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LAND REFORM

The right of access to housing and its applicability to citizens or non-citizens

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The latter part of 2019 was marred by a series of protests and attacks on foreign nationals across various parts of the country. These attacks and acts of intimidation towards foreign nationals resulted in the displacement of a number of foreign nationals, some even electing to return to their countries of origin. In terms of section 1 of the Refugees Act No. 130 of 1998 ("the Act"), a "refugee" is a person who has been granted asylum in terms of the Act, whereas an asylum seeker is a person who seeking refugee status. The grounds for refugee status are set out in section 3 of the Act. Essentially, a person qualifies for refugee status if that person is unable or unwilling to return to his/her country of origin due to a well-founded fear of persecution, or has been compelled to leave his or her country of origin due to occupation, aggression or serious disturbance of public order. Spouses of qualifying persons are also entitled to refugee status.

During October 2019, a group of approximately 600 refugees, who are allegedly all foreign nationals, occupied the Waldorf Arcade Building in Cape Town, which houses the United Nations High Commissioner for Refugees ("UNHCR") in protest. The refugees demanded that the UNHCR relocate them to Canada or Europe, and not to their countries of origin. The UNHCR advised that resettlement would be highly unlikely for a number of reasons, such as the fact that the policy does not include resettlement to other countries. The owners of the Waldorf Arcade Building approached the Western Cape High Court for an interim interdict, which was granted on 16 October 2019 and directed the refugees to vacate the building unless they obtained the consent of the building owners. On 30 October 2019, a joint law enforcement operation was carried out by the South African Police Service ("SAPS"), the UNHCR, the Department of Home Affairs, and others, during which over 100 people were arrested for contravention of the interim interdict.

The refugees were subsequently offered shelter by the Central Methodist Church ("the church") in Greenmarket Square. Mostly women and children occupied the church, and the men occupied the surrounding streets, sidewalks and other public spaces of Greenmarket Square, which had a significant effect on the area. The occupation was in contravention of the City of Cape Town's By-law Relating to Streets, Public Places and the Prevention of Noise Nuisance ("the City"). Since the start of occupation in September 2019, the number of refugees has grown, leading to complaints by hotels and traders in the area as the presence of refugees has devastating consequences for their business. Tourist presence has decreased in Greenmarket Square, from which the traders and hotels make most of their profit.

On 17 February 2020, an interim order was granted by the Western Cape High Court. The Department of Home Affairs was ordered to conduct a verification of the refugees within 7 days of the order. The refugees were also ordered to make representations on 17 March 2020 as to why the interim interdict should not be made final. Most importantly, the court did not order the City to provide alternative accommodation for the refugees. The City, both in public and in its papers, repeatedly stated that it is unable to provide alternative accommodation because due to existing backlogs of over 1000 South African citizens who are waiting for accommodation. The approach adopted in relation to the provision of housing was viewed by some as unfair and highlighted the lack of clarity as to the legal entitlements of non-citizens in respect of housing. Against the backdrop of a dire housing shortage, clarity on the legal entitlements is critical to quell narratives that only seek to cause further division.

The Constitution of South Africa, 1996 ("the Constitution") is the apex law of the country. All others laws must be consistent with it and be interpreted in accordance with the provisions of the Bill of Rights. Section 26 of the Constitution provides that "everyone has the right to access to adequate housing." Section 26(2) confers a duty upon the State to progressively facilitate access to adequate housing, within its available resources.

The Housing Act No. 107 of 1997, as amended ("Housing Act") was enacted to give effect to the Constitutional right to access to housing. The Housing Act envisions a system of housing developments to facilitate access to permanent residential structures, water and electricity. In terms of section 1 of the Housing Act, this right will apply on a progressive basis to "all citizens and permanent residents of the Republic." Notwithstanding the above, the Housing Act therefore does not grant refugees or temporary residents the right to access housing.

The National Housing Code and the National Housing Policy and Subsidy Programme also state that beneficiaries of individual, consolidation, institutional, or rural subsidies and residential development programmes must have either citizenship or permanent residency. Again no provision is made for refugees in these programmes. The Reconstruction and Development Programme of 1994 also focused on improving quality of life and access to housing primarily for citizens. According to the Department of Human Settlements, only South African citizens can apply for RDP houses.

Section 25 of the Immigration Act states that permanent residents have all the rights which a citizen is entitled to, save where a law or the Constitution explicitly ascribes those rights to citizenship. As refugees have neither citizenship nor permanent residency, they unfortunately do not have access to these rights.

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