urgent court application to have the compensation they are offering an affected community deemed fair and equitable.

relationship also strips the dwellers of any agency and further skews power relations with the farmer. Moreover, retrenchments conducted by farmers due to the economic downturn resulting from the lockdown makes farm dwellers and their families immediately vulnerable to evictions.

The farm dwellers are largely unskilled and often unaware of their constitutional rights, with their remoteness perpetuating their lack of access to assistance in defending their eviction.

Activists also have trouble accessing the farm dweller communities as they are located on privately owned land – the farmers deny them access, which further exacerbates the farm dwellers' inability to defend their eviction.

6. The proposed way forward

Conscientising State officials on the varied notions of what constitutes a 'home'

All levels of the State, including policy makers, law enforcement and the judiciary must be conscientised on the many varied ways in which a shelter can constitute a home and must accordingly be protected from demolition. We nevertheless acknowledge the limitations of this discussion document in proposing these expanded notions of what constitutes a 'home'.

Better planning from the State

The State must immediately outline the plan for evictions and rehoming for the duration of the lockdown, including for all alert levels. The current process is too ad hoc, and evinces a lack of foresight about the larger problem being faced and the manner in which it will continue to manifest – and can be combatted – going forward.

Included in this must be a push for the State to abandon its policy of de-densification in favour of the long-standing policy of upgrading informal settlements.

Dissemination of information to all persons living in South Africa

The State must urgently implement programmes which disseminate information relating to the COVID-19 pandemic, the lockdown and the nature and effect thereof to all persons and communities living in South Africa. Particular attention must be paid to rural and farm dweller communities, where information must be shared in local languages through the use of pamphlets, posters and community radio stations.

A blanket moratorium on all evictions for the duration of the national 'lockdown'

A blanket moratorium on evictions is both appropriate and necessary in the context of a legal framework which compels citizens to 'stay at home' and generally prohibits travel and movement, and aids in curbing the spread of COVID-19 by preventing homelessness during the period of lockdown (being the primary and ultimate purpose of the lockdown framework). The legal nature of this measure is highlighted by both the UN Special Rapporteur on the Right to Adequate Housing and the UN Committee on Economic, Social and Cultural Rights.³⁵

In particular, any restrictions on *inter alia* movement and transport are underscored by the need to 'stay at home', and render any eviction unjust in that context. Moreover, any continued such restrictions operate

³⁵ Committee on Economic, Social and Cultural Rights 'Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights', 17 April 2020 para 15; L Farha 'COVID-19

to prevent defendants from accessing legal services to aid their defence of an eviction application, further skewing the prevailing power imbalance between a landlord and tenant. Any institution and hearing of an eviction application would thus violate the defendant's right of access to the courts.³⁶

Given the above, we recommend that the Regulations for all alert levels of the national lockdown reflect a full moratorium on the institution and hearing of eviction proceedings, as well as the execution of eviction orders and all home demolitions. We propose the following wording:

“For the duration of the National State of Disaster:

- (a) No person may have their home demolished or be evicted or otherwise removed from their place of residence, including in terms of the Extension of Security of Tenure Act 62 of 1997 or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, or whether by way of an extra-judicial process, regardless of whether it is a formal or informal residence or a farm dwelling; and**
- (b) No person may demolish any structure which has been or is being constructed for the purposes of residential occupation on any land or in any building.”**

Measures to protect renters and mortgage payers

The UN Special Rapporteur on the Right to Adequate Housing has issued a Guidance Note on protecting renters and mortgage payers during the COVID-19 pandemic,³⁷ which directs states to adopt the following principles:

“State policies to address rent and mortgage arrears must be based in three principles:

- i) the burden of the response to the pandemic must be shared across society in a fair and equitable manner;*
- ii) renters and homeowners – whether in informal or formal markets – must not emerge from the pandemic overburdened with housing related debt as a result of financial and economic circumstances created by the pandemic; and*
- iii) the financial burden shouldered by banks, financial institutions, corporate landlords and other financial actors must be proportionate to their resources.”*

The Guidance Note proposes further measures which States should adopt, including –

Guidance Note: Prohibition of evictions’, United Nations Human Rights Special Procedures, 28 April 2020.

³⁶ Constitution s 34.

³⁷ L Farha ‘COVID-19 Guidance Note: Protecting renters and mortgage payers’, United Nations Human Rights Special Procedures, 8 April 2020.

“1 . . . Adequate monitoring mechanisms to ensure these prohibitions are adhered to must be established, including to prevent private actors from carrying out extrajudicial evictions . . .

*4. States must ensure housing affordability for tenants whose incomes decline as a result of COVID19. In this regard, for the duration of the pandemic and a reasonable period thereafter, **States should legislate a mandatory rent re-calculation by housing providers that caps the rent obligation of tenants to 30 per cent of their monthly income, including any social benefits received.** In States that have a system of housing benefits or social transfer payments to cover housing costs, the level of such benefits and eligibility criteria should be reviewed to ensure that tenants affected by the crisis do not have to pay more than 30 per cent of their monthly net income on housing costs.*

*5. **A government compensation scheme for landlords could also be established** to offset the difference between the pandemic rental cap rates and the rental rates that were in place prior to the pandemic. Compensation may be variable depending on the circumstances of the landlord. In this regard, as part of a larger stimulus package, States could establish a social solidarity fund – funded through taxation schemes and levies on revenues from corporate landlords – to provide compensation or assistance particularly to smaller landlords, conditional on their offering of reduced rental payments to tenants.*

6. Tenants suffering a loss of household income due to COVID-19 and who are renting houses in informal settlements or other unregulated environments must also be protected against eviction for any reason during the pandemic and for a reasonable time thereafter. Minimum income schemes and other social supports for residents of informal settlements could reduce the adverse impact of the crisis including rental arrangements in these settlements.” [Emphasis added.]

It is our strong suggestion that the State consider and adopt these measures.

Punitive mechanisms to support the moratorium on evictions

The proposed moratorium on evictions can be supported by the continued imposition of a criminal sanction against those who violate it, to assist with deterrence and underscore the importance of complying with this rule. Furthermore, monitoring and further capacitation is required to ensure that this sanction is imposed where landlords are found to have violated the Regulation.

Capacitating the Rental Housing Tribunal

This is the first port of call for affected tenants to raise issues with their landlord’s conduct, and so is particularly important in combatting evictions by private landlords. The Tribunal must be operating at full capacity, and must be properly capacitated and empowered to educate, advise and assist both landlords and tenants in protecting their rights during the lockdown.

Capacitating CCMA commissioners to recognise and address farm dweller-specific issues

The commissioners of the Commission for Conciliation, Mediation and Arbitration are well-versed in the content and scope of the Labour Relations Act 66 of 1995, but not similarly educated on the nature and effect of the land rights-related legislation which may be implicated in the labour disputes that come before them, such as the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996. This is necessary in order to properly take into account the full repercussions of employment-related decisions (such as retrenchments and dismissals) for farm workers' access to land and shelter.

Challenging the classification of 'essential services' under all levels of the lockdown

Private security companies which conduct evictions on behalf of the State and/or private landlords are presumably allowed to operate during lockdown because they are classified as 'essential services'. This classification should be opposed, and the conduct of such companies must be taken up with the Private Security Industry Regulatory Authority ("**PSIRA**").

Monitoring those who conduct evictions

When municipal law enforcement conduct evictions, it is unclear how best to hold them accountable in a manner which is similar to the oversight role of the IPID with the SAPS. As a start, it is recommended that all levels of the State be compelled to keep a public record of all demolitions and/or evictions which they undertake or which are undertaken on their behalf.

The PSIRA must be engaged to oversee the conduct of its members.

Finally, traditional councils and other communal organisations which operate in the rural space should be engaged to ensure that protective legislation, such as the Interim Protection of Informal Land Rights Act 31 of 1996, is enforced and complied with.

ENDS.