LITIGATING HOUSING RIGHTS IN JOHANNESBURG’S INNER CITY: 2004–2008

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ABSTRACT

This article argues for a theoretically informed, socially contextualised way of appraising the impact of strategic litigation on the needs and interests of the poor and vulnerable. After sketching the theoretical terrain against which human rights litigation falls to be assessed, the article examines the relative success of recent strategic litigation aimed at stemming the flow of forced evictions in Johannesburg’s inner city. Success or failure of rights and the strategies that give effect to them, the author argues, is always contingent on a broad range of factors, many of which are beyond the control of public interest law practitioners. The best that can be done is to practise law with an acute awareness of the nature and likely impact of those factors. This will guard against both an over-reductive approach, which posits that litigation can never ‘ultimately’ make a difference, and the over confidence of the intellectually able, but socially dislocated, elite practitioner who equates social change with ‘good jurisprudence’.

I INTRODUCTION

This article presents a case study of one moment in the struggle for housing rights in Johannesburg’s inner city. It is an attempt to reflect on when and how litigation works as part of a rights-based strategy for change. The case study is of a state programme of slum clearances in the inner city of Johannesburg, which, until they were (perhaps only temporarily) halted in March 2006, resulted in the eviction of around 10,000 desperately poor men, women and children by the state without the provision of alternatives. This programme existed (and may yet continue) in spite of the strong pro-poor housing rights framework in the Constitution of the Republic of South Africa, 1996, national legislation, policy and court decisions. Before turning to the facts of the case itself, I consider what conditions are theoretically necessary for litigation strategies to succeed.

There is a lively and interesting pre-constitutional literature on rights- and litigation-based struggles for social change in South Africa.1 There is also a sophisticated and empirically well-grounded international literature on ‘the

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politics of rights. With these literatures in mind, the purpose of this article is to begin, modestly, to address the paucity of empirical studies of the conditions under which rights might ‘work’ in the sense of securing social change in line with the underlying vision of the Constitution.

(a) Theories of rights, litigation and change

In *The Hollow Hope: Can Courts Bring About Social Change?*, Gerry Rosenberg questions the widely held view that the US Supreme Court is able, through its decisions, to bring about social change. Rosenberg identifies three constraints on that Court’s ability to effect social change. First, he says, the nature and content of constitutional rights in the US Constitution narrows the range of socially relevant issues the Court can hear or decide on. Second, the US Supreme Court does not have sufficient independence from the executive or legislative branches of the US political system to effect significant reform. Third, in the development of policy options and the implementation of programmes, the Court relies for its efficacy on the budgetary resource allocations made by the legislature and the administrative capacity of the executive. Rosenberg buttresses his claims with empirical data which, he suggests, show that many ‘landmark’ decisions of the US Supreme Court did not, in themselves, effect significant change. For example, *Brown v Board of Education* did not in itself lead to school desegregation, which only happened (to the extent that it did) in the aftermath of the Civil Rights Act of 1964. Rosenberg further argues that *Roe v Wade* has had little impact on the number of legal abortions in the United States.

These are powerful arguments. Of course, in the South African context, the first and second constraints identified by Rosenberg are less powerful. For example, the kinds of claims that can be heard by the Constitutional Court include a full range of social and economic rights claims, and the broad strokes in which the Court has developed its dignity jurisprudence present many opportunities for expanding the types of claims the Court will hear.

What does not change in South Africa is the Constitutional Court’s reliance on the state for the implementation of its decisions. In socio-economic rights cases at least, the Court is keenly aware of this dependence and – arguably as a result – has been timid and sometimes vague in the definition it has given to


4 Rosenberg (note 3 above).


6 410 U.S. 113 (1973).

those rights. It has also, until recently, been conservative in its direct access jurisprudence, almost always preferring to hear claims which have been formalised and filtered through the lower courts, rather than allowing poor and/or lay litigants to bring claims directly to it.

There is of course a distinction between litigation and rights-based strategies for social change. Michael McCann, while accepting Rosenberg’s scepticism on the direct efficacy of litigation, points out that litigation can indirectly effect social change through the mobilisation catalysed in preparation for it, and in its aftermath. McCann’s work, and that of Stuart Scheingold, amounts to a qualified endorsement of rights as instruments of progressive change. Rights are less established social facts than potentially useful ‘political resources’. Constitutional rights and progressive jurisprudence provide authoritative statements of public policy goals. But their articulation and assertion is never the end, and often comes at an early stage, of more wide-ranging social struggles. They signal that political claims have achieved a partial and often insecure official recognition. Declarations of rights must be made real by other forms of political action, such as lobbying bureaucrats and legislators, or campaigning for public support, or protest and other forms of direct action. While textual formulations of constitutional rights may be fairly immutable, concrete interpretations are always contingent. The ‘politics of rights’ refers to the manifold forms of political action through which declarations of rights (whether or not they are made by courts) are pursued as sometimes useful tools of lobbying and protest, while nonetheless recognising this contingency and plotting out political strategies accordingly.

One of the aims of a politics of rights could be to develop what Michael McCann has called a ‘jurisprudence from below’, in which constitutional rights are defined and internalised through an assessment of their meaning and import to a particular social struggle, by people directly engaged in that struggle. The interests of the rights-claiming group are thereby transformed and universalised into statements of entitlement, rather than expressions of interest or preference. Whether or not these claims secure recognition

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9 In its first year the Ncgobo Court has shown itself marginally more sympathetic to lay litigants, and litigants approaching it on issues that have not been filtered through the lower courts.

10 See J Dugard ‘Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court’ (2006) 22 SAJHR 261–82.

11 McCann (note 3 above).

12 Scheingold (note 3 above).

13 Ibid 84.


15 This process may be akin to what Sally Engle Merry calls ‘naming’ injustice in S Engle Merry Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans (1990).
depends on the outcome of a broader social struggle, which may or may not employ litigation.

A further condition for the success of rights claims and the effective promotion of the interests they protect is what Charles Epp has called a support structure for legal mobilisation. Judge-made law develops cautiously and in increments. In South Africa, our courts are generally reluctant to decide anything but a small number of the issues that come before them — those which they consider are absolutely essential to the disposal of a case. This limits the potential of one or even a cluster of decisions to alter significantly state policy and practice or private power structures, which sustain social inequality and disadvantage. While the courts have, on occasion, described their role as transformative, their capacity to effect pro-poor social transformation is inevitably limited by the cautious, piecemeal approach they adopt to the issues placed before them for decision. This is not to criticise our courts. It is merely to point out that they, like most courts in the common law tradition, tend to effect changes to the law in small steps, rather than leaps.

This means that pro-poor change, if it is to be effected at all through litigation, must be effected through a series of decisions over the medium-to-long term. Even watershed decisions require follow-up litigation to cement their advances. For example, the true potential of the decision of the Constitutional Court in Government of the Republic of South Africa v Grootboom has only really come to light through multiple later decisions in which its potential to stave off evictions which are likely to lead to homelessness has been recognised.

This in turn means that, in order to secure change through litigation over the medium-to-long term, the poor must be enabled to act as what Mark Galanter has famously called ‘repeat players’ in the legal system. Repeat players, through a continual and interactive engagement with the legal system of a period of time, are likely to be able to shape legal norms, processes and institutions in a manner conducive to their ends. The poor are, of course, repeat players in the legal system: in one obvious sense. A disproportionate number of them are criminal defendants, debtors, ‘unlawful occupiers’ and so on. That is not what is meant. The ‘repeat player’ of which Galanter speaks is, I think, an active participant in the legal system who seeks to manipulate law and the courts to serve specific, conscious social ends. The classic repeat player is the large corporation, which has a deep sense of the regulatory field in which it is embedded and which litigates strategically to shape that field.

18 2001 (1) SA 46 (CC). This case is discussed in a little more detail below.
In order to be that kind of repeat player, the poor require access to financial and organisational resources which permit them not only to be represented in matters which come before the courts, but to consciously evaluate whether to litigate, and on what terms, over the medium-to-long term. This is the support structure for legal mobilisation to which Charles Epp refers.

Finally, judicial sympathy for the social basis of a legal claim is a useful, though not determinate, predictor of success in litigation, especially constitutional litigation. The legal system’s founding myth is based on at least the two following propositions: that judges simply apply the law, they do not make it; and that a judge only admits considerations in his or her reasoning which are legally relevant. Most sensible lawyers and legal scholars would now accept that this is incorrect in any strong sense. Judges are constrained by law. In straightforward cases, they may objectively exercise little discretion, even of a legal nature. However, in complicated cases with potentially far reaching social and political consequences, judges entertain all sorts of considerations which are only loosely, if at all, connected to any consideration of legal principle. Sometimes moral and political considerations are explicitly acknowledged in judgments. At others they are merged with considerations of ‘public policy’ or ‘deference’ to those in power. In South Africa the range of legal norms which can be suffused with a judge’s moral, social or political predilections is fairly wide, given that our Constitution requires value-based adjudication without really specifying in any determinate way the identity and contours of the values to be applied. A judge broadly sympathetic to pro-poor litigation and a project of using the courts to effect pro-poor social change is obviously more likely to be helpful in adjudicating a claim cast in those terms.

These conditions for successful rights litigation: courts that will hear a broad range of rights claims, sophisticated legal consciousness, grassroots organisational resources, support structures for legal decision-making and a broadly sympathetic judiciary, are fairly uncontroversial predictors of success in making rights work through litigation. I now turn to apply them to a practical example.

The rest of this article is structured into four parts. Part II sets the social context by giving the reader an overview of the Johannesburg inner city and of the role of the state and private actors in tending to secure or undermine access to housing for poor and/or marginalised groups. Part III explores the still-evolving rights strategy of a group of organisations in the Johannesburg inner city and the reasons for its successes and limitations to date. Part IV offers some tentative conclusions and reminds the reader of the contingency of any rights-based struggle, and of the need to keep the normative promise of the Constitution well grounded in local realities.

II The Context: The Degeneration and Regeneration of Johannesburg’s Inner City

The area to which I refer as the Johannesburg inner city stretches over a region bounded by the southern end of Parktown and Louis Botha Avenue in the
north, to the northern edges of Selby and Kaserne, skirted by the M2 highway in the south. To the east, it ends at the eastern edges of Bellevue, Bertrams and Troyeville. In the west, it ends with the western borders of Fordsburg and Vrededorp. It is an area of around 12 square kilometres. It is home to around 200,000 people, but its population swells to over one million during the day, as, despite a period of decline during the 1990s, it is still a hub of significant commercial and some light industrial activity.

With the collapse of influx controls in 1986, large numbers of African people began to move into the Johannesburg inner city. In the face of the dramatic increase in demand for housing in the inner city, those property owners whose profit motive overrode their racism began to charge exorbitant rents to African tenants who moved into the inner city in the late 1980s and early 1990s, desperate for a place to stay away from the political violence in the African townships and close to the economic opportunities of the urban core. In response to the influx of black residents, white residents in a particular block able to move out would often do so, rather than share their living space with black people.  

While black tenants in the inner city were initially relatively affluent, profiteering by landlords meant that even salaried black tenants found it difficult to rent flats and/or houses without subletting their properties to other households and groups. In many residential blocks of flats, the consequent overcrowding put pressure on infrastructure and services in the inner city. Demand for water and electricity skyrocketed, while lifts and sewerage systems struggled to cope. This led to a decline in the living environment in many residential areas of the Johannesburg inner city.

Inevitably, a tipping point was reached at which the non-payment for rents and services occasioned by poor landlord-tenant relations resulted either in the landlord and/or the property agent abandoning the building altogether, or at least refraining from passing on rates and service payments to the municipality and pocketing whatever rental income it had from the building. As a result, residential properties ran up massive service arrears with the Johannesburg municipality. In 1997, in response to a perceived fiscal crisis, the Johannesburg municipality began to implement large-scale water and electricity disconnections in the inner city as a means of credit control. In buildings where owners had allowed arrears to accumulate, tenants simply stopped paying rent altogether, and attempted (with varying degrees of success) to pay for their ongoing use of services directly to the municipality. In response, owners would often cease to exercise any control over their properties, especially if, as was often the case, the property was held by a company forced into insolvency by the accumulation of rates and service arrears.

Other factors contributing to the decline of residential environments in the inner city included widespread fraud by landlords and managing agents, who

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22 I use ‘black’ here to refer to coloured, Indian and African people.
would often take payments in respect of services from residents but fail to pass them on to the Johannesburg municipality. Simple racism may have been behind a great deal of disinvestment in the inner city. Whites simply did not want to live in mixed neighbourhoods, and would move out if they could afford to. The exodus of more affluent whites was followed by the higher-end commercial and retail services that existed to cater for them. With the noteworthy exception of the large banks, corporate headquarters also moved out of the inner city into newly built office parks in the northern suburbs of Johannesburg. Commercial occupancy rates fell and large numbers of people who were still moving into the centre of Johannesburg began to occupy floors of old office blocks. This was done either with the active encouragement of commercial property owners desperate to make some money on their property investment, or without any serious effort on their part to stop it.

Along with the decline of living environments in the Johannesburg inner city, and an increasing abandonment of property, there came an increasing number of slum landlords. These ranged from a small number of legitimate owners, who extracted rent from residents, paid for services, but did little else to maintain a property, to criminal syndicates, which took control of abandoned buildings and began to fraudulently (and sometimes coercively) collect rent from the residents. In between these two extremes, there were a variety of arrangements, mostly dependent on a person fraudulently claiming to be, or to represent, the owner of the property and collecting rent from the residents. Residents had often never met the true owner of the building, or mistook a slum lord for the legitimate representative of the company owning the property.

By the mid-to-late 1990s, residential environments in the inner city of Johannesburg had reached their nadir. Characterised by large numbers of overcrowded, poorly-maintained buildings, often abandoned by their owners and/or fraudulently controlled by third parties, many parts of the inner city were inhabited by a ‘ghetto poor’ – the most disadvantaged of the inner-city community, characterised by informally employed or unemployed adults, dependent on social grants and living in poverty. On many properties, the ‘ghetto poor’ mixed with slightly more affluent households with rural/urban migrant adult men, employed on the very lowest rungs of the labour market, who came to Johannesburg to take advantage of employment opportunities not available to them in rural areas or other urban peripheries. Slums represented a low or zero-rental housing opportunity for them and allowed them to

23 In Johannesburg, the municipality hardly ever contracts directly with tenants in the provision of water, electricity and refuse collection services. Instead, property owners either include rates and services in a flat rate rental charge or (more often) collect consumption-based service charges. Where services are charged in addition to rent, it is common (though usually unlawful) for property owners to charge an additional and proportionate margin on services consumed by a tenant.


remit most of their income back to their families, consolidated in households in rural areas or on the urban periphery.26

(a) The state’s response: the Inner City Regeneration Strategy

By the late 1990s, the inner city was ‘read as a space that was systematically slipping beyond the control of both national and local government’.27 The state adopted the Inner City Regeneration Strategy (ICRS) in response to the situation. The ICRS was essentially a ‘clean-up’ and marketing campaign designed to tackle ‘crime and grime’ in the inner city. At its heart, the ICRS aimed to stimulate property values in the inner city by encouraging private sector investment in the urban core.28 Urban slums which had become home to large numbers of sometimes desperately poor people were to be ‘closed down’, sold in execution of the rates and service arrears owing on them and transferred to members of a cartel of approved private property developers,29 who would then upgrade the properties for commercial and/or residential occupation, at letting or purchasing rates far beyond the means of the ‘ghetto poor’ currently occupying them.

There was and is no mention in the ICRS of what should happen to the current residents of urban slums (or ‘bad’ buildings, as the ICRS refers to them). A report by the Centre on Housing Rights and Evictions (COHRE), published in 2005, estimated that ‘bad’ buildings probably housed 67,000 people, many of whom were paying no rentals or rentals (to slum lords) at rates far below market rates for residential accommodation in the inner city.

In 2002, it became very clear what the ‘closure’ of ‘bad’ buildings entailed. In that year, using its powers under health and safety legislation,30 the City of Johannesburg began to evict the residents of ‘bad’ buildings in preparation for the properties’ transfers to private developers. No alternative accommodation was provided, even on an emergency basis, in the aftermath of these evictions. The backlog of low-cost housing in the inner city of Johannesburg stood at approximately 18,000 units in 2005.31 There were only 3,000 or so housing units available to people earning less than R3,200 per month, and these were fully subscribed.32 The ICRS envisaged no plan to scale up provision of low-cost housing in the inner city of Johannesburg for people unable to afford R1,200 or more per month in rent, water and electricity charges. The best available data suggests that most if not all of the 67,000 people living in the buildings the City targeted for clearance in terms of the ICRS are persons

28 COHRE (note 26 above) 44.
29 Known as the ‘Property Owners’ and Managers Association’ (POMA).
30 More particularly, s 12(4)(b) of the National Building Standards and Building Regulations Act 103 of 1977.
31 COHRE (note 26 above) 67-8.
32 Ibid.
earning R3,000 per month or less. Although these precise figures were not available at the time the ICRS’ implementation commenced, it must have been obvious to all but the most short-sighted of City officials that ICRS slum clearances, if successful, would lead to homelessness on a massive scale.33

III NO ROOM FOR THE POOR? PRESENT DAY HOUSING RIGHTS STRUGGLES IN THE INNER CITY OF JOHANNESBURG

Between 2002 and 2006, mass evictions in the inner city of Johannesburg became a regular occurrence.34 What is more, they were presented to the public (and largely accepted, at least by the media) as a necessary corollary of development and inner-city regeneration. Regular newspaper articles and bulletins on the City of Johannesburg’s website openly advertised the ‘bad’ building clearances.35 In the same fora, the City’s plans for infrastructure upgrades and large-scale commercial development projects undertaken in concert with the private sector were regularly touted as the engines of regeneration. Property developers showcased luxury accommodation in converted ‘bad’ buildings. Television shows, such as SABC 3’s Apprentice and Hardcopy were set in the inner city. Johannesburg became chic and fashionable.

Lost in all of this were the voices of the slum dwellers removed to make way for the upgrade of ‘bad’ buildings. Public discourse on Johannesburg’s slums concentrated (often in exaggerated terms)36 on the poor state of many of the high-rise blocks which had metamorphosed into slums during the 1990s. The problem of urban slums was described as a ‘health and safety’ issue by City managers, and not acknowledged as a housing issue. To the extent that there was any discussion of the people inhabiting Johannesburg’s ‘bad’ buildings, it tended to stereotype slum dwellers as illegal immigrants, prostitutes, drug dealers or other such social undesirables.37 Beyond a few liberal voices within charities and social housing institutions38 and leftist grassroots activist associations based in the inner city,39 little was done to challenge this impression. There were few grassroots organisations representing or articulating the interests of people living in slum properties.

33 A similar point was made by Constitutional Court Justice Zak Yacoob in his judgment on the City’s inner city eviction programme. See Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC) para 19.
35 See, for example, ‘Evictions in the Inner City’ <http://www.joburgnews.co.za/2003/nov/nov12_raid.stm>.
38 See, generally, the homespun polemics of Neil Fraser on the City of Johannesburg’s Citichat website <http://www.joburgnews.co.za/citichat/menu.stm>; and specifically ‘Evictions: Between a Rock and a Hard Place’ <http://www.joburgnews.co.za/citichat/2006/mar13_citichat1.stm>. Compare with the more thoughtful Murphy Morobe’s comments, quoted in COHRE (note 26 above) 71; and ‘Speakers Urge Solution for Inner City Poor’ <http://www.joburgnews.co.za/2004/aug/aug24_inner1.stm>.
39 Specifically the Anti-Privatisation Forum (APF) and its affiliates and partners.
(a) The practice of inner-city evictions

Stereotyping slum dwellers and talking up inner-city regeneration would not, in itself, enable the City of Johannesburg to embark on a successful programme of mass evictions. Housing and eviction law in post-apartheid South Africa represented a significant obstacle to the speedy clearance of urban slums, especially if the state was unwilling to provide alternatives prior to slum clearances. Section 26(3) of the Constitution prescribes that 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 allowing for arbitrary evictions was permitted. As the decision of the Constitutional Court in *Government of the Republic of South Africa v Grootboom* made clear, state action which could lead to the deprivation of access to shelter for the desperately poor was extremely vulnerable to judicial censure. An innovative and speedy process was necessary in order to ensure that eviction orders could be obtained with the minimum of controversy.

This process commenced with the issuing of a notice in terms of s 12(4)(b) of the National Building Standards and Building Regulations Act 103 of 1977, declaring a building unfit for occupation and ordering all its residents to vacate the building within one week of the date of the notice. Soon (sometimes just a day) after a notice in terms of the National Building Standards and Building Regulations Act had been issued, the City lodged an application with the High Court for an interdict, ordering the occupiers of the building to vacate it and not to re-occupy it without the City’s written permission. Although framed as a temporary measure, the practical effect of the interdict once granted was the same as a permanent eviction. There was not a single case in which, having obtained an interdict, the City granted the residents of a building permission to re-occupy it.

Eviction applications under the National Building Standards and Building Regulations Act are often unopposed since the occupiers of a building struggle to obtain legal representation.

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40 *Grootboom* (note 18 above). In *Grootboom*, a community of desperately poor people living in shacks erected unlawfully on private land in Wallacedene near Cape Town sued the government on the basis that it had failed to take reasonable measures to realise their rights of access to adequate housing, because the state had no plan in place to provide immediate relief to desperately poor persons in need of access to land and basic shelter. In the Constitutional Court, the Wallacedene community was substantially successful. The state’s housing policy was declared unconstitutional to the extent that it failed to provide for immediate relief for desperately poor persons in crisis situations or in otherwise desperate need. The classic ‘crisis situation’ results, of course, from the eviction of desperately poor people. Accordingly, *Grootboom*, and a line of cases based on it, has made it almost impossible for the state to succeed in an opposed eviction application where it is clear that potential evictees are desperately poor and the state is not offering any alternative accommodation.

41 Section 12(4)(b) of the Act states that ‘If the local authority in question deems it necessary for the safety of any person it may by notice in writing, served by post or delivered – order any person occupying or working or being for any other purpose in such building, to vacate such building immediately or within a period specified in such notice’.

42 For a more detailed description of the City of Johannesburg’s practice of evictions in the inner city, see COHRE (note 26 above) 60–4.
Two further aspects of the City’s practice are noteworthy. First, the City retained a specific law firm and counsel, which specialised in obtaining eviction orders in order to manage the process. Second, the City routinely used urgent court processes in order to minimise the likelihood of opposition to the eviction applications it brought. Purported urgency was used as part of a strategy to steamroller the litigation process, in the hope that applications could be disposed of quickly, not usually because of any genuine urgency, but by minimising the opportunity for slum dwellers (who are all people lacking resources), to obtain legal representation to oppose the applications.

In this way, inner-city evictions became very easy to obtain. Between 2002 and 2006 residents of 122 properties in the inner city of Johannesburg were evicted in this way, numbering an estimated 10,000 people.43

The voices of the urban poor were lost in all of this because there were few grassroots organisational resources available to slum-dwelling communities capable of organising and articulating slum dwellers’ needs, or of interacting with the courts. Because of the collapse of any central authority or organisation in many ‘bad’ buildings, low levels of personal security and high levels of extortion by persons fraudulently claiming to ‘own’ slum properties, it was often difficult to organise urban slum dwellers around a consciousness of exclusion from urban regeneration.

(b) The ‘choice’ to pursue legal struggle

The rest of this article will chart the trajectory of the legal struggle against the City’s programme of mass evictions. At this point, though, it is necessary to ask why the inner-city poor and the organisations working with them pursued legal avenues of resistance in the first place, instead of what might be called more overtly political strategies (such as direct action, violent resistance to evictions or street protests).44

It is misleading to call the turn to law amongst the inner-city poor a real ‘choice’, in the sense that a single agent freely and carefully deliberated between competing alternatives. Firstly, the inner-city poor are not represented by, and do not constitute, a single agent, except to the extent that the challenge to inner-city evictions was eventually brought as a class action under s 38(c) of the Constitution.45 Secondly, the City was obliged by s 26(3) to approach a court to obtain orders to give effect to its eviction programme.

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43 These figures are based on the outcome of an access to information request filed with the City of Johannesburg during 2006. See also S Wilson ‘Human Rights and Market Values: Affirming South Africa’s Commitment to Socio-economic Rights’ CALS Newsletter (2006) 6.

44 It should be clear by now that self-help initiatives, such a savings schemes to improve the condition of the properties occupied and take ownership of them, were not viable options, in a context of rising property prices in the inner city and the low, informal incomes of people forced to live in ‘bad’ buildings. Since self-help of this nature was never anything more than a theoretical option for the inner-city poor, I do not address it in this article.

45 A class action in the sense contemplated in s 38(c) does not, in any case, contemplate that every member of the class has chosen to participate in litigation; s 38(c) provides that a court may be approached by ‘anyone acting as a member of, or in the interest of, a group or class of persons’.
In that sense, the terrain of struggle was already chosen for both parties by the Constitution. No matter how effective a grassroots campaign of direct action or political protest would have been, it seems unlikely that the occupiers of ‘bad’ buildings would have been able to resist their removal without engaging in litigation, unless they could have prevented eviction orders being sought in the first place. Without a voice in the policy-making and administrative processes leading to a decision to seek an eviction order and prosecute an application to evict (which occupiers of ‘bad’ buildings did not have), this seems unlikely.

Notwithstanding the fact that protest and direct action would probably not have been sufficient strategies to prevent the City from obtaining and executing orders, the organisational resources needed to implement such strategies were simply not present. While there were grassroots organisations working with the occupiers of ‘bad’ buildings (these are described more fully below), these groups simply did not have the resources or the support to mount direct action and mass protest on the scale that would have been required to dent the City’s resolve. Quite apart from the material resources this would have taken (which were not present), the heterogeneity and atomised nature of ‘bad’ building populations acted as a serious brake on the possibility of mobilising them to counter anything other than an imminent threat. Many occupiers of ‘bad’ buildings are relatively recent migrants from rural areas (having moved to Johannesburg within the past five or ten years). Most ‘bad’ buildings were occupied by a small but significant minority of non-South Africans (usually between five and ten per cent). Accordingly, occupiers of ‘bad’ buildings had differing linguistic, cultural and political traditions. In addition, in many buildings (especially collapsed sectional title schemes) there were separations between people who perceived themselves (often erroneously) to have some form of legal title and those who were considered by the ‘owners’ to be lawful tenants or unlawful occupiers. This hierarchy of rights militated against cooperation between occupiers with different forms of perceived title, especially as ‘owners’ insisted on higher status than tenants and unlawful occupiers and often blamed tenants and unlawful occupiers for precipitating a decline in the condition of the building. Of course, ‘owners’ would eventually realise that the City did not recognise any such division in status and sought their eviction on the same terms as tenants and unlawful occupiers. By this time, however, it was often too late to do anything other than find legal representation to fend off an eviction application.

The social, political, economic and linguistic cleavages set out above, while surmountable, required time and effort to overcome. The speed with which eviction orders were sought and obtained and the relative incapacity of grassroots organisations to organise on an appreciable scale made it overwhelmingly likely that resistance to the City’s eviction programme would come in the form of a defence to an eviction application.

Accordingly, external circumstances, rather than individual or collective agency, determined that the law was the principal arena of struggle in resisting evictions in the inner city. In this context, the conditions necessary for
successful legal struggle set out in the introduction to this article become even more relevant.

(c) The Inner City Resource Centre/Inner City Forum and Early Legal Challenges

In order successfully to resist the City’s programme of mass evictions, slum dwellers needed two things: access to the courts via adequate legal representation and a consciousness of their true position within the inner-city social milieu. The first step toward achieving this was an organiser. Saul Alinsky succinctly sums up the qualities required of an organiser:

He is an outsider, a professional, devoted to the community but external to its interests and cleavages, sharing the principles of community participation, but cool and distant enough to rely solely on his skills training and experience.⁴⁶

An organiser in the inner city came in the form of a community-based group known as the Inner City Forum (ICF), which subsequently became the Inner City Resource Centre (ICRC). Two individuals were at the core of the formation of the ICRC. These were Guy Slingsby, an effective leftist activist member of the African National Congress (ANC) with a long history in unions and the anti-apartheid struggle. After the end of apartheid Slingsby was one of a number of activists disappointed with the rightward drift of ANC economic and social policy who formed the APF⁴⁷ to which the ICF became affiliated. During 2004, the ICF broke away from the APF, renamed itself the ICRC and realigned itself as an apolitical inner-city residents’ rights association. At the forefront of the organisation was Shereza Sibanda. Sibanda was an inner-city resident, an owner/occupier of a sectional title unit in Yeoville, who built up the ICF/ICRC by giving advice to other inner-city residents in disputes with their landlords and helping residents of abandoned buildings to negotiate with service utilities to preserve their access to water and electricity. Still with an avowedly welfarist, left-of-centre politics, the ICRC disavowed the APF’s formerly exclusive reliance on direct action and began, alongside traditional protest politics, to assist inner-city communities to access legal representation, negotiate leases with their landlords and lobby the City of Johannesburg for better access to social services.

It is not clear when exactly the ICF/ICRC came into existence, but the first evidence of its work in raising consciousness among and providing advice to inner-city slum dwellers appeared in 2002, when it (unsuccessfully) attempted to negotiate with the City a stay of execution of an inner-city eviction from Armadale Court, a multi-storey building on Bree Street earmarked for clearance and upgrading by the City of Johannesburg. In the aftermath of the Armadale Court eviction, the ICF/ICRC began to search

⁴⁶ S Alinsky in M Castells The Urban Question: A Marxist Approach (1977) 61.
⁴⁷ A socialist protest group, which advocates that poor communities should be more conscious of how their poverty is (at least partially) a consequence of particular arrangements of national and international economic and political power.
for legal representation for a few ‘bad’ buildings, the residents of which had realised that an eviction order had been obtained, or was about to be obtained, by the City.

The ICF/ICRC’s first attempt to link inner-city slum dwellers with access to legal assistance came in 2003 with *Occupiers of Junel House v City of Johannesburg*, where around 100 people faced eviction from two buildings in the central business district of Johannesburg. The ICF/ICRC approached the Wits Law Clinic\(^{48}\) for assistance after the residents of each of the buildings had appeared in person to defend the City’s eviction application. The judge hearing the initial application issued an eviction order, against which the Wits Law Clinic subsequently filed an appeal. The Court interdicted the City of Johannesburg from executing the order pending the appeal. The appeal was never pursued, but the City has to date declined to approach the High Court to have the interdict lifted and to execute the eviction orders.

The *Junel House case* is important since it probably represents the first time that public interest lawyers in Johannesburg had applied their mind to the constitutionality of the City’s mass evictions programme. The Wits Law Clinic requested assistance from the Centre for Applied Legal Studies (CALS) and the Johannesburg Bar in subjecting the City’s action to constitutional analysis. The view they took may be summed up as follows:

- The decision to clear a ‘bad’ building by issuing a notice in terms of s 12(4)(b) of the National Building Standards and Building Regulations Act constitutes administrative action. Since no hearing is afforded to persons in occupation of ‘bad’ buildings in respect of which notices are issued, the decision to clear a building falls to be reviewed and set aside;
- Section 12(4)(b) of the National Building Standards and Building Regulations Act is unconstitutional, since it allows for eviction without an order of court. It does not set out any criteria to guide the administrator issuing the notice. This renders the provision arbitrary. Evictions without an order of court and arbitrary evictions are in violation of s 26(3) of the Constitution. It is not open to the City to rehabilitate a provision which is unconstitutional on its face by simply choosing to approach a court to authorise the exercise of powers which have been unconstitutionally conferred. Any action taken in terms of unconstitutional legislation is void ab initio;
- Since most residents of ‘bad’ buildings are living there without the permission of the true owner, they are ‘unlawful occupiers’ within the meaning of the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act, 1998 (the PIE Act) and are therefore entitled to its protection. The PIE Act gives a court the discretion to refuse an eviction order if granting such an order would not be just and equitable having regard to the social and economic circumstances of the ‘unlawful occupiers’ in question. An eviction application brought in terms of the National Building Standards and

\(^{48}\) A legal aid office at the University of the Witwatersrand, Johannesburg.
Building Regulations Act is vulnerable to dismissal on the ground that the PIE Act applies to its exclusion. On a proper analysis, the mass eviction of hundreds of poor people from urban slums in circumstances where they have no alternative accommodation which is better and safer, would not be just and equitable in terms of the PIE Act;

- Eviction without the provision of alternative accommodation by an organ of state in circumstances where it has no emergency housing policy in place, as required by the Court in *Grootboom*, would be unlawful in itself. The City should be required to formulate a housing policy to cater for people living in Johannesburg’s ‘bad’ buildings, or provide alternative accommodation where needed as part of its slum clearance programme, or, indeed both;

- The City is not genuinely concerned for the health and safety of urban slum dwellers. If it were, it would provide alternative accommodation and/or invoke its health and safety powers in respect of at least some of the several hundred thousand shacks within its area of jurisdiction outside the inner city where living conditions are just as unhealthy and unsafe. Its failure to do so reveals an ulterior purpose (the intention to transfer ‘bad’ buildings to members of POMA) and discriminates against the inner city poor without rational justification.

These five arguments were placed, in truncated form, before the Court in *Junel House* and doubtless persuaded the Court to suspend the execution of the eviction orders issued in the case. They became the mainstay of constitutionally-based legal defences to inner-city slum clearances for the following three years.

*Junel House* represented a turning point for the ICF/ICRC because, for the first time, it gave them, and the inner-city slum residents they represented, a complete strategy for resisting slum clearances. Alongside its traditional strategies, the ICF/ICRC was simply required to link slum dwellers up with competent legal assistance. The arguments above would do the rest. This strategy was successful in at least two additional cases. First, there was *Chancellor House* in 2003, in which the municipality decided not to pursue an eviction application against several hundred people in a historic building in Johannesburg’s central business district after the above arguments were raised in an answering affidavit filed by the Wits Law Clinic on behalf of the residents. Then there was *Park Court* in 2004, in which the Legal Resources Centre (LRC)\(^49\) stalled in a similar way an eviction application against 50 people in Yeoville.

Yet evictions of hundreds of people who did not manage to secure legal representation continued throughout 2003 and 2004. The ICF/ICRC, and inner-city slum dwellers generally, still faced the problems of the superior administrative capacity of the City, public indifference to (or support for) the City’s mass evictions programme and a very low level of organisation.

\(^{49}\) A donor-funded legal aid NGO.
and rights consciousness amongst inner-city slum dwellers. While important small-scale victories had been won, there was still the task of bringing what had become the City’s eviction conveyor-belt to a halt altogether, and forcing the City to concede a subsidised permanent presence for slum dwellers in upgraded housing in the inner city. Slum dwellers still lacked the organisational resources and legal consciousness necessary to respond to the City’s exclusionary practices.

(d) The CALS-COHRE-ICRC alliance and the COHRE report

In order to stop ICRS slum clearances (at least without the provision of alternative housing), a broader understanding of the social dynamics of urban slums was necessary. It was also necessary to raise awareness of the impact slum clearances had on Johannesburg’s inner-city poor. In early 2004, at a meeting between representatives of CALS, COHRE and what had by that time become the ICRC, a fact-finding mission under the auspices of COHRE was agreed. Its purpose was to produce a detailed overview of the impact of settlement planning and urban regeneration on the lives of Johannesburg’s poor. The project was implemented by CALS, COHRE and the ICRC in partnership. Sibanda of the ICRC led the fieldwork effort in the inner city and CALS researchers wrote up most of the report, with specialist input from urban planning consultants and housing policy specialists in the University of the Witwatersrand’s School of Architecture and Planning. The report was edited by COHRE and published for public comment under COHRE’s imprint in early 2005. A final version of the report was printed and distributed in March 2005. The report was titled *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (the COHRE report).

The findings of the report have been extensively cited in this article and need not be repeated again here. Noteworthy, however, is the way in which the report allowed CALS, COHRE and the ICRC to speak with authority on the causes and consequences of inner-city slum dwelling and the impact the ICRS slum clearances had on people living in slums. A profile of inner-city slum dwellers was projected. They were security guards, petrol pump attendants, scrap metal collectors and recyclers, informal traders or very low-paid shop assistants and office workers in the inner-city area or in the affluent suburbs to the north. Their income ranged between around R200 (US$28) and R2,000 (US$280) per month. This was not enough for them to rent or buy in any of the available residential housing developments or building renovations being implemented under the auspices of the ICRS. Nor, however, was it enough for them to live on the urban periphery and commute to their jobs every day. Their only option – apart from special shelters in which the supply of accommodation far outstripped demand for it – was informally managed or

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50 COHRE is an international NGO, based in Geneva, which advocates for access to housing on behalf of poor communities around the world, and campaigns for an end to evictions that lead to homelessness.
abandoned properties in the inner city of Johannesburg, where they could live for low or zero rental.

By characterising these properties as ‘health hazards’ requiring immediate ‘evacuation’ in circumstances where there was nowhere better or safer for the occupiers of the buildings to go, the ICRS and the municipality implementing it were creating the homelessness which they were constitutionally and statutorily obliged to ameliorate. In addition, most buildings from which the inner-city poor were ‘evacuated’ turned out to be the very properties which were subsequently transferred to private property developers to be upgraded in terms of the ICRS. This made it easy to conclude that slum clearances were driven by the ulterior motive of providing a no-holds-barred bonanza for property developers at the expense of acute suffering for the poorest inner-city residents. Key to raising awareness of the dynamics sketched above was the COHRE report’s qualitative methodology. Although partly an exercise in basic number-crunching of demand and supply-side influences on housing provision in Johannesburg, the report concentrated much more in characterising the lived experience of inner-city slum dwellers. The aim was to give a human face to the structural exclusion of Johannesburg’s poor from its redevelopment initiatives.

The COHRE report was the only reliable information resource on the dynamics of Johannesburg’s inner-city slums. As such, its highly critical stance on the ICRS could not be convincingly contradicted by the Johannesburg municipality itself. Precisely because the ICRS required slums properties to be ‘evacuated’ with the minimum of fuss and then upgraded for occupation by higher-income groups, the municipality had made little effort to understand the causes of slum dwelling in the first place and the consequences of ‘evacuations’ from slum properties in the absence of alternative accommodation.

The municipality received the COHRE report with terse reiterations of the alleged health risks that exist in slum properties, but never really engaged with its findings. To do so may have meant being forced to address the report’s main criticism of the ICRS – that it caused mass homelessness amongst the inner-city’s poorest inhabitants. To do this may have necessitated a slow-down or a suspension of slum clearances while short-term shelter and long-term housing options for the poor were worked out and provided. This was, in fact, the COHRE report’s key demand. Addressing it would have disturbed the alliance between the state and private property developers, which was the motive force behind the ICRS. Without a steady supply of vacant buildings to upgrade and rent out at a profit, property developers would be loath to invest in urban renewal. Yet the municipality was unable or unwilling to gainsay the COHRE report’s key findings.

Throughout 2005, the findings of the report informed much debate and criticism of the municipality’s slum clearance programme. The media’s response to the several slum clearances that took place during that year changed from

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51 COHRE (note 26 above) 73.
one of tacit approval to muted criticism. Each major eviction was met with a press statement by COHRE and CALS, and some criticism from community-based faith groups. In addition, Sibanda of the ICRC came to the fore as a spokesperson for inner-city slum dwellers themselves. Critical pieces appeared most frequently in the more sophisticated weekly newspapers, such as the Mail&Guardian and the Sunday Independent.

These media pieces helped raise consciousness amongst the inner-city poor and the public in general. They helped set the context in which a legal challenge to the City’s practice of evictions was not merely possible: it was expected.

(e) From limited public opprobrium to constitutional challenge: the Rand Properties case

However, more widespread and public condemnation of inner-city slum clearances appeared to do little to slow them down. The year 2005 saw an intensification of evictions at the instance of the municipality. If the COHRE report had raised awareness of the causes and consequences of inner-city evictions, it had done little to encourage inner-city slum dwellers to seek competent legal assistance or to test the resolve of the municipality. At the heart of the problem was the socially atomised nature of inner-city slums, which were inhabited by the ultra-poor and semi-literate, who were often more concerned with the exigencies of individual survival than with the need to build a community-based movement to resist their removal from the inner city.

A catalyst for change was required. It was to come in the form of a Court case reported as the City of Johannesburg v Rand Properties (Pty) Ltd. The case involved the municipality’s attempt to evict some 300 people in occupation of six inner-city properties. Four of the properties were abandoned houses on Joel Street, Berea. The fifth was a 16-floor block of flats on Olivia Road, also in Berea. The sixth was a disused motorcycle repair workshop on Main Street in the centre of Johannesburg. All the properties were dilapidated to some degree and all were informally occupied in varying degrees of squalor. The Olivia Road and Main Street properties were managed informally by a residents’ committee, which did its best to maintain the property in a hygienic state. However, as a result of the municipality’s disconnection of their water supply, this was extremely difficult.

The Joel Street and Olivia Road communities had participated in research leading to the publication of the COHRE report and had been assisted by the ICRC in the past. As a result, lawyers acting for the occupiers were able to place the circumstances of the occupiers on the Court record with relative

52 See, for example, my own contribution to the headlines ‘Jo’burg Evictions “barbaric” and “unconstitutional”’ The Star (14 July 2005).
55 The High Court judgment is reported at 2007 (1) SA 78 (W). The Supreme Court of Appeal (SCA) judgment is reported at 2007 (6) SA 417 (SCA).
case and in great detail, providing the High Court with a compelling set of facts on which to base a ruling. The arguments advanced by the occupiers are sketched out earlier in this article. However, the substance of the occupiers’ defence was that the municipality was not entitled to evict them from the current accommodation (however inadequate) in circumstances where there was nowhere better or safer for them to go within a reasonable distance of access to jobs, livelihood opportunities and social services. The occupiers also advanced the view that the municipality was constitutionally required to have a plan which catered for their short-, medium- and long-term housing needs, whether this resulted in accommodation in the inner-city area or not. The occupiers brought their case as a class action. They stood for the 67,000 people estimated in the COHRE report to live in slum conditions in the Johannesburg inner city.

The *Rand Properties* case was instituted by CALS, who arranged for two leading members of the Johannesburg Bar to give strategic advice, draft and settle legal documents and appear in Court free of charge. The cogency of the alliance between the ICRC, CALS and the advocates was particularly important. This combination of organisational resources: the legal strategic knowledge of the advocates on the team, the policy and research expertise at CALS and the embeddedness of the ICRC in the client communities was essential to the effective presentation of the case.

By the time the case came to be heard in the Johannesburg High Court in February 2006, the Court record ran to over 5,000 pages. The COHRE report itself was entered into evidence on behalf of the occupiers. A last-minute boost to the occupiers was the allocation to hear the case of a sympathetic judge, who had a reputation as an activist lawyer during apartheid and as an independently minded, compassionate jurist after he was appointed to the bench.

The case was heard over three days. The first day consisted of an inspection-in-loco during which the judge visited the properties forming the subject matter of the case, as well as other slum properties in the inner city and various informal settlements on the edge of Johannesburg. The inspection had been at the insistence of the municipality, which was keen to showcase the poor condition of the properties and point out to the judge the potential health and safety risks to the occupiers. The strategy backfired. The judge appeared less struck by the safety risks in the property than by the stories of survival related by the occupiers and the often immaculate condition of their dwellings inside the properties.

The judge’s sympathy and his reluctance to order the eviction of the occupiers was confirmed on 3 March 2006, when he handed down judgment dismissing the municipality’s eviction application and declaring its housing policy unconstitutional by reason of its failure to cater for the occupiers of slum properties in the inner city. The judge also interdicted the municipality from evicting or seeking to evict the occupiers until such time as it provided alternative accommodation or implemented a constitutionally compliant housing policy.
The High Court judgment indirectly halted the municipality’s programme of slum clearances in the inner city. While the judgment did not stop the municipality from seeking or executing orders for the removal of people from slums, it required that some programme to provide low-cost housing for inner-city slum dwellers be put in place or that slum dwellers removed from their homes by the municipality be re-accommodated. The municipality had neither the programme nor the shelters necessary to do this, and so slum clearances ground to a halt.

For this reason, the judgment was met with much criticism. Revealingly, most of the criticism emanated from property companies concerned about the impact it would have on the viability of property investment, rather than from anyone remotely concerned with the safety of the occupiers of the properties. Even municipal criticism of the judgment was concerned more with the viability of the ICRS than with the safety of the occupiers of slum properties themselves. There was little attempt to advance these two ends as compatible with each other. Indeed, the High Court judgment had exposed the divergence between the interests driving the ICRS and those of the inner-city poor.

The municipality immediately lodged an appeal to the SCA. On 26 March 2007, the SCA handed down judgment substantially upholding the municipality’s appeal, but still requiring that the municipality fulfil a constitutional obligation to the occupiers of the properties in the particular appeal to be given ‘temporary emergency shelter’ where they might live ‘secure against eviction’. The SCA was not clear on where in the Constitution that obligation sprang from, but it was unequivocal in its refusal to interfere with the rest of the municipality’s slum clearance programme, which was held to be consistent with the various laws and constitutional provisions which had grounded the occupiers’ attack on it. In particular, the SCA held that it had no jurisdiction to review a policy decision that would result in the exclusion of the poor from the inner-city of Johannesburg. The SCA also declined explicitly to extend relief to the class of persons the occupiers in Rand Properties claimed to represent.

With the exception of the holding that the occupiers were entitled to temporary shelter as a short-term measure, the SCA’s judgment was appealed to the Constitutional Court as Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg.

The Constitutional Court heard the Olivia Road matter on 28 August 2007. Shortly before the hearing, the municipality filed an application to introduce new evidence, which contained details of what it called its ‘Inner City

57 The SCA’s approach was clearly based on the line of reasoning adopted by the Constitutional Court in Grootboom. In Grootboom, though, the Constitutional Court shrank from explicitly affirming the High Court’s finding in that case that the Constitution conferred a right to the immediate provision of basic shelter to those in desperate need. In addition, in Grootboom the Constitutional Court’s ruling was based on s 26(2) of the Constitution and the High Court’s ruling was based on the child’s right to shelter in s 28 of the Constitution. The SCA judgment in Rand Properties said nothing of significance about either of these provisions.
58 2008 (3) SA 208 (CC).
Regeneration Charter’ process. The application’s gist was that the municipality had seen the error of its ways and was in the process of developing a plan to make adequate affordable housing available to those driven to make a home in slum conditions for want of anything better. The municipality was ominously silent, however, on whether, and under what circumstances, ‘bad’ building clearances would continue.

The Court appeared moved by the City’s professed change of attitude toward the problem of ‘bad’ buildings. After hearing argument, the Court handed down an interim order requiring the parties to:

engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory obligations of the municipality and the rights and duties of the citizens concerned. 59

Of course, the ‘values of the Constitution’ and the ‘rights and duties of the citizens concerned’ were in plain dispute between the parties at the time the order was handed down. This meant that the parties had little practical guidance in the negotiations that took place over the six weeks following the Constitutional Court hearing. 60 After a series of tense conferences, the parties came to an agreement with three material consequences. First, the City would take a number of interim measures to provide water and other basic services to the properties concerned and would also perform a once-off clean-up of both properties. Second, the City would provide the occupiers of the properties with accommodation in two inner-city buildings on broadly the same terms as ordered by the SCA, on condition that they agreed to vacate San Jose and 197 Main Street permanently. The occupiers would live in the properties ‘secure against eviction’ and would be required to pay no more than 25 per cent of their household income (including water and electricity charges) in rent. The accommodation would be provided pending the formulation of permanent housing solutions, which would be identified in consultation with the occupiers concerned.

Litigation is replete with imperfect settlements between evenly matched parties with which neither side is entirely happy. However, the Olivia Road agreement was different. It represented an almost comprehensive surrender on the City’s part. The City’s capitulation to almost all of the occupiers’ demands was spectacular and was caused by a palpable (and, in my view, exaggerated) fear of public censure from the Constitutional Court, which had made clear during argument that its sympathy lay with the occupiers. While the

60 I was on the team that negotiated on behalf of the occupiers. The other members of the occupiers’ team were Moray Hathorn (attorney for the occupiers of 197 Main Street), Lauren Royston and Monty Narsoo (both development and planning consultants). We were assisted in the negotiating room by Marc Dettmann (an intern at CALS) and Kate Tissington (a researcher at CALS). The main players on the City’s negotiating team were Greg Vermaak (an attorney to the City of Johannesburg), Graeme Gotz (a policy adviser in the mayor of Johannesburg’s office) and Karen Brits (the City’s chief in-house counsel).
City had foregrounded its willingness to do more for the inner-city poor in its submissions to the Constitutional Court, the lengths to which it was prepared to go to appease the occupiers were truly surprising. The City’s retreat from its position at the commencement of the litigation was so comprehensive, it appeared calculated to render the entire dispute moot and to avoid any binding decision at all from the Constitutional Court. The Court noted the agreement on 5 November 2007 and indicated that it would hand down a judgment on the legal issues not agreed between the parties in due course.

In its decision, handed down on 19 February 2008 by Yacoob J, on behalf of a unanimous Court, the Court did indeed declare much of the case moot. However, besides overturning the SCA’s eviction order and ordering the City to pay the occupiers’ legal costs, the Court made two findings of importance. First, it held that the state (including the City) was under a general obligation to ‘meaningfully engage’ with persons it sought to evict ‘individually and collectively’ and to ‘respond reasonably’ to the views and concerns raised during that engagement. What a reasonable response was, the Court ruled, depended on the circumstances and might range from the provision of permanent housing to the provision of no housing at all. The obligation to ‘meaningfully engage’ was located by the Court in s 26(2) of the Constitution. Accordingly, the judgment left little doubt that the only reasonable response to desperately poor persons who would be rendered homeless on eviction was to provide them with at least some alternative accommodation. In this sense, the *Olivia Road* decision was simply a re-affirmation of earlier decisions such as *Grootboom* and *Port Elizabeth Municipality*, which had already suggested that the state would find it extremely difficult to evict poor people without providing a reasonable alternative.

Second, the Court held that, before deciding to seek to evict a person from a building it considered unsafe, the City is required to apply its mind to the consequences that might follow on eviction. The City had argued throughout that the decision to evict on health and safety grounds, and the decision to provide alternative accommodation were entirely separate considerations legally irrelevant from each other. The Court rejected this argument, holding that:

> the City had a 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. It cannot be that the City is entitled to make decisions on each of these two aspects separately, one department making a decision on whether someone should be evicted and some other department in the bureaucratic maze determining whether housing should be provided.61

### (f) The effect of Rand Properties/Olivia Road

While many of the legal issues surrounding the *Rand Properties/Olivia Road* case remain undecided, the net legal effect of the case so far has been to establish the principle that Johannesburg’s inner-city poor cannot be evicted

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61 *Occupiers of 51 Olivia Road* (note 58 above) para 44.
without at least some alternative accommodation provided after a rigorous and considered process of engagement. The standard of justification for evicting the inner-city poor from bad buildings has been raised so high that it seems unlikely that the City will ever be able to reach it without providing alternative housing to those it seeks to evict. It is unlikely that the conveyor-belt of inner-city evictions will restart soon.

An indirect effect of the case has been to force the municipality, as a largely political expedient, to formulate a new planning vision for the inner-city area, and to acknowledge explicitly for the first time that at least some provision should be made for those earning less than R3,500 per month in the inner city on a semi-permanent basis. This it did in its Inner City Regeneration Charter.\(^\text{62}\) The Charter acknowledges that housing options for the poor will have to be developed, mostly, it appears, through ‘Inclusionary Housing’ incentive schemes which will encourage private sector involvement (perhaps with the assistance of rental subsidies) in provision of housing units in or near the inner city at unprofitable rental rates.

The Charter (and the Housing Plans it envisages) is still in its infancy. As Harms ADP acknowledged in the SCA decision in the Rand Properties case, ‘plans are one thing, execution is another’.\(^\text{63}\) The successful implementation of the Charter is likely to depend on a range of contingencies, including civil society’s and ordinary citizens’ abilities to occupy the strategic spaces opened up by the Constitutional Court and hold the City to its stated intentions.

It will also depend, though, on a range of other factors which neither courts nor lawyers can directly influence. These include the balance of power between the City, private property developers and community groups, as well as the presence of the necessary political will within the City itself to sustain policy experimentation and allocate adequate resources to the intended housing programme for many years to come. The arrangement of these forces and conditions will determine whether the Rand Properties/Olivia Road case keeps the poor in the inner city or simply allows them to negotiate the terms of their departure.

IV WHEN CAN RIGHTS WORK?

In Olivia Road the Constitutional Court did not develop the right to housing in a manner which set substantive conditions for the legality of state action. It instead created a legal context in which those rights could be shaped and claimed through the process of ‘meaningful engagement’. In suggesting that ‘civil society organizations that support [the claims of the inner-city poor] should preferably facilitate the engagement process in every possible way’,\(^\text{64}\) the Court appeared to accept that access to organisational resources which would assist the poor to do this was a necessary pre-condition for this rights

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\(^{63}\) City of Johannesburg (SCA) (note 55 above) 77A.

\(^{64}\) Occupiers of 51 Olivia Road (note 58 above) para 20.
claiming. The judgment also made clear that, if the engagement process failed to produce a just outcome, the courts would always be available to fashion one. This was a cautious remedy. It ensured that the inner-city poor would require continued access to grassroots organisational resources, support structures for legal decision-making and a broadly sympathetic judiciary for many years to come.

Access to these resources will also be necessary to engage with and expand the City’s half-hearted gestures towards developing a housing plan for the inner-city poor. Recent developments have suggested that the City’s strategy is now to use the process of ‘engagement’ to narrow the scope and content of its obligations towards the poor significantly. In cases similar in nature to Olivia Road/Rand Properties the City has offered temporary shelter for a non-renewable period of one year, on conditions designed to make occupation of the shelters as uncomfortable as possible. In contrast to the dignified conditions in the buildings tendered to the Olivia Road occupiers, families in other shelters are divided into gender-differentiated dormitories, which offer little by way of privacy. The appropriateness and legality of these conditions look certain to form the subject of further litigation.

In another development, the City of Johannesburg has adopted a policy of excluding slum dwellers from its temporary shelter programme if they were evicted from private land by private landowners. The Johannesburg High Court has already declared this policy unconstitutional. The SCA upheld this finding on appeal. The matter is now awaiting a hearing before the Constitutional Court.

In the final analysis, the Rand Properties/Olivia Road decision illustrates the verdict of one American legal scholar on the impact of the decision in Brown v Board of Education:

> The law is a landing force [of change]. It makes the beachhead. But the breakthrough, if it is to be significant, is broadened by the forces from behind which take advantage of the opening to go the rest of the way. Where these forces are present, significant alteration of social practices is the result. Where they do not exist, the law has been unable to hold its beachhead and the legal action becomes a kind of military monument on which is only recorded ‘we were here’.

The lasting impact of the Rand Properties/Olivia Road decision in the inner city of Johannesburg will be determined by the alacrity of those forces and the capacity of the poor to organise to shape them. This conception of strategic litigation furthermore raises questions about the usefulness of the models of causation adopted by some analyses of the ‘success’ or ‘failure’ of public interest litigation. Rosenberg in particular seeks to separate out individual legal decisions and ask whether those deci-

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65 Ibid 34.
66 Interview with Mary-Anne Munyembate, CALS head of litigation (28 October 2010).
sions directly themselves ‘caused’ a broader set of social and policy changes which came after them. Accordingly, he points out that *Roe v Wade* did not, in itself, change the number of legal abortions in the US and the *Brown v Board of Education* did not in itself lead to school desegregation. Yet this kind of abstract analysis leaves the decision itself on the steps of the courthouse. It does not properly account for how a particular decision affects the behaviour of those mobilising for or against a particular form of change; the reactions, capabilities and constraints of the judicial and state officials charged with its interpretation and implementation; what the indirect or unintended consequences of the litigation leading to it were and whether the decision was taken up by those with the organisational resources to campaign for its implementation. These are important considerations. They allow us to understand how litigation can be enmeshed within a broader network of political activities, which can lead to progressive change. Even Rosenberg acknowledges that litigation can assist the ‘relatively disadvantaged’ when combined with other forms of political action.69

The question is not ‘can a judicial decision change things by itself?’ If this were the question, then Rosenberg would undoubtedly be correct. The answer is clearly ‘no’. But the real question those considering rights-based strategies for change must explore is rather twofold: ‘under what social and political conditions is a judicial decision likely to form an effective part of the arsenal of rights and resources upon which those seeking progressive change might rely? And what role does the decision play in the strategies of those seeking change?’

For practitioners of rights (whether or not they are formally qualified lawyers), the lesson is not to see law, rights and the institutions that enforce them as complete normative systems, which describe the proper and immutable distribution of obligations between states, corporations and citizens. Rather, they should be evaluated as partially developed and rather half-hearted gestures at regulating behaviour in a more or less predictable way in line with dimly perceived conceptions of the good. Rights and law are *always* contingent and incomplete. Their importance in a strategy for change depends not just on their normative content – which is in any case indeterminate at best – but also on the position of the actor deploying them, his linkages with other individuals and groups in the social system in which he is embedded and his capacity to form alliances across a range of social groups and institutions. In short, the successful ‘practitioner’ of rights is something of a game-player, particularly skilled in the law, but keenly aware of its limitations and the social conditions necessary for its effective deployment.

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69 Rosenberg (note 3 above) 431.