

No Place for the Poor: The Governance of Removal in *Zulu* and *SAITF*

Irene de Vos*
Dennis Webster†

The law is a terrain of struggle that we cannot avoid.
Zikode, 2012.¹

I INTRODUCTION

In early September 2013, police and Land Invasion Control Unit (Control Unit) officers stormed the Cato Crest informal settlement near Durban and illegally destroyed the homes of many people living there, rendering thousands of them homeless. Later that month, 17-year-old Nqobile Nzuza was shot in the back of the head during protests against the municipality by Abahlali baseMjondolo, the Durban-based shack dwellers movement. Her death brought to three the number of activists who were killed that year in the battle for adequate housing that raged in the settlement.²

Towards the end of the same month, in what proved to be an extraordinarily violent spring for poor people struggling for access and dignity in South African cities, a programme of illegal and forced evictions began in Johannesburg's inner city. Police confiscated goods from informal traders, forcibly removed people from their businesses and dismantled their stalls. The operation was characterised by an excessive use of violence; traders were beaten and assaulted, often whilst running away from the police. Traders were left without their goods and deprived of their businesses and ability to put bread on the table for their families. There were an estimated 30 000 dependants of the evicted traders.³

These two struggles by poor people – for access to land and housing and the use of public space to make a living in South African cities – were taken to

* Senior Legal Researcher and General Counsel, Socio-Economic Rights Institute of South Africa.

† Researcher, Socio-Economic Rights Institute of South Africa.

¹ S Zikode quoted in H Alviar García, K Klare & LA Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 33.

² Abahlali baseMjondolo 'Marikana Continues: Statement on the Murder of Nqobile Nzuza' (3 October 2013) available at <http://abahlali.org/node/12292/>; R Pithouse 'Durban Poison' (16 October 2013) available at <http://sacsis.org.za/site/article/1817>.

³ G Nicolson & T Lekgowa 'Operation Clean Sweep: Not Just a Clean-up but a Purge of the Poor' (15 November 2013) *Daily Maverick*, available at <http://www.dailymaverick.co.za/article/2013-11-15-operation-clean-sweep-not-just-a-clean-up-but-a-purge-of-the-poor/>; Socio-Economic Rights Institute (SERI) *'The End of the Street?' Informal Traders' Experiences of Rights and Regulations in Inner City Johannesburg* (2015), available at http://www.seri-sa.org/images/Seri_informal_traders_report_FINAL_FOR_SIGN_OFF_2.pdf.

the Constitutional Court. In *Zulu*, the occupiers of Cato Crest were successful in obtaining an order that disallowed the further destruction of their homes.⁴ Similarly, in *SAITF* the Johannesburg informal traders obtained an order that their eviction from their places of business was unlawful.⁵ The Court victories in both cases came at the end of difficult struggles and failed attempts to engage with local government. Both represent successful strategies of poor people to retain urban land and resources that keep them close to work, social amenities and the benefits of living in a city.

With the Court's roll dominated by socio-economically empowered groups, and in a national context of limited court access for poor people, slow legal processes, and limited *pro bono* services, the rulings also served as a reminder that litigation remains an important avenue for addressing South Africa's extreme levels of poverty and inequality. The state was initially non-compliant with the rulings, however, and their translation into people's lives have been contested, signalling both the obstinance of exclusionary urban agendas and some of the demographic limitations of the constitutional project. In light of criticisms of the Constitution as a document that has entrenched apartheid and colonial legacies,⁶ and of the Court as serving elite interests,⁷ a careful consideration of the two cases is necessary.

In this paper, we do not deal extensively with either of the Court's judgments. Rather, our aim is to interrogate the circumstances and conflicts which led to them being heard in the Court; what Madlingozi has called 'the road from the street to the Court'.⁸ We begin by discussing the two cases in the context of a broader urban crisis in South Africa. We examine issues of urbanisation, housing and the labour market, and suggest that particular forms of governance shape this crisis. In relation to the occupiers of Cato Crest and the Johannesburg informal traders, local government effected forms of governance from which social, spatial and economic justice were by and large excluded. Through a discussion of some of the dimensions of informal work and housing in South Africa, we argue that the municipalities involved, eThekweni (the Municipality) and the City of Johannesburg (the City), conditioned 'states of exception', through which they were able to implement governance distinguished by a pursuit of removal. States of exception are situations which have been structured in such a way that meeting daily needs is made impossible without transgressing the law. The states of exception to which Cato Crest occupiers and Johannesburg informal traders

⁴ *Zulu and Others v eThekweni Municipality and Others* [2014] ZACC 17, 2014 (4) SA 590 (CC), 2014 (8) BCLR 971 (CC).

⁵ *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8, 2014 (4) SA 371 (CC), 2014 (6) BCLR 726 (CC).

⁶ JM Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal* (argues against notions that the new constitutional dispensation has heralded a 'fundamental rupture and radical break' with colonial and apartheid patterns of racial subordination and socio-economic inequality).

⁷ This critique is more typical among activists and social movements than it is in more elite academic, civil society, and media forums. See for instance T Ngwane as quoted in T Madlingozi 'Social Movements and the Constitutional Court of South Africa' in OV Vieira, U Baxi & F Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 537.

⁸ *Ibid* at 539.

were consigned were contrived and exacerbated by local government, which ‘governed through removal.’ We conclude that, in the face of this urban crisis and an approach to governance characterised by states of exception and removals, the court system remains an important site of struggle for formal recognition of people’s rights.

II SOUTH AFRICA’S URBAN CRISIS

South African cities reflect the broader political and socio-political exclusion experienced by the majority of South African society, which ‘neither benefits from the neoliberal economic model nor is able to influence the political system.’⁹ The country is currently facing an urban crisis characterised by high rates of urbanisation and a lack of affordable accommodation. This is unfolding in the context of a labour market which does not create sufficient formal employment opportunities for people.

The delivery of housing opportunities in post-apartheid South Africa has happened at an impressive rate. Government has created around 3.7 million housing opportunities since 1994,¹⁰ ranging from subsidised free standing houses to the more recent social and rental housing.¹¹ For the better part of this period, housing policy was focused on building large numbers of small Reconstruction and Development Programme (RDP) units to eliminate the apartheid housing backlog and ensure better living conditions for poor people.

Despite these significant achievements, however, there is general consensus among government¹² and civil society that delivery has not been good enough. The housing backlog has risen from an estimated 1.5 million to 2.3 million units.¹³ Other problems have also emerged regarding the RDP programme: a falling rate of delivery, inflated costs, the poor quality of construction, and suspicions of patronage, fraud and corruption in allocation processes.¹⁴ RDP houses are also generally located on urban peripheries where cheap land is readily available. This has effectively re-inscribed apartheid spatial geographies, and has kept poor people far removed from economically viable city centres.

Urbanisation, together with the globalisation and liberalisation of the economy, has been instrumental in the proliferation of urban micro-enterprises, to which some estimates have apportioned 70 per cent of GDP and 80 per cent of urban jobs in sub-Saharan Africa.¹⁵ South Africa’s rapid urbanisation has unfolded in

⁹ J Dugard, T Madlingozi & K Tissington ‘Rights-Compromised or Rights-Savvy? The Use of Rights-Based Strategies to Advance Socio-Economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers’ Movement’ in H Alviar García, K Klare & L Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 23, 27.

¹⁰ The Presidency *Twenty-Year Review: 1994–2014* (2014).

¹¹ SACN (South African Cities Network) *From Housing to Human Settlements: Evolving Perspectives* (2014).

¹² See, for example, the Department of Human Settlement’s *Coherent and Inclusive Approach to Land Policy Framework for Human Settlements* (2016).

¹³ I Turok ‘What will Housing Megaprojects do to our Cities?’ (10 November 2015) available at <http://www.econ3x3.org/article/what-will-housing-megaprojects-do-our-cities>.

¹⁴ SACN (note 11 above).

¹⁵ C Skinner ‘Street-vending in Africa: A Review’ (2008) Working Paper 51, University of KwaZulu-Natal, School of Development Studies.

a context of relatively stagnant growth in formal employment and the increasing casualisation of labour. Macro-economic policies have largely prioritised economic growth over redistribution,¹⁶ overseeing a shift from welfare municipalism to a neoliberal emphasis on fiscal restraint and balancing budgets. Unemployment and inequality have also escalated, and urban poverty is worsening at alarming rates. Recent measures suggest that, when considerations of ‘well-being’ are taken into account, 62.76 per cent of South Africans are poor.¹⁷ Race remains a key determining factor of these levels of poverty: 70.75 per cent of Black people in South Africa are poor, compared with 56.78 per cent of Coloured people, 20.47 per cent of Asian/Indian people, and only 4.06 per cent of White people.¹⁸

The informal economy has consequently been required to absorb an increasing supply of labour. While this absorption has not been as pronounced as in other African economies, or enough to stem the rampant unemployment in the country, street vending has come to be a dominant activity in South Africa’s informal economy, accounting for around 15 per cent of non-agricultural informal employment and almost half of informally self-employed women.¹⁹ While 30 per cent of the estimated 500 000 people making a living on South Africa’s streets in 2007 were reported to live in cities, this figure does not account for traders commuting into cities every day to sell their goods and services.²⁰

Excluded from formal job and housing markets, where both the state and market have failed in providing equal levels of access, thousands of people living in South African cities have turned to their own resourcefulness, unofficial networks and arrangements, and informal means to secure some of their most basic needs. For millions of people, shacks are a more adequate housing option than poorly constructed and located government units, which are subject to heavily contested and often corrupt allocation processes.²¹

As Abahlali baseMjondolo have argued, however, this is as much a struggle for basic needs as it is for ‘being human’ – the demand for houses, land and economic opportunity are expressions of the conditions in which people live. Shacks, and the proliferation of street trade, are popular responses to this deeply entrenched urban crisis. The struggles that led to the judgments in *Zulu* and *SATF* both arose from within, and as a result of, this urban crisis.

¹⁶ Dugard, Madlingozi & Tissington (note 9 above) at 24.

¹⁷ J Budlender, M Leibbrandt & I Woolard ‘South African Poverty Lines: A Review and Two New Money-metric Thresholds’ (2015) Working Paper 151, Southern Africa Labour and Development Research Unit 1, 30.

¹⁸ A Finn ‘A National Minimum Wage in the Context of the South African Labour Market’ (2015) Working Paper 153, Southern Africa Labour and Development Research Unit 1, 5.

¹⁹ G Wills ‘South Africa’s Informal Economy: A Statistical Profile’ (2009) Working Paper 6, WIEGO (Urban Policies).

²⁰ Ibid at 48.

²¹ K Tissington, N Munshi, G Mirugi-Mukundi & E Durojaye *Jumping the Queue, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa* (2013).

III ZULU AND SAITF

A Zulu

The eThekweni Municipality promised RDP homes to backroom tenants in Lamontville Township in Durban.²² Nothing came of this promise and the tenants, unable to meet their monthly rental obligations, were forced to move from their homes. Unable to afford rent anywhere else, and with the Municipality renegeing on its promise to provide homes, the occupiers had nowhere to go. The only place they could move was onto a vacant piece of state-owned land.

As soon as the occupiers arrived, the Municipality demolished their homes.²³ The Municipality was supported by the police and the Municipality's Control Unit. The occupiers' homes were destroyed without a court order. The Municipality argued that it didn't need a court order to destroy homes and evict people, because the occupiers were 'land invaders'. The Control Unit and police regularly visited the property and destroyed their homes. On each occasion, the occupiers rebuilt their homes. Between September 2012 and August 2015, they were evicted and had their homes destroyed 24 times. On each occasion, the demolitions occurred without a court order.²⁴

However, after several evictions, even the police did not agree with the Municipality's conduct of evictions without court orders and informed the Municipality that it would only evict people if the Municipality obtained an eviction order. The Municipality and the MEC for Human Settlements then approached the Durban High Court, but instead of seeking an eviction order, they sought extraordinary relief: an interdict that would apply universally and prohibit any person from occupying several properties, including Lamontville Township. Circumventing the procedural steps provided in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act),²⁵ the interdict would allow the police and the Municipality to restrain any person from occupying, amongst other properties, the Lamontville Township. The effect of the order was that all the people living on these properties were now doing so unlawfully. Astonishingly, the occupiers themselves were not cited in this application. They were excluded from the court process entirely and this extraordinary relief preventing them from occupying their homes was sought and obtained in their absence. In this way the Municipality effectively obtained an eviction order without following the provisions of the PIE Act and without the occupiers being joined to the proceedings.²⁶

²² *Zulu* (note 4 above) at para 4.

²³ *Ibid* at para 5.

²⁴ *Ibid* at para 6.

²⁵ Act 19 of 1998.

²⁶ The interim order authorised the police and the Municipality to take all reasonable steps to 'prevent any persons from invading and/or occupying' any structures or placing any material on the property, to remove any materials placed on the property and to demolish and/or dismantle any structure that may be constructed on the property after the granting of the order. Specifically Koen J ordered that SAPS and the Municipality may take all reasonable steps: 'interdicting and restraining any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the aforementioned properties.'

A month after the universal interdict was granted, hundreds of the occupiers approached the Durban High Court for relief. They did so in two steps. The first was to seek an order²⁷ restraining the state from demolishing their homes or evicting them without an order of court.²⁸ The second was to request the Court to allow them to be part of the proceedings in which the Municipality and the MEC had obtained the universal interdict. It was this application for leave to intervene which the Durban High Court denied. The Durban High Court²⁹ held that the occupiers did not have a ‘direct and substantial’ interest in the proceedings. The occupiers took this decision on appeal to the Constitutional Court.

In the Constitutional Court, the occupiers argued that the universal interdict was, in essence, an eviction order. The Municipality argued that it was not an eviction order, nor was it used as an eviction order. Again, the Municipality and the MEC argued that the occupiers did not have a direct and substantial interest in the proceedings.³⁰ The Court held that the universal interdict prevented occupiers from continuing to occupy the property, which amounted to their eviction as it precluded them from either returning to their homes after a temporary absence or because they could be prevented from continuing to occupy the property. This meant that, to this extent, the interim order was an eviction order.³¹ The Court joined the occupiers to the proceedings.³² The majority did not set aside the universal interdict granted by the Durban High Court and referred the matter to the High Court to reconsider. In a minority judgment Van der Westhuizen J set aside the universal interdict. He found that the order could never be legally valid as it had been granted in clear contravention of the PIE Act. The High Court ultimately upheld Van der Westhuizen J’s position and dismissed the interdict.³³

B SAITF

As the main arrival point from the rest of the continent, and as the economic heart of a South Africa in which vast sections of the population have little prospect of employment, Johannesburg has developed a thriving informal sector. Nowhere is

²⁷ *J Zulu and 389 Others v Etkekwini Municipality and Others* (unreported) case no 4431/2013.

²⁸ *Zulu* (note 4 above) at para 12.

²⁹ *Ibid* at para 15.

³⁰ They contended that the appellants had no locus standi in the proceedings as the interim order did not affect them or their rights since it only related to invasions or attempted invasions that occurred or would occur after the grant of that order. They submitted that the appellants had already been living on the Lamontville property when the interim order was granted and that the order did not apply to persons who were already in occupation of the Lamontville property when it was granted. In its affidavits and submissions to the Constitutional Court the Municipality was clear: the interim order was not sought for, nor did it apply to, people who were already in occupation of the property. The MEC similarly stated that the occupiers were wrong in their approach to the interim order as it did not cover those who were already in occupation. The legal point was crisp – the interim order does not authorise the eviction of the occupiers as they were in occupation; they therefore had no direct and substantial interest in the case and had no standing. This proved to be false as the state repeatedly used the order to evict occupiers.

³¹ *Zulu* (note 4 above) at para 25.

³² *Ibid*.

³³ *MEC for Human Settlements & Public Works of the Province of KwaZulu-Natal v Etbekwini Municipality and Others; In re: Abablali BaseMjondolo and Others v Etbekwini Municipality and Another* [2015] ZAKZDHC 69, [2015] 4 All SA 190 (KZD).

this sector more pronounced than on the streets of the inner city, where informal street traders in markets and stalls sell almost everything from muti to make-up, from Nollywood films to fresh fruit and vegetables, from lengths of Mozambican fabric to Nike sneakers, and where most of the inner city eats daily, at Pakistani tea houses, South African chisa nyama stalls and Ethiopian restaurants.

Approximately 7 000 of these traders – the vast majority – were evicted on a mass scale between 30 September and 31 October 2013 as part of the City's 'Operation Clean Sweep'. Accompanied by confiscations of stock, the operation left the traders, many of whom were the breadwinners in their families, without their goods and places of business. The police did not provide a clear or consistent explanation for the evictions. By the end of October, a vast majority of Johannesburg's inner city traders were left without both their places of business and their stock.³⁴ Whilst the traders had been trading 'informally', they were not trading illegally, and were in possession of the necessary permits. Without warning – and without the necessary legal basis – the police arrived and started destroying the traders' stalls. Footage of the action shows massive police brutality. Deprived of a means to support themselves and their families, the traders decided to negotiate with the City, despite legal advice to pursue litigation. The result of these negotiations was an agreement to a 'verification' process. This meant that all the traders would submit to a process in which they would be verified and they would be 're-registered' as informal traders.³⁵ In turn, the City would then allow traders who were verified to return to their stalls. However, the City did not uphold its part of the agreement and the traders were not permitted to return to their stalls after being verified and re-registered. Those who did so were again forcibly removed by the Johannesburg Municipal Police Department (JMPD), who also dismantled the stalls previously used by the traders.³⁶ It became clear that the operation was not an attempt to verify and re-register the lawful informal traders, but was rather a unilateral decision to remove them from the inner city.

Only at this stage did the traders launch an application seeking urgent relief as they had been left without any income for several months. The City argued that their urgency had lapsed as it had negotiated with the traders. The traders ought to have known – argued the City – that the negotiations would not be successful. The Johannesburg High Court agreed with the City and dismissed the application for a lack of urgency. The traders sought direct access to the Constitutional Court. They argued that their eviction was unlawful. The City conceded there was no lawful ground for the operation; however, the City referred to the prejudice that city residents might suffer, 'who no longer have access to ATMs, walk-in banks, cinemas, departmental stores, restaurants and other amenities because of

³⁴ SERI (note 3 above).

³⁵ *SAITF* (note 5 above) at para 8.

³⁶ *Ibid* at para 9.

criminality that hides among the illegal hawkers'.³⁷ The Court dismissed this and held that the eviction had been unlawful.³⁸

IV GOVERNANCE

The current state of local governance, which has developed alongside South Africa's urban crisis, has been characterised as a 'governance deficit', distinguished by corrosive patronage politics, a lack of state engagement with citizens and weak public accountability.³⁹ *Zulu* and *SAITF* are revealing of this deficit, and some other worrying features of urban governance in South Africa. In both cases, local government associated the values of places with people, effectively cutting poor people off from economically competitive city places. Influx control of this kind, characterised by the withdrawal or denial of basic infrastructure and services, is a 'widely deployed means of neoliberal governmentality' and 'has always been an inherent element of modern urban governance'.⁴⁰ Trends of anti-poor approaches have been similarly constant, and amount to governing the poor out of the city.

A Informality: Governance through Exception

State violence against informality and 'unauthorised urbanisation' has a long history in South Africa. Its most notorious manifestation saw informal settlements, which had developed on the peripheries of 'white' apartheid cities presenting the promise of employment, systematically and forcibly removed during the 1960s, 1970s and 1980s.⁴¹ Black South Africans living in cities, and especially those without formal employment, confounded the divisions between tradition and modernity on which colonial and apartheid planning were established and were pathologised as dangerous and 'matter out of place'.⁴²

Ideas that poor black people represent a threat to the urban order persist in the current state's treatment of certain populations. Local government characterised informal homes and work as social and spatial pathologies in both *Zulu* and *SAITF*. In a vocabulary of 'epidemics',⁴³ which has played a crucial role in casting informal settlements as social threats that need to be eradicated, the occupiers in *Zulu* were referred to as 'land invaders'. In *SAITF*, street traders were referenced as the authors of 'crime and grime' in Johannesburg's inner city, which

³⁷ Ibid at para 32.

³⁸ The full order granted was:

- a) Pending the determination of Part B of the application in the High Court, the first to fifth respondents are interdicted from interfering with the trading of the applicants listed in Annexures A and B to this order at the locations they occupied immediately before their removal between 30 September and 31 October 2013.
- b) The first to fifth respondents are directed to pay the applicants' costs in this Court and in the High Court including, in each case, the costs of two counsel.

³⁹ M Van Donk 'Citizenship as Becoming' in *State of Local Governance – Active Citizenship Matters* (2012) 12, 15–17.

⁴⁰ A Selmeczi "'From shack to the Constitutional Court": The Litigious Disruption of Governing Global Cities' (2011) 7 *Utrecht Law Review* 60, 64–66.

⁴¹ J Ferguson 'Formalities of Poverty: Thinking about Social Assistance in Neoliberal South Africa' (2007) 50 *African Studies* 71.

⁴² M Douglas *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (1966).

⁴³ N Gibson *Fanonian Practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011) 152.

ostensibly results from a proliferation of unregistered trading, despite the City being complicit in this proliferation⁴⁴ and failing in its responsibility to maintain the public environment in the inner city.⁴⁵ Urban planning apparatuses were accordingly deployed ‘to correct or eliminate’⁴⁶ them.

This must be seen in the context of a legal and policy framework which not only recognises those who live and work informally, but also creates rights to protect them. In relation to housing, and within the current context of a limited provision of formal housing, and the constraints of the economy, there is an emerging appreciation that informal work and informal housing are becoming increasingly important to the composition and organisation of cities. This is reflected in the amount of high-level policies which are explicitly designed to manage informality.⁴⁷ Similarly, in the context of informal trade, while a national policy dealing explicitly with informal work remains elusive, local policy acknowledges the crucial economic contributions of informal trade and prescribes a framework of recognition, inclusion and regulation.⁴⁸

Despite national policy and legally binding programmes specifically focused on the recognition and regulation of informal settlements, the approach of local governments to informal settlements has largely been one of relocation, eviction

⁴⁴ C Benit-Gbaffou *In Quest for Sustainable Models of Street Trading Management: Lessons for Johannesburg post Operation Clean Sweep* (2015).

⁴⁵ SERI (note 3 above).

⁴⁶ AY Kamete ‘Missing the Point? Urban Planning and the Normalisation of “Pathological” Spaces in Southern Africa’ (2013) 38 *Transactions of the Institute of British Geographers* 639.

⁴⁷ *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004) available at http://abahlali.org/files/Breaking%20new%20ground%20New_Housing_Plan_Cabinet_approved_version.pdf. (This policy has held the promise since 2004 of support based state housing interventions, which begin with securing tenure and then enabling governments to upgrade informal settlements in situ in partnership with communities. Informal settlement upgrading before eviction or relocation is also prioritised in the Upgrading of Informal Settlements Programme (UISP).)

⁴⁸ In Johannesburg, the Growth and Development Strategy 2040 (GDS) and the Inner City Transformation Roadmap, which is designed to oversee GDS’s implementation in the inner city, are both decidedly progressive policy frameworks. The GDS, for instance, contains an inclusive conception of the informal sector:

A robust informal sector is essential in supporting economic resilience.... Regulation and policy that manages informality, without destroying informal economic activities and the opportunities they present, serves as additional support, growing resilience further within these economies.

The Inner City Transformation Roadmap holds the promise, in policy at least, for a more inclusive approach to the management of informal trade in Johannesburg. It outlines a progressive strategy for the inner city:

A diverse offering of economic activity will be promoted within a mixed economy... Informal trading will be supported within managed linear and demarcated markets and will be integrated with transportation routes and movement plans for the inner city. Micro trading and informal trading will be appropriately regulated... Employment, through meaningful work and livelihood opportunities, will be increased.

The policy also highlights that the issues of ‘crime and grime’ in the public environment of the inner city are best addressed through an urban management approach. With regard to informal trade, it highlights the need for effective management to bolster livelihood opportunities: ‘These issues [“crime and grime”] require effective urban management, ongoing maintenance, and repair by many City departments and entities’, and ‘Well managed informal trade is important both for the dynamism of that sector and for its co-existence with other forms of retail and with pedestrian activity in the inner city.’ The Roadmap reads as a basis for cooperative interventions and management, enabling traders to generate a livelihood in the inner city.

and demolition.⁴⁹ This was expressed most brazenly in the ‘eradication of slums’ discourse that characterised Lindiwe Sisulu’s first term as Minister of Housing.⁵⁰

In *Zulu*, the Municipality’s governance was characterised by the creation of a state of exception. The Municipality promised to deliver RDP homes to occupiers at Cato Crest. It later excluded the occupiers from these benefits on the basis that they were ‘backroom dwellers’ – an exclusion which has no basis in the legal framework. Nonetheless, the Municipality used the backroom-dweller category to create a state of exception from the protection of the legal framework, and thereby exclude occupiers from benefitting from RDP homes. By categorising the occupiers as backroom dwellers, the Municipality made it impossible for the occupiers to bring themselves within the confines of the law or regularise their presence on the property, or any other property for that matter.

The state of exception extended further, however. Once evicted from their backrooms, the occupiers moved onto state-owned land without any consent: they were the very definition of unlawful occupiers.⁵¹ As unlawful occupiers they were entitled to procedural and substantive protection under the PIE Act. This protection means that they had to be given additional specific notice before the eviction application was launched,⁵² their personal circumstances needed to be put before a court, and they could only be evicted if the court deemed it just and equitable.⁵³ Vitaly, if the eviction would lead to homelessness, the state is under an obligation to provide them with alternative accommodation.⁵⁴ Again, the state avoided the legal provisions and its obligations by creating a further state of exception: the occupiers were excluded from their protection under the PIE Act as they were not ‘unlawful occupiers’ but ‘land invaders’. After categorising the occupiers as ‘land invaders’, the Municipality excluded them from the protection they were legally entitled to and the laws that could regulate or legalise their presence on the property. Wherever the occupiers went next, they would be ‘land invaders’, excluded from legal protection and unable to bring themselves within the prescript of the law.

The spatial effect of this sort of governance is that occupiers excluded from legal protection are further excluded from our towns and cities. The occupiers are not welcomed and included, despite legal prescripts that mandate the state to do so, but are relegated to unseen spaces on the urban periphery. Instead of enjoying the benefits of inclusion and protection, they are excluded and wished away.

Operation Clean Sweep flew similarly in the face of the urban-management approach outlined in legal and policy frameworks. In *SAITF*, the City contended that if the applicants were allowed to return to their trading stalls, the inner city

⁴⁹ M Clark & K Tissington ‘Courts as a Site of Struggle for Informal Settlement Upgrading in South Africa’ in L Cirolia, T Gorgens, M van Donk, W Smit & S Drimic (eds) *Upgrading Informal Settlements in South Africa: Pursuing a Partnership-Based Approach* (forthcoming).

⁵⁰ The Housing portfolio has since been changed to Human Settlements.

⁵¹ The PIE Act defines an unlawful occupier as ‘a 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’.

⁵² PIE Act s 4(2).

⁵³ PIE Act s 4(7).

⁵⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC).

would be ‘chaotic, uncontrolled and illegal trading with its concomitant crime and grime [will] be permitted to return to the streets of Johannesburg’.⁵⁵ Underlying the City’s stance was the premise that the informal traders and their wares were dirty, which necessitated their removal. Despite the City’s duty to provide a clean environment for traders, it unlawfully⁵⁶ evicted them for contributing to ‘grime’ in the inner city. The traders were not seen as rights bearers, but as nuisances dirtying the city.

The Court, however, recognised the growing reliance on informal sources of income in contemporary South Africa. It acknowledged that the livelihoods of thousands of Johannesburg families depended on informal street trade and that the kind of economic exclusion imposed by Operation Clean Sweep constituted ‘financially perilous conditions’ for informal street traders that traders may not be able to survive.⁵⁷ The Court effectively embraced the struggle for access to city spaces for the purposes of making a living into the ambit of constitutional rights by ruling that ‘the ability of people to earn money and support themselves and their families is an important component of the right to human dignity’, and by adjudging exclusionary urban cleaning operations like Clean Sweep to have ‘a direct and on-going bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services’.⁵⁸

Discourses of urban development, regeneration and improvement have, however, ensured that (often violent) exclusion remains the prevailing experience of poor people living in South Africa.⁵⁹ Solutions to the urban crisis are now typically seen, often through the use of the language of global competitiveness,⁶⁰ as a matter of efficient, bold and creative management that can produce an enabling and secure environment for investment, tourism and entrepreneurship. By defining groups of people outside of the law in both cases, the state’s violence against them, despite being explicitly illegal, was made to appear more legitimate. This is symptomatic of a broader depiction by the South African state of popular practice as criminal, which prepares the grounds on which state violence becomes socially authorised.⁶¹

⁵⁵ *SAITF* (note 5 above) at para 32.

⁵⁶ The unlawfulness of this conduct was never disputed. The Court held that there was no dispute over the entitlement of the traders to trade in the stalls the City allocated to them:

The traders have clear, undisputed rights under section 4 of the By-Laws to do business in the locations where they traded before they were removed. ... The City’s decision to declare certain areas as prohibited or restricted was not made in accordance with the procedure in section 6A(2)(a) of the Businesses Act. The City confesses to this flaw. ... The City has not identified any lawful ground that permits it to frustrate the enjoyment of these rights.

Ibid at paras 25, 27 and 28. The Court expressed concern that the City had described the eviction of several thousand informal traders as ‘convenient’ and instead characterised Operation Clean Sweep as ‘indiscriminate’ and ‘flawed’, finding that the City had ‘gone about achieving its objectives in flagrant disregard of the traders’ rights’.

⁵⁷ *SAITF* (note 5 above) at paras 29–30.

⁵⁸ *Ibid* at para 31.

⁵⁹ S Wilson ‘Planning for Inclusion in South Africa: The State’s Duty to Prevent Homelessness and the Potential of “Meaningful Engagement”’ (2011) 22 *Urban Forum Volume* 265.

⁶⁰ The City of Johannesburg’s aspirational discourse of a ‘world-class African city’ is an example.

⁶¹ R Pithouse ‘An Urban commons? Notes from South Africa’ (2014) 49 *Community Development Journal* 31.

The formality binary has been criticised at length. Keith Hart, who first coined ‘the informal sector’ in 1973, has recently argued that the demise of national capitalism and the rise of neoliberalism since the 1970s has seen the informal economy ‘take over the world’, usually under cover of the rhetoric of ‘free markets’.⁶² But it is important here in order to stress the point that informality is not descriptive of a sector: it is not the shadow of formality. Neither should informality be understood as the object of state regulation, but rather as something brought about by the state itself.⁶³ The state, especially through its legal and planning apparatus, determines what is informal, and in turn, through the deployment of police and private security companies, which kinds of informality will flourish, and which kinds will be torn down and removed. Urban informality, as we see it here, is then a state of exception determined by city planning and development agendas and apparatuses, and is constituted by ‘population[s] whose very livelihood or habitation involve violation of the law’.⁶⁴

B An Unlawful State: The Pursuit of Removal

After excluding the ‘land invaders’ in *Zulu*, and those guilty of ‘crime and grime’ in *SATF*, from the reach of rights – despite the legal and policy framework designed to include them – occupiers and traders were removed from their homes and places of business respectively.

The intention that underscored the state of exception through which Operation Clean Sweep was achieved was evident from JMPD spokesperson Edna Mamonyane’s announcement at the time that the operation was a success, claiming that the ‘nightmare’ of Johannesburg’s streets had been overcome as ‘now [they] look clean’.⁶⁵ The initiative sought to remove traders permanently from their trading stalls and relocate them to unknown ‘alternative designated areas’, and prohibit them from trading in the interim. These locations would not be close to the high foot traffic in the inner city that the traders depend on for their business. The motivation for the operation was, as the name foreshadowed, one of removal: an attempt to ‘clean’ the inner city.

In *Zulu*, a similar motive of removal informed the Municipality’s actions. And so, when the Control Unit left, the occupiers, having nowhere else to go, rebuilt their homes. The Control Unit regularly visited the property to destroy the homes of occupiers who had rebuilt them after previous destructions. The Municipality had no regard for where the occupiers ought to go to, and sought only to remove them from the land.

The decision to exclude, and the motive to remove, were apparent in the Court proceedings. Up until the Court ruled that the occupiers did have a direct and substantial interest, they had been entirely excluded from the legal process through

⁶² K Hart ‘How the Informal Economy took over the World’ in P Moertenboeck, H Mooshammer, T Cruz & F Forman (eds) *Informal Market Worlds Reader: The Architecture of Economic Pressure* (2015) 33.

⁶³ A Roy ‘Urban Informality: Toward an Epistemology of Planning’ (2005) 71 *Journal of the American Planning Association* 147.

⁶⁴ P Chatterjee *The Politics of the Governed Reflections on Popular Politics in Most of the World* (2004) 40.

⁶⁵ SERI (note 3 above) at 15.

which their removal was sought and their rights to housing and protection against unlawful eviction denied.

The pursuit of removal in *Zulu* reached a point of absurdity. Occupiers, labelled as ‘land invaders’, were evicted without a court order, rendering them homeless. Having nowhere to go they, were forced to ‘invade’ land again, where the eviction cycle began again. In this way, the politics of removal created a chronic eviction cycle in which the occupiers became poorer with each eviction.

V CONSTITUTION AS A SITE OF STRUGGLE FOR POLITICAL SOCIETY

The Constitution imagines all members of South African society as equal, rights-bearing citizens. In the constitutional sense, however, shack dwellers and street traders are only tenuously rights-bearing. While not beyond the reach of the state, which is responsible for them as a population within its jurisdiction, their relationship to it does not always reflect what is imagined in the Constitution.⁶⁶ *Zulu* and *SATTF* express the demographic limitations of the constitutional project. Street traders in Johannesburg and shack dwellers in Durban both occupy a space in what Chatterjee⁶⁷ has termed ‘political society’: they live in informal conditions, whether with regard to access to housing, basic infrastructure and services, or employment, and are compelled to make legal transgressions in their daily lives.⁶⁸

It is important to note that legal proceedings can be ‘long, procedural and expensive affairs that can drain the resources and challenge the integrity’⁶⁹ of any organised and mobilised group of poor people. Litigation, if used at all, only ever constitutes a part of the tactics of these groups. Indeed, the claims to rights are extraordinary in urban struggles in the global south. Everyday survival in ‘political society’ is often more reliant on social networks and local informal arrangements. We focus here only on such extraordinary claims, and indeed only still the litigious hemisphere of these claims. The courts are only a very limited part of disruptive claims to rights, which include mobilisations and protests.

However, that focus is an important one. *SATTF* and *Zulu* constitute moments when distinct groups of South Africa’s ‘political society’ were able to ‘move beyond a politics of invisibility’⁷⁰ and ‘silent encroachment’ and actualise their citizenship in terms of the rights guaranteed them in the post-1994 constitutional framework. Successful struggles in the Court saw them gain ingress to the rights-bearing citizenship from which the state’s governance of removal had excluded them. The Constitutional Court in this context represents a useful site to distil what are often complex and multi-faceted South African urban struggles. In both *SATTF* and *Zulu*, poor people excluded, eventually by force, from prevailing planning agendas made the choice to enlist the courts in their struggle.

⁶⁶ Chatterjee (note 64 above) at 38.

⁶⁷ Ibid.

⁶⁸ C Benit-Gbaffou & S Oldfield ‘Claiming ‘Rights’ in the African City: Popular Mobilisation and the Politics of Informality’ in S Parnel & S Oldfield (eds) *The Routledge Handbook on Cities of the Global South* (2015) 282.

⁶⁹ N Gibson (note 43 above) at 158.

⁷⁰ Benit-Gbaffou & Oldfield (note 68 above) at 283.

Despite the successes achieved in the Court, the struggle of the traders and occupiers continue. For example, in *SATTF* the Constitutional Court's order was not complied with. Not only was the order not complied with, but Nomzamo Zondo (an attorney acting for the traders) was arrested for addressing police. She was arrested only a few hours after the Court interdicted the City from interfering with lawful informal traders' rights to trade.

The JMPD, also a party to the urgent Court application, disregarded the order handed down by Moseneke ACJ and prevented the informal traders from setting up their stalls in the places they occupied prior to Operation Clean Sweep, as authorised by the court order. Zondo was called to the scene and, according to a number of eyewitnesses, was assaulted when she tried to explain to the JMPD officials what the order meant – that the traders were lawfully allowed to trade. She was then arrested and taken to Johannesburg Central Police Station. The exact charges and reasons for her arrest were never made clear as she was never formally charged, only processed. She was detained for over five hours after she was arrested and was denied police bail. It was only on the following day, under threat of contempt and after legal representatives had repeatedly engaged with JMPD officials and showed them the court order, that the JMPD complied with the Constitutional Court's order.

In *Zulu*, the hearing took place on 12 February 2014. The day after the hearing, 13 February 2014, the Municipality demolished a number of structures on the Lamontville property.⁷¹ Despite consistently assuring the Court, in affidavits and submissions, that the interim order would not be used to evict occupiers, the Municipality did so the very next day. This much was admitted by the Municipality in affidavits filed in the Court:

There is an inconsistency between the Municipality's stance on the interim order before this Court prior to and on 12 February 2014 and its reliance upon that order in carrying out the demolitions of 13 February 2014. The Municipality has taken two contradictory positions on the interim order in this matter. Having taken the stance that the Municipality took at the hearing, it was totally unacceptable that the day after the hearing it took a contrary position and carried out the demolitions that it did.⁷²

Aside from the unlawful evictions in the face of undertakings not to evict, the MEC continued to defend an order that operates universally allowing indiscriminate evictions. In addition, the MEC has subsequently sought to 'prevent land invasion' by seeking similar orders. At present there is a universal interdict similar to the one granted by the Durban High Court in *Zulu* operating on a large portion of state-owned land in Durban. It remains to be seen if people will be evicted based on this order as they were in *Zulu*.

VI CONCLUSION

Approaches to governance that centre on the removal of the urban poor, and the interventions they engender, continue to have considerable force in the lives of many people living and working in South African cities. Indeed, both the

⁷¹ *Zulu* (note 4 above) at para 30.

⁷² *Ibid* at para 36.

City of Johannesburg and the eThekweni Municipality are pursuing, through different means, the relocation of Johannesburg informal traders and the eviction of Durban shack dwellers. In Johannesburg, the City has recast its programme as the 'designation of new trading areas', which still amounts to a non-consultative removal of traders,⁷³ while the eThekweni Municipality is currently in the process of refining the interdicts it seeks to use to effect the mass evictions of shack dwellers.

The governance of removal persists beyond these cases as well. In Johannesburg in early 2015, for instance, the City began Operation Ke Molao. The operation, which is still ongoing and echoes much of the logic operationalised during Clean Sweep, is designed to rid the city's traffic intersections of window-washers, peddlers and beggars. Recent statements by the eThekweni Municipality regarding the development plans for Durban in the lead-up to the 2022 Commonwealth Games are similarly worrying. Utilising the now-familiar discourse of 'crime and grime', the municipality is pursuing aesthetic development in its promises to provide a clean and orderly city centre in the next few years.

If these currents persist, the South African urban crisis is unlikely to reach any democratic conclusion, and urban governance will become increasingly exclusionary, authoritarian and repressive.

⁷³ SERI (note 3 above).

