POLICY BRIEF

May 2024
The WRC operates in terms of the Water Research Act (Act 34 of 1971) and its mandate is to support water research and development as well as the building of a sustainable water research capacity in South Africa.

Legal impediments to providing services to informal settlements on private land

Since 2000, the national government has embarked on a series of initiatives to reform water supply and sanitation policies. However, despite the progress made by local government, there are still over 3 million South African households that experience substandard sanitation services. The Water Research Commission funded a study to understand the challenges and constraints associated with providing sanitation in urban areas and present policy recommendations to address these challenges.

Introduction

Service provision is a basic human right which will contribute to the achievement of the Sustainable Development Goals. The majority of South Africa's backlogs in the provision of water and sanitation are those in informal settlements, which are concentrated in urban areas. One of the major barriers to providing services in these areas is the perception that there are legal impediments to municipalities providing water and sanitation on privately held land especially, particularly where the private landowner is unwilling to recognise the settlement. However, the precise legislation that prohibits this has never been identified, nor tested through the courts. There is no legislation expressly covering this scenario, nor is there directly relevant case law. There are also conflicting legal opinions on the issue. All of this results in legal uncertainty and undermines service delivery to informal settlements.

The WRC appointed PDG to undertake research to generate empirical evidence to inform efforts to resolve this issue. This included a legislative review, primary research with municipalities and key informants. This policy brief presents a summarised version of the research findings and policy recommendations.

Scope

The scope of this policy brief concerns the lawfulness of installing fixed water and sanitation services infrastructure (water pipes, sewers, etc.) in informal settlements located on private land, where the settlement is present without the consent of the landowner and where the municipality is not willing or able to expropriate the land imminently. The scope of work is restricted to unlawful occupiers as defined in in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 so this excludes backyard dwellers, farmworkers, informal settlement residents paying rent to landowners, or anyone with a tenure right under other law.

The findings refer to the Department of Human Settlements (DHS) classification of settlements:

- Category A – full upgrade (permanent, viable site)
- Category B1 – interim basic services (viable site, full upgrade delayed)
- Category B2 – emergency basic services (immediate relocation not possible)
- Category C – relocation is required and imminent

Main study conclusions

- Municipalities have a powerful duty to provide basic services, regardless of the lawfulness of occupation, according to S27 of the Constitution (amongst other Constitutional and statutory duties).
- It is lawful to install fixed services in permanent or semi-permanent settlements on private land (Categories A, B1, B2).
- No outright legal impediments to installing fixed services were identified, although some anomalies may arise in specific cases.

Key findings of the legal review

- **The owner's property rights do not automatically trump the occupiers' rights to housing and basic services**

The tension between the owner's property rights and the occupiers' constitutional rights lies at the heart of the issue. The municipality is obliged to respect both sets of rights. Court precedent has shown that the owner's rights do not automatically trump unlawful occupiers' rights. There is a trend to recognise a social dimension to land ownership. A complex weighing up of competing rights is needed when considering eviction under the Prevention of Illegal Eviction (PIE) Act. If a court is faced with a decision whether to evict the occupants, the court may find that it is not just and equitable to evict, despite the occupation being unlawful. In this case, despite being an unlawful occupation, the owner will still be deprived of the use and enjoyment of the land.

- **When is a settlement 'permanent' or 'semi-permanent'?**

A settlement can be considered permanent or semi-permanent when a court finds eviction is not just and equitable. It can also be clear from the scale, duration of occupation and other contextual factors that a settlement is effectively permanent, and that imminent relocation is clearly not possible or humane. The absence of owner's PIE application is not determinative of whether a settlement can reasonably be considered permanent or semi-permanent.

- **Deprivation of property rights occurs because a settlement is permanent or semi-permanent and not because services have been installed**

If a settlement is considered as permanent or semi-permanent (see above), it means an owner is wholly deprived of the use and enjoyment of the land. Installing fixed services on such land cannot be a further deprivation, as full deprivation has already occurred.

Other potential or reported legal impediments considered in the report include:

- Reported impediment – Condonation of settlement by the municipality through the provisions of services impacts on owner's ability to evict under PIE: This is a remote possibility, but the owner would likely have exercised their right to evict previously if prospects of success were good. To address this, the municipality should give the owner an opportunity to comment on the intention to install fixed services on the land. The owner can then decide whether to challenge the installation of fixed services and/or to apply for eviction.
- Reported impediment – Providing fixed services means the municipality is condoning illegal conduct: A municipality is self-evidently unable to prevent the ongoing unlawful occupation if the settlement is legitimately regarded (or ordered by court) as being permanent. The municipality does not have power to remove the settlement but still has a duty to provide basic services.
- Reported impediment – Infrastructure accedes to private land: The infrastructure does not necessarily accede to the land because S79(1) of the Water Services Act provides for fixed infrastructure to remain the property of the Water Services Authority (municipality). Municipal water bylaws often have similar provisions.
- Reported impediment – Infrastructure increases the value of private land: A municipal decision which increases land value does not make it unlawful and there are many examples of this taking place in other contexts. In any event, it is questionable in the context of a permanent or semi-permanent settlement whether installing infrastructure increases the value of the land.
- Reported impediment – MFMA GRAP risk of using capital to create assets on private land: See point above on infrastructure acceding to private land. The assets remain the property of the municipality.
- Reported impediment – MFMA fruitless and wasteful expenditure risk: This risk only arises where relocation is going to occur (category B2 and C). There is no risk for the other categories of settlement. This is a risk for a category C settlement where relocation is imminent. In B2 settlements where the relocation may be relatively imminent, the municipality will have to consider the expected relocation date in the context of the cost of installing (and possibly removing) the services infrastructure versus the costs of alternative services mechanisms. However, it is still debateable whether the expenditure is 'fruitless' if it is delivering on the core constitutional mandate of the municipality.

Recommendations

National government should provide a clear statement on the lawfulness of providing fixed water services infrastructure to permanent or semi-permanent informal settlements located on private land. This can be achieved or supported using existing legal mechanisms, including:

- the Minister of Human Settlements gazetting additional principles of housing development under section 2(2) of the Housing Act;
- amending the Housing Code on upgrading of informal settlements, including to make it clear that grants can be used to install fixed services on private land; and
- National Treasury issuing circulars, instructions, practice notes or other instruments under the MFMA to clarify

the accounting treatment and financial consequences of investing capital expenditure on private land.
- Spatial Planning and Land Use Management Act (SPLUMA)

Provincial government could make legislation under Schedule 1 of SPLUMA on procedures relating to the approval of applications for upgrading informal settlements including matters related to the provision of services.

Municipalities should issue new bylaws (or amend existing water services bylaws) to regulate the provision of services to informal settlements on private land this including:

- how and when it can be done;
- rights and duties of parties (including notice to the owner);
- removal of anomalies in existing water bylaws;
- that the Municipality retains ownership of infrastructure; and
- the possible inclusion of statutory servitudes over the infrastructure.

Municipalities could also consider identifying an appropriate test case to take through the courts to obtain clarity on the parameters of a municipality's authority and duty in these circumstances. Appropriate **public interest organisations** could join as ***amicus curiae*** (friends of the court).

Related project:
A review of the challenges and constraints associated with the provision of sanitation services in urban informal settlements (**WRC project no. 2486/1/17**),
link: https://wrcwebsite.azurewebsites.net/wp-content/uploads/mdocs/2486_Finalreport.pdf