MANAGING AND CURBING UNAUTHORISED LAND OCCUPATION

RFP/JHB/2015/020

Housing Development Agency

ANNEXURE 1
Legal Opinion

April 2016

Cover photo: Phola Park Informal Settlement, Scenery Park, East London, Buffalo City Metropolitan Municipality

EX PARTE: THE HOUSING DEVELOPMENT AGENCY

IN RE: LEGAL PRINCIPLES APPLICABLE TO MANAGING NEW LAND OCCUPATIONS

OPINION

A INTRODUCTION

1 Consultant is the Housing Development Agency ("the Agency").

2 The Agency seeks an opinion addressing the legal principles that apply to the state's efforts to manage what it calls "land invasions". By "land invasion", I understand the Agency to mean the act of a person or persons coming onto land for the purposes of residential settlement, without any right in law to do so.

3 The Agency seeks an opinion on –

3.1 The policy and legislation implicated in the management of unauthorised land occupations.

3.2 The issues and processes to be considered and deployed when responding to unauthorised land occupations.

3.3 The appropriate legal response to unauthorised land occupations.

3.4 The practical and legal issues created by the implementation of an appropriate legal response to unauthorised land occupations.

What is a "land invasion"?

4 The Constitutional Court has spoken in strongly disapproving terms of what it calls “land invasions”. The term “land invasion” as the Constitutional Court understands it, refers to the act of taking occupation of land or buildings with the express intent of “coercing a state structure into providing housing on a preferential basis to those who participate”.[1]

5 In *Grootboom*, the Court held that land invasion – so defined – “is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of the State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.”[2]

6 However, the Constitutional Court has also held, that the term “land invasion” should not be stretched to include land occupations undertaken out of necessity, in circumstances where the occupiers have no alternative land or shelter realistically available to them.[3]

7 Indeed, in *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others*,[4] the Court held that describing homeless people moving on to vacant, unused land out of necessity as “invaders” “detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers.” The Court went on to hold that

[1] *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC), para 92
[2] Ibid.
[3] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (“*Port Elizabeth Municipality*”), para 20, footnote 22.
[4] 2012 (2) SA 337 (CC) (“*Golden Thread*”).

"[t]his form of citation should not be resorted to. A more neutral appellation like "occupiers" might well be more appropriate".[5]

8 Accordingly, I have avoided the use of the terms "land invasion" and "land invader" in this opinion. I refer instead to "unauthorised land occupation" and "occupier".

9 But the Court's remarks on the meaning of the term "land invasion" speak to a more fundamental issue. That issue is how the state should respond to land occupations undertaken out of necessity by people who have nowhere else that they can realistically live. These occupations are not "land invasions" in the narrow sense adopted by the Constitutional Court. Accordingly, there is no legal warrant for a coercive response to them.

10 It is also worth mentioning that the Supreme Court of Appeal has refused to evict communities of people who have undertaken "land invasions" even in the narrow sense defined by the Constitutional Court, in circumstances where the invasion was motivated by legitimate grievances concerning the process of allocating housing, and at least some of the "invaders" were the intended beneficiaries of the housing project they "invaded".[6]

The Structure of this Opinion

11 In any event, the applicable law suggests that the state is obliged to implement a more sympathetic response to unauthorised land occupations than is generally understood.

[5] *Golden Thread,* para 4.
[6] *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA) ("*Ekurhuleni*").

12 This opinion sets out the legal contours of that response.

13 This opinion will be structured as follows –

13.1 First, I will set out the statutes applicable to unauthorised land occupation. I will show that none of the applicable statutes directly addresses itself to the state's response to new unauthorised land occupations.

13.2 Second, I will address the applicable common law. The common law does create a framework within which private property owners can respond to unauthorised occupation of their land, by allowing private property owners to repel unauthorised land occupations before an occupier manages to settle permanently on the land. However, these common law principles are not an appropriate template for state responses to unauthorised land occupations.

13.3 Third, I will address the emerging constitutional jurisprudence on responding to unauthorised land occupations. I will show that this jurisprudence requires the state to hold the balance between the interests of private property owners in undisturbed possession of their land, on the one hand, and the interests of very poor people who have literally nowhere to stay, on the other. This balance is to be struck by actively engaging with new entrants upon land whenever an unauthorised occupation of land is taking place. Depending on the circumstances, it may be appropriate either for the state simply to manage settlement on the land within acceptable boundaries, and compensate the private owner for the loss of the

use of his property or for the state to divert new occupiers to vacant land elsewhere, on which they may settle as part of a managed process. I will also show that, when viewed in the context of existing constitutional and statutory duties to "pro-actively plan" to meet existing and future housing need, the duty to "actively engage" with new unauthorised land occupations on a case-by-case basis implies a further duty on the state ensure that it has a reserve of vacant land to which new occupiers can be diverted if necessary.

13.4 Finally, I will sum up the legal position.

B THE STATUTORY FRAMEWORK

14 There are three principal statutes that address themselves to the unauthorised occupation of land. The first, and most important, is the Constitution itself. Section 26 (3) of the Constitution provides that "[n]o-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".

15 The scope of section 26 (3) has been widely construed. It obviously prevents demolition of one's home, and one's removal from it. But it also extends to any "attenuation or obliteration of the incidents of occupation" of land or buildings for residential purposes.[7]

[7] *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC), para 12.

16 Accordingly, once a person is in occupation of his or her "home", a court order is required not only to remove him or her from it, but also to interfere in any way with his or her use and enjoyment of the land or buildings for residential purposes.

17 Eviction orders are not given for the asking.[8] The Constitution specifies that a court must take into account "all the relevant circumstances" before ordering an eviction. What these circumstances are is for a court to decide on the facts of each case. Where an eviction might lead to homelessness, the availability of alternative accommodation is always relevant.[9]

18 At its most fundamental, section 26 (3) of the Constitution requires a court to make a value judgment about whether an eviction is fair in all the circumstances.[10]

The Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act")

19 The PIE Act provides the fine statutory framework in which this judgment is made.

20 PIE applies to any –

> "person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land . . ."[11]

[8] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (CC), para 38.
[9] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) ("*Shulana Court*"), para 13.
[10] *Ekurhuleni*, para 19.

21 The word “occupies” here covers both the active (‘to take occupation of’) and passive (‘to be in occupation of’) sense. In other words, PIE applies both where occupation was unauthorised at the outset, and where occupation of land or buildings was originally lawful, but has become unlawful.[12]

22 Under the PIE Act, a court may not evict a person from their home unless it is “just and equitable” to do so. A substantial body of case law has matured on the procedure to follow in deciding whether or not an eviction would be just and equitable. That body of law requires a court to make a series of enquiries before it decides whether or not to evict. These enquiries are as follows -

22.1 The first is whether an eviction *per se* would be just and equitable. If an eviction would be just and equitable, the court is then enjoined to consider what conditions should be attached to the eviction order and on what date the eviction may be carried out.[13] An eviction that would lead to homelessness is not, generally, just and equitable.[14]

22.2 Where an eviction would lead to homelessness, the participation of the local authority in the proceedings is essential.[15] The question of whether an eviction would be just and equitable depends, at least in part, on whether the local authority has made alternative

[11] Section 1 of the PIE Act. PIE does not apply where an occupier has a right of occupation in terms of the common law, the Interim Protection of Informal Land Rights Act 31 of 1996 or the Extension of Security of Tenure Act 62 of 1997.
[12] *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) (“*Bekker*”), para 23.
[13] *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA) (“*Changing Tides*”), paras 19 and 25.
[14] *Port Elizabeth Municipality*, para 28; *Shulana Court*, para 16.
[15] *Shorts Retreat*, paras 11 to 14.

accommodation available to the unlawful occupiers, or whether it can reasonably be expected to do so. If there is no alternative accommodation, an eviction order that would make people homeless cannot be made.[16]

22.3 Once it is established that a local authority has made accommodation available, or will be directed to do so, the question of when the eviction should take place arises as a second inquiry.[17] Generally, the date of eviction should be linked to the date on which the local authority offers to provide, or is directed to provide, alternative accommodation.[18]

23 The PIE Act accordingly aims to strike a balance between a property owner's common law right to exclusive use and possession of his or her property, and the needs of people who are driven to occupy land unlawfully because they have nowhere else to go.

24 Property owners are entitled to exclusive use and possession of their property, but, where their property is unlawfully occupied by people who would otherwise be homeless, that right is suspended until the state, usually the local authority, is reasonably able to provide alternative accommodation to the unlawful occupiers.[19]

[16] *Changing Tides*, paras 25 and 29. *Port Elizabeth Municipality*, para 28. *Shulana Court*, para 16.
[17] *Changing Tides*, paras 20 and 25.
[18] *Blue Moonlight*, para 100.
[19] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC), para 40. *Bekker*, para 17. *Shulana Court*, para 16.

The Trespass Act 6 of 1959

25 It is often suggested that the Trespass Act provides a remedy to landowners whose land is unlawfully occupied. This is incorrect.

26 The Trespass Act applies only to people who enter or who are present on land or in buildings without lawful reason and without the consent of the owner or lawful occupier, for purposes other than residential occupation.

27 It is true that the Trespass Act applies to anyone who "enters or is upon" property. It also contains no explicit exclusion for people who are using property as a home.[20] However, the Trespass Act must be read as subject to the PIE Act.

28 This is because where two statutes deal irreconcilably with the same subject matter, the later statute impliedly repeals the earlier one.[21] Accordingly, the Trespass Act, to the extent that it can ever have been said to apply to unlawful occupation of a home, was superseded by the PIE Act.

29 To summarise the position –

29.1 Where unlawful occupiers have established a home, they may not be removed from that home, or be disturbed in occupation of it, without an order of court.

29.2 Before the court will grant an eviction order, it must be satisfied that it is just and equitable to evict an unlawful occupier.

[20] Section 1 of the Trespass Act. There is, though, a specific exclusion for ESTA occupiers.
[21] *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A), 164C

29.3 It will not, generally, be just and equitable to evict an unlawful occupier if the eviction would render the occupier homeless.

29.4 Where an eviction would lead to homelessness, an owner's right to use and possession of his or her property is generally suspended until such time as the state can reasonably be expected to provide alternative accommodation to the unlawful occupier.

30 I now turn to consider the position applicable where residential occupation of land has not yet been established.

C THE COMMON LAW OF POSSESSION

31 The common law is generally understood to provide the owner of land with a limited window in which to repel unlawful occupation before unlawful occupiers have been able establish "actual physical occupation" of the relevant property.[22]

32 Actual physical possession must be peaceful and undisturbed, and sufficiently durable. It is more than the construction of a dwelling with the intent to occupy.[23] However, it need not be a particularly lengthy period of occupation. The PIE Act has been applied where occupation has only been established for two to three weeks.[24] Six weeks has been authoritatively held to be sufficient to establish peaceful and undisturbed possession.[25]

33 However, periods of occupation much shorter than this are likely to qualify as peaceful and undisturbed possession. Merely being present on land for the

[22] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), paras 22 and 23.
[23] Ibid, para 22.
[24] *Golden Thread*, para 7.
[25] *Mthimkulu and Another v Mahomed and Others* 2011 (6) SA 147 (GSJ), para 11.

purposes of residential occupation for any period of time is likely to be enough – even if a dwelling has not been fully constructed.[26]

34 Much depends on the facts, and courts have been reluctant to lay down hard and fast rules on what constitutes peaceful and undisturbed possession.[27]

35 The general distinction however, is between people who are in the process of moving on to property for the purposes of residential settlement, and people who have already established residency on the property. If a person is in the process of moving on to property, he or she has not established peaceful and undisturbed possession. A person who has already established residency on a property has established peaceful and undisturbed possession. Where the line between these two states is to be drawn will change depending on the particular context.

36 Where peaceful and undisturbed possession has not been established, an owner or occupier of property is permitted to "counter-spoliate" – to use force to repel a person moving on to it. As long as the owner or occupier acts "instanter" (promptly or instantly) to repel the new occupation, no court order is required.[28]

37 However, it bears emphasis that counter-spoliation cannot be deployed once the occupiers have entered the property and established a dwelling.

[26] *Yeko v Qana* 1973 (4) SA 735(A) at 739 D-G.
[27] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), paras 22 and 23.
[28] Ness v Greef 1985 (4) SA 641 (C), 648A-D.

38 Nor can counter-spoliation be deployed by the state – whether as landowner itself, or on behalf of other landowners – to repel occupation by poor people who genuinely have nowhere else to go.

39 The state bears special duties in dealing with new, unauthorised, occupations of land. It is to these duties that I now turn.

D THE STATE'S DUTIES IN DEALING WITH UNAUTHORISED LAND OCCUPATIONS

Pre-emptive Eviction not Permitted

40 In *Grootboom*, the Constitutional Court had this to say about the appropriate response to new land occupations by people who have nowhere else to go –

> "[86] Whether the conduct of Mrs Grootboom and the other respondents constituted a land invasion was disputed on the papers. There was no suggestion, however, that the respondents' circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred. If there had been such a plan the appellants might well have acted differently.
>
> [87] The respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds."

41 In *Modderklip* the Supreme Court of Appeal quoted this passage with approval –

"[34] To assess Modderklip's culpability (if any), it is useful to have regard to the role played by the municipality. That the municipality had a duty to act is clear from Grootboom. Dealing with the facts of the case, Yacoob J said in para [87]:

> 'The respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.'

[35] In this case, the municipality became aware of the invasion during May 2000 and, instead of engaging with the occupiers - it will be recalled that the original occupation was the result of an eviction effected by the municipality - it gave notice to Modderklip, by letter dated 19 May, to institute proceedings to evict them under PIE. Modderklip responded the next day by pointing out that the situation had arisen from a spill-over from overcrowding at Daveyton and Chris Hani and that eviction should therefore be the responsibility of the municipality. Modderklip nevertheless offered to join in any action which the municipality deemed advisable."

42 It is clear, therefore, that the state cannot rely merely on the common law of counter-spoliation to repel new land occupations. Nor can it rely on private property owners to implement their own remedies. It has a heightened duty to engage with new land occupations as and when they happen, to have a plan in terms of which the needs and circumstances of new land occupiers can be assessed.

43 In addition, those plans cannot be limited to securing the prompt removal of new occupants of land. The Constitutional Court and the High Court have strongly disapproved of pre-emptive measures to repel new occupations of land by desperately poor people with nowhere else to go –

"[43] . . . In view of our country's history of colonialism and apartheid, dispossession of land and gross discrimination, as well as prevailing poverty and inequality, issues around housing are central to our constitutional democracy. Section 25(1) of the Constitution states that no one may be deprived of property, except in terms of a law of general application, and that no law may permit arbitrary deprivation. Section 26(3) guarantees that, unless and until a court has issued an order after considering all the relevant circumstances, no one may be evicted from her home or have her home demolished, and that no legislation may permit arbitrary evictions.

[44] Eviction is governed by the provisions of PIE, which aim to ensure that the most vulnerable among us are protected. Its rules and requirements are not optional. The interim order authorises evictions — and has been used as authority for at least three evictions — without providing the unlawful occupiers a hearing and ensuring that they were protected to the extent required by law. An order of this nature deprives unlawful occupiers of rights enshrined in the Constitution and recalls a time when the destitute and landless were considered unworthy of a hearing before they were unceremoniously removed from the land where they had tried to make their homes.

[45] At the very least, an eviction order could not lawfully have been issued without judicial determination that it was just and equitable to do so, considering all relevant circumstances and having allowed affected persons, especially the most vulnerable, to present evidence of their circumstances in a hearing. The order was issued without consideration of those persons whom it would impact, in obvious contravention of PIE and in direct violation of underlying constitutional rights. I would find that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village residents' rights (as well as those of unnamed others) under PIE and s 26(3) of the Constitution.

[46] Not for a moment do I doubt the seriousness of illegal land invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else to live. This was the motivation for the enactment of PIE and its protective measures which are intended to ensure due process and sufficient consideration of housing needs prior to eviction. As state organs, the respondents have failed in their constitutional obligations by repeatedly evicting (or, as the case may be, sanctioning the eviction of) the Madlala Village residents without an appropriate court order."

44 These remarks were made in *Zulu v eThekwini Municipality*.[29] In that case the Court criticised an order granted in the KwaZulu Natal High Court, which authorised the eThekwini Municipality to repel authorised occupations of

[29] 2014 (4) SA 590 (CC)

land by summarily evicting occupants of a list of 1538 properties within its jurisdiction wherever it found them occupied.

45 The Court unanimously found that the order authorised eviction without compliance with the PIE Act. A majority referred the case back to the High Court for further proceedings to determine its validity. A minority of two judges would have set the order aside there and then.

46 On referral, the High Court found the order to be invalid and set it aside,[30] for the principal reason that new land occupations have to be dealt with on a case-by-case basis, and the order was too vague to protect the rights of people who, if removed from land would have nowhere else to go.[31] The decision of the High Court was not appealed.

47 Accordingly, where a land occupation is taking place because the new occupiers have been evicted from elsewhere (as was the case in Modderklip) or otherwise have nowhere else to go, the state is obliged to have a plan to deal with new unauthorised occupiers of land on a case-by-case basis. Although there is no authority for the proposition that the state must respond with offers of shelter to every new land occupation, or that it must passively accept new land occupations when they happen, an inflexible policy of pre-emptively evicting or repelling new land occupations is clearly impermissible.

[30] *MEC for Human Settlements & Public Works of the Province of Kwazulu-Natal v Ethekwini Municipality and others; Abahlali Basemjondolo and others v Ethekwini Municipality and another* 2015 (4) All SA 190 (KZD)
[31] Ibid, para 24.

48 Once it is accepted that evicting or repelling new occupants of land is not an appropriate response in all cases, an alternative strategy has to be considered.

49 Although the law in this area has not yet fully developed, some basic principles can be discerned.

The Duty to Engage

50 The starting point is the need for meaningful engagement with communities who have occupied or are in the process of occupying vacant land or buildings. In both the *Modderklip* and *Grootboom* cases, the Supreme Court of Appeal and the Constitutional Court have stressed the need for meaningful, case-by-case, engagement with new land occupants.

51 In *Olivia Road*[32] the Constitutional Court had to deal with a case in which the City of Johannesburg wanted to evict a community of people from a building it considered unsafe. In that context, the Court held –

> "There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine -
>
> (a) what the consequences of the eviction might be;
>
> (b) whether the city could help in alleviating those dire consequences;
>
> (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;

[32] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and

(e) when and how the city could or would fulfil these obligations."[33]

52 It is fairly straightforward to imagine a similar list of objectives in the context of managing a new land occupation. They might include –

52.1 Where the new occupants are coming from.

52.2 Why they were displaced from their place of origin.

52.3 What would happen to them if they were not permitted to occupy the land that they are in the process of moving on to.

52.4 Whether, objectively, residential occupation has already been established (in which case a court order is in any event required to remove them).

52.5 Whether, if residential occupation has not been established, the state can divert the occupants to vacant land elsewhere, or simply manage the occupation of the land that is taking place within acceptable limits by agreement with the owner of the land if necessary.

53 Engagement with new land occupations of this nature implies further duties to actively plan for the possibility of new land occupations.

The Duty to Plan

[33] Ibid, para 14.

54 The duty to engage set out above implies the need for the state to plan for the eventuality that new land occupations will happen, and to prepare to respond to them with the appropriate resources and personnel.

55 The Constitutional Court has already confirmed that municipalities have duties to foresee, plan and budget for housing emergencies.[34] The Court has also held municipalities have the duty to recruit the personnel and develop the institutional capacity to engage with poor communities at risk of homelessness.

56 In *Olivia Road*, the Court said –

> "[15] Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side."

57 The Court went on –

> "[19] It has been suggested that there are around 67 000 people living in the inner city of Johannesburg in unsafe and unhealthy buildings in relation to whom ejectment orders will have to be issued and that it would be impractical to expect meaningful engagement in every case. I cannot agree. It is common cause that the implementation of the city's Regeneration Strategy is an important reason that founded the decision to evict. That strategy was adopted in 2003. If structures had been put in place with competent sensitive council workers skilled in engagement, the process could have begun when the strategy was adopted. It must then have been apparent that the eviction of a large number of people was inevitable. Indeed the larger the number of people potentially to be affected by eviction, the

[34] *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC), para 66.

greater the need for structured, consistent and careful engagement. Ad hoc engagement may be appropriate in a small municipality where an eviction or two might occur each year, but is entirely inappropriate in the circumstances prevalent in the city."

58 Accordingly, the duty to engage with new land occupations implies a correlative duty in law on municipalities to plan, budget and build the capacity to respond effectively to them in a non-coercive manner.

E CONCLUSION

59 To sum up –

59.1 The law's general disapproval of "land invasions" does not extend to unauthorised land occupations undertaken by poor people who genuinely have nowhere else to go.

59.2 Where a new land occupation has already taken place, the occupants cannot be evicted without a court order, and will have to be given some form of alternative accommodation if their eviction would otherwise lead to homelessness.

59.3 Where a new land occupation is in the process of happening, a private property owner may, in certain circumstances, be entitled to use force to repel it.

59.4 An organ of state is not, however, entitled to pre-emptively evict new occupiers or repel new land occupations – whether on its own behalf or on behalf of a private property owner – where the occupation is being undertaken by a genuinely homeless

community that has been evicted or otherwise displaced from elsewhere.

59.5 In that instance, the state – usually the municipality – is under a duty to engage meaningfully and sensitively with the new land occupation.

59.6 Appropriate responses to a new land occupation may include managing settlement on the land within acceptable boundaries, and compensating the private owner for the loss of the use of his property or the diversion of new occupiers to vacant land elsewhere, on which they may settle as part of a managed process.

59.7 Municipalities are under a duty to pro-actively plan, budget and build capacity to deal with new land occupations in a non-coercive manner.

STUART WILSON

Chambers, Johannesburg, 12 February 2016