between various sectors, such as health, nutrition, food and agriculture, is crucial. SANAC is only one example of a cross-sectoral institution working on HIV/AIDS in South Africa. It is an example that provides several indicators of a lack of ability to communicate within government and between government and civil society. However, the development and reconstruction of SANAC may suggest an improved ability to communicate and progress in the process towards the realisation of socio-economic rights affected by HIV/AIDS.

Conclusion
The five capacity components discussed above are interlinked and interdependent. For example, leadership and commitment to obligations has an impact on all other aspects of capacity, such as communication and decision-making. However, the capacity framework has the potential to organise ideas into manageable categories. It may also help to identify entry points and critical processes in socio-economic rights realisation.

To grasp the meaning of each aspect of capacity, the development of indicators and benchmarks is important. A small number of qualitative indicators have been suggested here and many more are required to achieve a comprehensive understanding of state capacity to realise socio-economic rights.

Furthermore, capacity must be contextualised in relation to specific socio-economic and political conditions and in relation to specific rights. This may help to move away from the traditional cross-national comparisons towards monitoring progress and regression in one country. One may argue that all the above-mentioned aspects of capacity must exist in some form for a state to carry out its duties relating to socio-economic rights. However, the form they take and their relative importance may vary enormously from one country to another.

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Proposed amendments to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
A setback for vulnerable occupiers

Annette Christmas

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), in addition to other land reform statutes, was promulgated to address the unfair eviction practices of the past. It provides vulnerable occupiers facing the prospect of eviction with both procedural and substantive protection in the course of eviction proceedings.

However, since its inception PIE has been viewed with disfavour by landowners who argue that it unduly interferes with their common law right to evict unlawful occupiers from their land summarily. Their contention is that the procedural and substantive requirements of PIE are ‘cumbersome’. These requirements, they argue, in the context of increasing land invasions and the spread of informal settlements in South Africa, make it extremely difficult, if not impossible, for landowners to evict unlawful occupiers from their land.

The scope and application of PIE has consistently presented difficulties of interpretation for our courts, particularly with regard to who may benefit from its application. However, the recent Supreme Court of Appeal (SCA) judgment in Ndlovu v Ngcobo; Bekker and Another v Jika...
2003 (1) SA 113 (SCA) (Ndlovu/Bekker) held that the provisions of PIE extended beyond unlawful occupiers (traditionally labelled as ‘squatters’) to include defaulting tenants and mortgagees who are in unlawful occupation of property. The effect of this judgment is that eviction procedures for a defaulting tenant or mortgagee are not only governed by the terms and conditions of the lease or mortgage agreement, but are also subject to the provisions of PIE.

In an attempt to address the concerns of landlords, banks and property developers the Minister of Housing published the Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2003 (the Draft Bill) on 27 August 2003. The Draft Bill aims, among other things, to limit the application of PIE by narrowing the definition of ‘unlawful occupier’ to exclude defaulting tenants and mortgagees. This will have wide implications for those persons who stand to be excluded from the framework of PIE. The discussion of these amendments will be limited to evaluating how they impact on vulnerable tenants and mortgagees.

The purpose and scope of PIE

PIE repealed the Prevention of Illegal Squatting Act 52 of 1951 (PISA). PISA criminalised the act of ‘squatting’ and provided simplified eviction procedures for landowners. Unlike PISA, PIE attempts to bring the owner’s common law right to evict in line with the constitutional principles governing evictions entrenched in section 26(3) of the Constitution. Section 26(3) provides that “no-one may be evicted from their homes...without an order of court made after considering relevant circumstances”.

The procedural requirements of PIE therefore aim to ensure the meaningful representation and participation of unlawful occupiers in eviction proceedings. Section 41(2) of PIE stipulates that, at least 14 days prior to eviction proceedings, the unlawful occupiers and the municipality in whose jurisdiction they fall must be informed of the eviction proceedings. The Act gives courts the discretion to order a specific manner of service that would ensure that, as far as possible, unlawful occupiers understand the contents of the notice of eviction. In addition to the date and time of court proceedings and the grounds for the proposed eviction, the notice must also state that the unlawful occupiers have the right to defend the case and to apply for legal aid where necessary.

The substantive provisions of PIE compel the courts to consider the broader socio-economic context in which each application for eviction is made. Section 41(6) of PIE stipulates that in reaching a “just and equitable decision” in respect of granting an eviction order, courts are compelled to consider relevant circumstances including “the rights and needs of the elderly, children, disabled persons and households headed by women”. In addition to these factors, section 41(7) enjoins courts to determine “whether land has been made available or can reasonably be made available by a municipality or an organ of state or another landowner,” where the unlawful occupiers have occupied the land for more than six months.

In a range of cases the courts have interpreted the term “relevant circumstances” in section 41(6) narrowly. For example, in Brisle v Drotsky 2002 (4) SA 1 (SCA), the Supreme Court of Appeal (SCA) interpreted it to mean that only legally relevant circumstances could be considered in an eviction application concerning a lessee. The socio-economic circumstances of the occupier, regardless of whether he/she fell within a designated vulnerable group in terms of PIE, were not relevant.

However, by extending the protection of PIE to vulnerable tenants and mortgagees the Ndlovu/Bekker judgment now effectively enjoins the courts to consider the impact that an eviction order could have on these vulnerable groups of occupiers. This decision is in keeping with the reasonableness standard enunciated in Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC). According to this standard, any measure instituted by the State cannot be considered reasonable unless it takes into account the needs of those in desperate circumstances and “whose ability to enjoy all rights are therefore most in peril”.

Furthermore, courts, in reaching a “just and equitable” decision in eviction proceedings, must consider the interests of both the unlawful...
occupiers and the landowner. The effect of PIE, as the court in Ndlovu/Bekker pointed out, is therefore not to expropriate land. It merely suspends the exercise of the landowner’s full proprietary rights until an equitable decision on eviction can be made.

Landlords, banks and property developers received the Ndlovu/Bekker decision with great concern. They felt that extending the protection of PIE to defaulting tenants and mortgagees would unfairly disadvantage landlords and banks. It would give unscrupulous tenants and mortgagees a chance to abuse the protection offered by PIE. For instance, by taking advantage of the procedural requirements of PIE, they would make it difficult for landlords to evict them in the event of lawful termination of a lease or mortgage agreement.

**Impact of the proposed amendments on vulnerable occupiers**

If passed, the effect of the amendment will be that it will deprive vulnerable ex-tenants and ex-mortgagees of the protection of PIE irrespective of whether, upon eviction, they will be “people living in crisis situations, with no access to land, or roofs over their heads”. Thus, while PIE will continue to protect occupiers who unlawfully took occupation of land, the same protection would be denied to those occupiers whose initial occupation was not unlawful. Occupiers who, through socio-economic circumstances, can no longer afford to meet the terms of their lease or mortgage agreements would therefore be excluded from the protection of PIE. An initial ability to pay for tenure, it is argued, does not necessarily make a person any less vulnerable than ‘squatters’. It is also not a factor that would be likely to assist them in finding alternative accommodation where an eviction order renders them homeless.

In Ndlovu/Bekker it was argued that vulnerable tenants were afforded protection by other land reform statutes such as the Rental Housing Act 50 of 1999. However, this Act does not contain provisions that afford procedural protection for vulnerable tenants in eviction proceedings. Worse still, the protective measures which related to rent control and the limitation of eviction proceedings originally contained in the Rent Control Act of 1976 and retained in section 19 of the Rental Housing Act (which replaced the former), have since been removed.

Section 19 of the Rental Housing Act requires the Minister to monitor and assess the impact that the phasing out of these rent control measures could have on poor and vulnerable tenants. It also requires the Minister to “take such action as he or she deems necessary to alleviate hardship that may be suffered by such tenants”. The Minister must define criteria based on age, income or any form of vulnerability that applies to such tenants, for purposes of amending or augmenting policy frameworks on rental housing to accommodate them. This includes the creation of a special national housing programme which, informed by these criteria, could meet the needs of these vulnerable tenants.

Most vulnerable tenants, such as the aged and households headed by women, cannot afford even minimal market-related rent increases. These directives have not been implemented to date. The result is that many vulnerable tenants, particularly the aged, have no protection from rent increases and from eviction, which follows when they are unable to pay the increased rent.

The Rent Tribunals established by the Act have no regulatory rent-control powers. Only in the case of exorbitant or excessive rent increases can the Tribunal make an appropriate order.

Recent reports in the media have highlighted the spate of evictions of the elderly as well as indigent tenants since the Minister removed the rent-control protections in August 2003. The amendment, if passed, will only further erode these vulnerable tenants’ already weakened security of tenure.

**Conclusion**

It is true that if the fears expressed by investors in the rental-housing sector are not allayed, banks and landlords may be discouraged from dealing with persons from disadvantaged backgrounds. The position in which the Department of Housing finds itself in trying to balance competing social and...
commercial interests is, therefore, not an enviable one.

However, the State has a constitutional obligation to prioritise the needs of the most vulnerable people in society, which includes former tenants and mortgagees. As the Constitutional Court held in the case of Hoffmann v South African Airways 2000 (11) BCLR 1211 (CC):

while legitimate commercial interests are important...the greater interests of society require the recognition of the inherent human dignity of every human being.

Depriving tenants and mortgagees of the protection of PIE, in the absence of alternative protective measures, would constitute a failure by the government to give effect to the right of access to adequate housing and the right to human dignity. Any hasty amendment to PIE, without a proper evaluation of its consequences and adequate consultation with the public, would not serve the interests of the most vulnerable members of our society.

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CASE REVIEW 1

Extending access to social assistance to permanent residents

Julia Sloth-Nielsen

The Khosa/Mahlaule case involved a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, including provisions of the latter Act that had not yet been brought into force. These provisions restricted access to social assistance to South African citizens only. The practical effect was that permanent residents – aged persons and children who would otherwise have qualified for social assistance but for the citizenship requirement – were excluded.

As the minority judgment by Judge Ngcobo succinctly points out, this case is different from previous socio-economic rights cases, namely Government of the Republic of South Africa and Others v Grootboom and Others 2001 (11) SA 46 (CC) and Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC). In these cases, the Constitutional Court (the Court) had to evaluate the compliance of State programmes (or their contents) with the constitutional requirements. In Khosa/Mahlaule, it was specifically the exclusion of non-citizens from the programme that was at issue.

The question remains, nevertheless, whether the exclusion of potential beneficiaries of social assistance (for example, children who fall above the age specified for receiving the child support grant, or, as in this case, non-citizens) meets the test of reasonableness. The criteria the State chooses to limit benefits must be consistent with the Constitution as a whole.

Facts

The applicants in both cases were Mozambiquan citizens who had acquired permanent residence status in South Africa under the now repealed Aliens Control Act of 1991. All of them, except the second applicant in the Khosa case, had fled Mozambique in the 1980s as a result of the outbreak of civil war there.

All the applicants are destitute and would qualify for social assistance under the Acts but for the citizenship requirement.