



CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS SERIES  
NUMBER 5, 2004

**ELISABETH WICKERI**

***GROOTBOOM'S LEGACY: SECURING THE RIGHT TO ACCESS TO  
ADEQUATE HOUSING IN SOUTH AFRICA?***

NYU School of Law • New York, NY 10012  
No part of this paper may be reproduced in any form  
without permission of the author.

# GROOTBOOM'S LEGACY: SECURING THE RIGHT TO ACCESS TO ADEQUATE HOUSING IN SOUTH AFRICA?

© ELISABETH WICKERI  
Law Program Officer  
Human Rights in China  
Author email: [elisabeth.wickeri@hrichina.org](mailto:elisabeth.wickeri@hrichina.org)

The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. The Center's Faculty Director is Philip Alston, its Executive Director is Smita Narula, and its Research Director is Margaret Satterthwaite. CHRGI thanks Stephanie Welch for copyediting and formatting this paper.

## *Abstract*

At the end of apartheid in 1994, the African National Congress ran on a political platform of “housing for all,” a welcome promise for South Africans living in deplorable situations, a direct consequence of hundreds of years of white minority rule. Despite that promise, and the inclusion of the right to access to adequate housing in the new constitution, little changed after the ANC’s landslide victory. In October 2000, the country’s highest court handed down a landmark social and economics rights case, *Government of the Republic of South Africa and Others v. Grootboom and Others*. The Court declared the government to be in breach of its constitutional obligations, and required it to reasonably implement a program that at a minimum provides for those living in intolerable or crisis situations. Although the decision was praised internationally as signifying that social and economic rights are justiciable, little has changed for millions of poor South Africans in the four years since the decision. This paper argues that despite the absence of sweeping change for South Africans living in informal settlements, *Grootboom* provided a powerful tool for communities involved in evictions proceedings, building a growing body of right-to-housing case law based on discrete victories for various communities. The willingness of the judiciary to push the envelope, coupled with meaningful implementation of a new emergency housing policy suggests that section 26’s right to access to adequate housing may yet have a meaningful impact on the lives of millions of South Africans that was originally intended by *Grootboom*.

## INTRODUCTION

The right to adequate housing is included in numerous international treaties and declarations as a fundamental human right.<sup>1</sup> Although international dialogue on human rights officially proclaims an economic/social right such as housing to be equal to, and indivisible from a civil/political right such as freedom of speech,<sup>2</sup> attention in municipal law internationally has tended to focus on civil/political rights<sup>3</sup>—seeing those rights as superior hierarchically and chronologically, or

---

<sup>1</sup> See, e.g., Universal Declaration of Human Rights, art. 25(1), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR] (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing . . . .”); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), 213 U.N.T.S. 222, *entered into force* Sept. 3 1953, as amended by Protocols Nos. 3, 5, 8, and 11 entering into force Sept. 21 1970, Dec. 20 1971, Jan. 1 1990, and Nov. 1, 1998 (recognizing the respect for private and family life, and requiring no public interference in those rights except as in accordance with the law and as necessary in the public interest); European Social Charter, art. 16, 529 U.N.T.S. 89, *entered into force* Feb. 26, 1965 (affirming the right of the family to social, legal and economic protection by means including providing family housing); International Covenant on Economic, Social and Cultural Rights, art. 11(1), G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 [hereinafter ICESCR] (recognizing the right of everyone “to an adequate standard of living for himself and his family, including . . . housing, and to the continuous improvement of living conditions,” States Parties are required to “take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(iii), G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 (requiring the prohibition of racial discrimination in all forms in the enjoyment of the right to housing); Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 2, 1981 (prohibiting discrimination on the basis of sex in the enjoyment of adequate living conditions, “particularly in relation to housing, sanitation, electricity and water supply”); Convention on the Rights of the Child, art. 27(3), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990 (requiring States Parties to take measures to provide material assistance with regard to housing for children and those responsible for them who are in need).

<sup>2</sup> See, e.g., Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 14–25 1993, para. 5, U.N. Doc. A/CONF. 157/24 (Part I) at 20 (1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 4, Maastricht, Jan. 22–26, 1997 (“It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”).

<sup>3</sup> Although “the great majority of governments have taken some sort of intermediate position” as regards the support of civil/political versus economic/social/cultural rights (as of June 2004, for example, there were 149 states parties to the ICESCR, and 152 states parties to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]), there is a lack of actual entrenchment by states of those rights in their constitutions and national laws. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 237 (2d ed., 2000). See also José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 11 (noting that only some states have attempted to judicially enforce economic and social rights, and citing the *Grootboom* judgment in the South African Constitutional Court). Much of the discourse on human rights internationally focuses on civil and political rights, despite the supposed recognition that all rights are equal. See MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 9 (1995); Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT’L L.J. 763, 763–764 (“While the [UDHR] posits as fundamental both the

not seeing rights that are not civil/political as rights at all.<sup>4</sup> Several post-colonial and transitional countries have, however, included those rights in their newly adopted constitutions,<sup>5</sup> including South Africa, which has protected in its constitution, in addition to “traditional” civil and political rights, economic, social and cultural rights including workers’ rights,<sup>6</sup> environmental rights,<sup>7</sup> the right to education,<sup>8</sup> the right to use the language and participate in the cultural life of their choice,<sup>9</sup> and the right to access to health care,<sup>10</sup> food and water,<sup>11</sup> and adequate housing.<sup>12</sup> The constitutional entrenchment of those rights stemmed in part from a desire to distance the new constitution and transitional government from the previous regime where rights—primarily “traditional” rights—were available only to white South Africans.<sup>13</sup> The need in particular to recognize the right to housing was the direct consequence of hundreds of years of white minority rule, and its institutional manifestation in the twentieth century, the system of apartheid.<sup>14</sup> The apartheid government forcibly and often brutally evicted and relocated millions of black South Africans in order to secure the most and best land for white South Africans, resulting in overcrowded areas of abject squalor with no running water, electricity, sewage services or paved roads. The end of white minority rule following the first democratic elections in 1994 heralded an end to *de jure* segregation, and the promise by incoming leaders of “housing [] for all.”<sup>15</sup> Despite those promises, however, millions of South Africans continue to face housing crises.

In October 2000, the South African Constitutional Court handed down *Government of the Republic of South Africa and Others v. Grootboom and Others*,<sup>16</sup> a decision that has been

---

traditional tenets of individual liberty and so-called second-generation rights, the social, economic, and cultural preconditions of a dignified human life remain marginalized in the dominant rights discourse.”)

<sup>4</sup> STEINER & ALSTON, *supra* note 3, at 237. Many writers suggest while that civil/political rights are essentially “negative,” mandating a hands-off approach to rights-enforcement, economic/social rights are “positive,” requiring invasive judgments by the courts into the affairs of policy-makers. An in-depth discussion of the reasons behind the artificial separation of civil/political and economic/social rights are beyond the scope of this paper. Such analysis can be found in, for example, *Id.* at 242–245; Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137 (Louis Henkin & John Lawrence Hargrove eds., 1994); KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS (The School of Human Rights Research Series, 1999); ISFAHAN MERALI & VALERI OOSTERVELD, GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Pennsylvania Studies in Human Rights, 2001).

<sup>5</sup> See for example the social and economic rights affirmed in the constitutions of Armenia, Haiti, India and Vietnam.

<sup>6</sup> S. AFR. CONST. (Act No. 108 of 1996) ch. 6 (Bill of Rights), § 23.

<sup>7</sup> *Id.* at § 24.

<sup>8</sup> *Id.* at § 29.

<sup>9</sup> *Id.* at § 30.

<sup>10</sup> *Id.* at § 27(1)(a).

<sup>11</sup> *Id.* at § 27(1)(b).

<sup>12</sup> *Id.* at § 26.

<sup>13</sup> See discussion *infra* Part I.B.

<sup>14</sup> Though racial segregation and discrimination was widely practiced prior to 1948, in that year the National Party gained power and officially implemented apartheid (Afrikaans for “apartness”). Apartheid was the policy that legally governed the relations between white and nonwhite South Africans, requiring racial segregation and mandating political and economic discrimination. The policy segregated persons by categorizing them, through the Population Registration Act, Act No. 91 of 1950, as white, Bantu (all black Africans), colored (those of mixed race), or Asian (Indian and Pakistani). The impact that apartheid had on housing will be discussed *infra* Part I.

<sup>15</sup> AFRICAN NATIONAL CONGRESS (“ANC”), ELECTION MANIFESTO, 1994, at [www.anc.org.za/ancdocs/policy/manifesto.html](http://www.anc.org.za/ancdocs/policy/manifesto.html) (last accessed Jan. 9, 2004).

<sup>16</sup> 2000 (11) BCLR 1169 (CC).

heralded by academics, lawyers and activists internationally as the landmark case signifying the undeniable justiciability of economic and social rights,<sup>17</sup> and in particular promised change for South Africans living in “crisis situations”<sup>18</sup> as regards their right to access to adequate housing. Despite the order of the Court, however, which required the implementation of a policy to deal with persons living in crisis, there has been no revolutionary change in either availability or delivery of housing for South Africa’s urban poor. As for the community involved in the original *Grootboom* litigation specifically, things are no better.<sup>19</sup>

Despite the rather bleak reality that the government’s delivery of housing to poor South Africans in the four years since the *Grootboom* decision is not much improved, there have been some recent positive changes in both housing policy and case law. This paper<sup>20</sup> seeks to analyze the extent to which the *Grootboom* decision has led to positive implementation of the right to access to adequate housing in South Africa. It will ultimately argue that *Grootboom*’s impact is significant, but limited. Millions of South Africans continue to live in informal settlements<sup>21</sup> in deplorable conditions. Yet the decision has had two distinct positive impacts as regards housing rights. First, it has created a powerful tool for the advocates of specific communities involved in evictions proceedings, building a growing body of right-to-housing case law. That tool has led to discrete victories for local communities, even if that victory is simply the difference between being evicted and left homeless, or being allowed to remain in their, albeit informal, homes. Second, a recently adopted national program for housing assistance in emergency circumstances

---

<sup>17</sup> See, e.g., Sandra Liebenberg, *The Implications of Grootboom for Current Social Security Policy in South Africa*, 17 S. AFR. L.J. 211, 212 (2001) (*Grootboom* as creating positive precedent for the judicial enforcement of economic and social rights); Kameshni Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights*, 6 L. DEMOCRACY & DEV. (2000) (*Grootboom* as settling any doubt about the justiciability of socio-economic rights in the South African constitution); Julia Sloth-Nielsen, *The Child’s Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse*, 17 S. Afr. J. Hum. Rts. 210, 224 (2001) (*Grootboom* as a “meaningful step forward for socio-economic rights”); Andre van der Walt, *Dancing With Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 S. Afr. L.J. 258, 310 (2001) (*Grootboom* as giving social and economic rights their due); Woods, *supra* note 3, at 783 (*Grootboom* as demonstrating that violations of economic and social rights can be remedied by courts without interfering with legislative discretion). For a discussion on the justiciability of economic and social rights generally, see, Woods, *supra* note 3, at 765–766, 792–793 (disputing the notion that social and economic rights are merely moral aspirations and cannot be heard before courts due to their budgetary implications, and arguing rather that South African jurisprudence has demonstrated that there are no institutional obstacles to the realization of these rights and that the justiciability of those rights can play a vital role in enabling the world’s poor to realize human dignity).

<sup>18</sup> *Grootboom*, at para. 99.

<sup>19</sup> See discussion *infra* Part III.

<sup>20</sup> The research took place primarily over the summer of 2003 when I interned in the Constitutional Litigation Unit of the Legal Resources Center (“LRC”), in Cape Town. The LRC is an independent, client-based non-profit public interest law firm founded in the late 1970s by a group of anti-apartheid lawyers. The LRC represented the South African Human Rights Commission, an independent body designed to promote and monitor the observance of human rights in South Africa (mandated in Chapter 9, section 184 of the Constitution), and the Community Law Centre, an NGO based at the University of the Western Cape, who intervened as amici curiae when the *Grootboom* case was appealed to the Constitutional Court.

<sup>21</sup> A report completed in 2003 suggests there are three types of informal settlements in South Africa: Squatter settlements (which are unplanned and unauthorized settlements established by gradual occupation or “organized ‘invasion’” of land), informal rental housing (including tenants and subtenants such as backyard shacks that may themselves be within formal or other informal settlements), and informal subdivision of legally or illegally obtained land). URBAN SECTOR NETWORK & DEVELOPMENT WORKS, SCOPING STUDY: URBAN LAND ISSUES, FINAL REPORT 2003 60–61 [hereinafter SCOPING STUDY], available at [www.sarpn.org.za/documents](http://www.sarpn.org.za/documents) (last accessed May 20, 2004).

is a very promising document that if actually implemented could lead to meaningful change in the lives of millions of South Africans.

Part I of the paper will give a historical overview of housing in South Africa to contextualize the conditions in which the applicants in the *Grootboom* case were living and felt compelled to go to court to seek to enforce their rights. Part II will examine the case itself and analyze how the Court sought to enforce the right to access to adequate housing, and to what extent it gave effect to international jurisprudence on the matter. Part III will examine how *Grootboom* has been used in the attempt to secure housing rights in South Africa. Finally, Part IV will offer some brief conclusions.

## I. OVERVIEW: HOUSING IN SOUTH AFRICA

### *A. Housing & Apartheid*

When the African National Congress took office in 1994, it inherited a country that had developed unequally over almost three hundred and fifty years of white minority rule. Severe inequalities in land and resource distribution and ownership were in particular a direct result of apartheid policies that sanctioned forced and brutal removal from land, extrajudicial evictions and the demolition of homes, and required black South Africans to live only in officially mandated settlements that were run-down, cramped, and without utilities.<sup>22</sup>

Discrimination was rampant under colonial South Africa, but after the founding of the Union of South Africa in 1910, some of the most damaging and long-lasting pieces of legislation were passed, institutionalizing segregation and the unequal division of social property and resources between white and nonwhite South Africans. National planning was characterized by overlapping color-controlling laws and regulations. The Natives' Land Act<sup>23</sup> and the Native Trust and Land Act<sup>24</sup> created "reserves" for black South Africans, formalizing the separation of black and white. This policy was expanded in the 1950s under the National Party who adopted a policy of "separate development"<sup>25</sup> primarily through the Group Areas Act<sup>26</sup> whereby black South Africans were divided into racial enclaves—"Bantustans" (homelands)—along ethnic and linguistic lines.

---

<sup>22</sup> Kim Robinson, *False Hope or a Realizable Right? The Implementation of the Right to Shelter Under the African National Congress' Proposed Bill of Rights for South Africa*, 28 HARV. C.R.-C.L. L. REV. 505, 508 (1993) (citing SOUTH AFRICAN INST. ON RACE RELATIONS, RACE RELATIONS SURVEY 257 1991/92 and LAURINE PLATZKY & CHERRYL WALKER, THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA vii (1985)). For a complete overview of the laws regulating urban planning and urban race control in South Africa from the early 1800s through 2002, see SCOPING STUDY, *supra* note 21, at 49–59.

<sup>23</sup> Act No. 27 of 1913.

<sup>24</sup> Act No. 18 of 1936.

<sup>25</sup> Catherine O'Regan, *Forced Removals*, 1 S. Afr. Hum. Rts. Y.B. 127, 127 (1990).

<sup>26</sup> Initially passed in 1950 as Act No. 41 of 1950, later consolidated by Act. No. 36 of 1966. The Act was complemented by the Black Land Act, Act. No. 27 of 1913, and the Native Trust and Land Act, Act. No. 18 of 1936. See, Peter Rutsch, *Group Areas*, 1 S. Afr. Hum. Rts. Y.B. 139, 139 (1990). Rutsch emphasizes that the National Party that promulgated apartheid was not the only group responsible for the segregation of land; the policy of segregation along racial land "can be traced to the early days of white occupation . . . in particular [in] British-ruled Natal." *Id.* at 139 n.5.

The Group Areas Act had the effect of setting aside only thirteen percent of the land for black Africans who made up eighty-two percent of the population.<sup>27</sup> Black Africans not living on reserved land were forcibly removed from their homes—losing any land they previously inhabited. This forcible dispossession was often brutal, and inevitably resulted in fragmented families and communities.<sup>28</sup> From 1950 to 1979 approximately 3.5 million people were removed from their homes and sent to Bantustans.<sup>29</sup> White South Africans, on the other hand, were able to live anywhere in the remaining eighty-seven percent of the country (save particular zones created for Indians and so-called colored people) which included the main industrial and agricultural centers.

This forced removal policy was disbanded<sup>30</sup> in 1986 in favor of “orderly urbanization”<sup>31</sup> allowing some freedom of movement within urban areas to all South Africans. The new policy—in recognition of some inevitable urbanization for black Africans, and out of fear of growing informal settlements on the outskirts of cities—still required blacks to live only in mandated settlements on the outskirts of cities that had little or no access to utilities. Any black Africans who lived elsewhere, in backyards or on other land, lived there with no security of tenure, and could be evicted by the police at any time, even if they were informally paying rent to poor Indians, whites, or so-called colored people. The White Paper that promulgated the government’s new policy stated that the urbanization process would “be ordered, planned and directed.”<sup>32</sup>

Despite the increased access to urban land for black South Africans, however, the government did not institute any policy to encourage the development of homes for blacks who began to return to the cities. The official housing policy of the government was “limited to facilitating private sector involvement in the market, and to providing homes to the destitute.”<sup>33</sup> The provision of homes for the poor, however, meant only that serviced sites would be provided in order to promote self-help.<sup>34</sup> Furthermore, the Prevention of Illegal Squatting Act (PISA)<sup>35</sup> that was first passed in 1951, was enhanced in order to ensure “ordered” urbanization. PISA became “a key control measure”<sup>36</sup> creating powers of removal and demolition, and also established informal settlement areas. The demolition powers vested in Section 3B of PISA created an exception to the generally accepted principle that court orders are required prior to demolishing homes. Both local authorities and landowners were vested with powers of summary demolition: no notice had to be given to inhabitants, and to obtain a court order preventing demolition,

---

<sup>27</sup> See Rutsch, *supra* note 26, at 140. The policy and racial requirements of the Group Areas and related acts are discussed in detail in Rutsch’s article.

<sup>28</sup> NATIONAL LAND COMMITTEE, LAND RIGHTS PROGRAM, A HISTORY OF LAND DISPOSSESSION, Gender & Land Media Fact Sheet, at [www.nlc.co.za/mddisp.htm](http://www.nlc.co.za/mddisp.htm) (last accessed May 3, 2004). See also sources cited *supra* note 22.

<sup>29</sup> Catherine O’Regan, *Forced Removals*, *supra* note 25, at 128 (citing SURPLUS PEOPLE PROJECT, FORCED REMOVALS IN SOUTH AFRICA VOL. 1 (1983)).

<sup>30</sup> The provisions were repealed by the Abolition of Influx Control Act, Act No. 68 of 1986.

<sup>31</sup> Catherine O’Regan, *Land and Housing in the Urban Areas*, 2 S. AFR. HUM. RTS. Y.B. 119, 119 (1991) (citing White Paper on an Urbanization Strategy for the Republic of South Africa 1986).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 122.

<sup>34</sup> *Id.*

<sup>35</sup> Act No. 52 of 1951.

<sup>36</sup> Catherine O’Regan, *Forced Removals*, *supra* note 25, at 129.

residents had to show that it was both unlawful and would be executed in bad faith,<sup>37</sup> creating an almost insurmountable standard for the poor who were most affected by the legislation.

The result of these policies was a veritable housing crisis by the 1980s. A survey conducted from 1989 to 1990 put the housing shortage figure at between two million and 3.4 million units; ninety percent of that shortage was borne by black Africans.<sup>38</sup> Facing burgeoning informal settlements<sup>39</sup> and increased unrest over housing and land in urban areas, the government again changed its policy by repealing the Land Acts and Group Areas Act,<sup>40</sup> and passed new legislation to lessen the control over some aspects of settlement-establishment and to appease disgruntled groups.<sup>41</sup> While the changes ensured that blacks could own and occupy some land that was previously reserved only for whites, other statutes that controlled racial segregation remained in place, contributing to an ever-increasing confusion between branches of national, provincial and local government and overlapping rules and regulations. Furthermore, PISA—the Act mandating extrajudicial evictions and demolition—was left largely untouched.

Struggle for land and housing continued both in and outside of urban areas. The pronouncement by the government that despite change in policy, no land restitution would be feasible,<sup>42</sup> was met by public outcry and in many cases communities decided to move back onto their homes in protest.<sup>43</sup> Those communities were met varyingly with violence, negotiation and litigation between the communities and local government.<sup>44</sup> Yet a growing number of cases heard by sympathetic judges proved successful in challenging evictions, either in post-eviction spoliation proceedings (a process by which plaintiffs can seek restitution for improper destruction of their property) or pre-eviction interdicts (injunctions), demonstrating the relative independence of the judiciary under apartheid.<sup>45</sup> One unreported case went so far as granting the appeal against an eviction order where the evictees would have been rendered homeless because there had been no consideration of alternative land or accommodation.<sup>46</sup> It is significant that this same concern

<sup>37</sup> Act No. 52 of 1951, § 3B(4)(a).

<sup>38</sup> SOUTH AFRICAN INST. ON RACE RELATIONS, RACE RELATIONS SURVEY 100 1989/90, *cited in Robinson, supra* note 22, at 510 n. 21–22. These figures are geared towards estimating how many units would have to be built in order to eliminate overcrowding and establish formal housing.

<sup>39</sup> See SCOPING STUDY, *supra*, note 21, at 62.

<sup>40</sup> Catherine O'Regan & Joanne Yawitch, *Land and Housing*, 3 S. AFR. HUM. RTS. Y.B. 119, 119 (1992).

<sup>41</sup> *Id.* The new included the Abolition of Racially Based Land Measures Act, Act. No. 108 of 1991, the Less Formal Township Establishment Act, Act. No. 113 of 1991, and the Upgrading of Land Tenure Rights Act, Act. No. 112 of 1991.

<sup>42</sup> O'Regan & Yawitch, *supra* note 40, at 129 (*citing* WHITE PAPER ON LAND REFORM 1991).

<sup>43</sup> *Id.* at 130–134.

<sup>44</sup> *Id.* at 135.

<sup>45</sup> See, e.g., Administrator, Cape v. Ntswaqela and Others, 1990 (1) SA 705 (A) (following removal from privately owned land by the police, informal settlers applied for and received a spoliation order with costs); Luvwalala v. Port Nolloth Municipality, 1991 (3) SA 98 (C) (holding that section 4B(4)(a) of PISA that enables landowners to destroy structures on their property can be ex-ante restrained by the courts where landowners cannot show the demolition falls under the terms of the act).

<sup>46</sup> Kayamandi Town Committee v. Mkhwaso and Others, unreported, CPD No. 6311/90 (1990) at 15 of typescript judgment (*cited in O'Regan, Land and Housing in the Urban Areas, supra* note 31, at 127) (“It seems to me that the applicant was not entitled . . . [to remove] a large body of squatters from land controlled by it without first having considered whether at least a transit camp could be made available where they could erect their own shelters . . . . [A] local authority cannot take a decision to remove squatters from land which it controls unless it has given consideration to what is to be done with them.”).

would later be included as a required consideration in the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (“PIE”)<sup>47</sup> for persons living on private land for more than six months.

Community organization within formal and informal settlements had emerged in the late 1970s to fight for access to urban land and bolster the democratic movement’s struggle for equality. Community organizations encouraged boycotting rental and utilities payments in protest over poor access to land and lack of services, actions that contributed to the ANC’s strategy to make South Africa ungovernable.<sup>48</sup> In some cases, wider initiatives were announced by national movements. For example, in July of 1990, the United Democratic Front (“UDF”) announced its intention to launch a campaign that would encourage the homeless to occupy unused land.<sup>49</sup> Although no land was occupied as a consequence of the campaign, meetings that were held between provincial government and a UDF delegation in August of that year resulted in the declaration by the government that there would be no subsequent demolition of shacks or forced removals of communities without prior consultation with them.<sup>50</sup>

### B. “Housing For All”: The ANC’s Promise

The ANC thus inherited the urban landscape that apartheid had created, and despite the removal of legal obstacles to land tenure and ownership for South Africans of all ethnicities, cities and towns remained racially segregated in apartheid structure: black townships and settlements were followed by so-called colored and Indian areas as a buffer, who were in turn buffered by poor white areas from the wealthy white areas on the best land, segregated from poverty.<sup>51</sup> In 1994, eighteen percent of South Africans were living in squatter settlements, backyard shacks or in overcrowded conditions with no formal rights to their homes.<sup>52</sup> Approximately twenty-five percent of all urban households in the country had no access to potable water, sixteen percent of households had no kind of sanitation system, and almost forty-seven percent of all households had no electricity.<sup>53</sup> In 1994 it was estimated that in one year the housing backlog would reach one and a half million units, increasing at an annual rate of one hundred and seventy-eight thousand units.<sup>54</sup> The government estimated that approximately two hundred thousand households would have to be housed annually for the backlog to be eradicated over a period of

---

<sup>47</sup> Act No. 19 of 1998.

<sup>48</sup> SCOPING STUDY, *supra* note 21, at 63. This kind of community organizing and boycotting remains a feature of South Africa’s political landscape. See ASHWIN DESAI, WE ARE THE POORS: COMMUNITY STRUGGLES IN POST-APARTHEID SOUTH AFRICA (2002).

<sup>49</sup> O’Regan, *Land and Housing in the Urban Areas*, *supra* note 31, at 120.

<sup>50</sup> *Id.*

<sup>51</sup> SCOPING STUDY, *supra* note 21, at 5–6.

<sup>52</sup> New Housing and Policy Strategy for South Africa: White Paper, para. 3.2, GN 1376 in GG16178 of 23 Dec. 1994 [hereinafter Housing White Paper], available at [www.gov.za/whitepaper/](http://www.gov.za/whitepaper/) (last accessed May 25, 2004). A report prepared in 1998 noted that the poorest 40% of homes (50% of the population) receive just 11% of the total income, while the richest 10% of households (7% of the population) receive over 40% of the total income. Furthermore, those numbers are replicated along the race line, such that black Africans are some of the most impoverished. 50% of the population were considered to fall beneath the poverty line. OFFICE OF THE EXEC. DEP. PRESIDENT & INTER-MINISTERIAL COMM. FOR POVERTY & INEQUALITY, POVERTY & INEQUALITY IN SOUTH AFRICA, Summary (May 13, 1998), at [www.undp.org.za/docs/pubs/poverty.html](http://www.undp.org.za/docs/pubs/poverty.html) (last accessed June 3, 2004).

<sup>53</sup> Housing White Paper, *supra* note 52, at para. 3.1.4.

<sup>54</sup> *Id.* at para. 3.2.

ten years.<sup>55</sup> The crisis was compounded by the “culture of nonpayment” that continued to pervade informal settlements, which had been used as a tactic to cripple the state through the 1980s, making delivery of services difficult for the new government.<sup>56</sup> Thus, a key concern for the ANC was to focus on the housing crisis facing the millions of South Africans who had been systematically discriminated against and dispossessed over hundreds of years, and the party was under considerable pressure to deliver on the repeated promises they had made.

As early as 1955, the ANC proclaimed a need to recognize housing rights.<sup>57</sup> The wording of the provision in the Freedom Charter on housing informs the desperate need in which the majority of South Africans lived.

There Shall be Houses, Security and Comfort!

All people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security;

Unused housing space to be made available to the people;

Rent and prices shall be lowered . . .

Slums shall be demolished . . .

Fenced locations and ghettos shall be abolished, and laws which break up families shall be repealed.<sup>58</sup>

A similar provision was adopted in the ANC’s Draft Bill of Rights in 1990, emphasizing the dismantling of apartheid institutions such as housing hostels associated with the migrant labor system, and also demanding the provision of services to all homes, and the outlawing of extrajudicial evictions.<sup>59</sup> The ANC ran on a platform that emphasized housing rights in 1994, declaring the intent to build one million homes, provide running water to over a million families and to electrify two and a half million rural and urban homes within five years of taking office.<sup>60</sup> After the ANC had secured its landslide victory, the focus on housing continued. The new Minister of Housing, Joe Slovo, announced:

---

<sup>55</sup> *Id.* at para. 4.1.

<sup>56</sup> To combat this strategy that remained in place after 1994, the Masakhane campaign was introduced by the government to change the mindset of those living in both formal and informal settlements. Astrid Wicht, *Social Housing in South Africa: A Feasible Option for Low-Income Households?* 1999, available at [www.hdm.lth.se/training/postgrad/ad/papers/1999](http://www.hdm.lth.se/training/postgrad/ad/papers/1999) (last accessed Jan. 25, 2004). See also Tammy Cohen, *Land and Housing*, 6 S. AFR. HUM. RTS. Y.B. 131, 134 (1995).

<sup>57</sup> AFRICAN NATIONAL CONGRESS, *THE FREEDOM CHARTER*, adopted Congress of the People (June 26, 1955), at [www.anc.org.za/ancdocs/history/charter.html](http://www.anc.org.za/ancdocs/history/charter.html) (last accessed Jan. 12, 2004).

<sup>58</sup> *Id.*

<sup>59</sup> AFRICAN NATIONAL CONGRESS, *DRAFT BILL OF RIGHTS*, reprinted in 2 S. AFR. HUM. RTS. Y.B. 401, 409 (1991).

<sup>60</sup> ELECTION MANIFESTO, *supra* note 15.

It is our task to give millions of South Africans an essential piece of dignity in their lives, the dignity that comes from having a solid roof over your head, running water and other services in an established community.<sup>61</sup>

It was acutely recognized not only that the “lack of adequate housing and basic services in urban townships and rural settlements [had] reached crisis proportions,”<sup>62</sup> but also that the crisis was directly attributable to apartheid policies. The pressure on the government to deliver their specific promises, and distinguish themselves from the pre-1994 National Party, was immense.

The importance of overhauling the housing situation in South Africa was so acute that the right to access to adequate housing was constitutionalized in the 1996 Constitution. The need to include economic and social rights as well as “traditional” civil and political rights arose from the desire to distance the new “rainbow nation” from the system that had existed pre-1994. Justice Albie Sachs of the Constitutional Court has commented that many people were skeptical of including any bill of rights at all in the new constitution, lest it become a “bill of whites,” a document created to maintain the status quo in South Africa, “guarantee property rights, and impose extreme limits on the capacity of the democratic state to take decisive action to achieve meaningful redistribution of wealth.”<sup>63</sup> By contrast, the inclusion of economic and social rights demonstrated that the new South Africa was willing to face the reality in which millions of South Africans who had previously been disadvantaged and dispossessed lived.<sup>64</sup> When the new constitution was certified by the Constitutional Court—a requirement which had been written into the interim constitution to ensure that drafters followed principles agreed to in 1994—the Court emphasized that those economic and social rights that had been included were justiciable, and stated an intent to hear claims emanating from them.<sup>65</sup>

The new national housing policy was promulgated in a 1994 summit that brought together representatives of the government, the homeless, the financial sector and NGOs.<sup>66</sup> The new policy proclaimed two specific goals: to increase the state housing budget to five percent, and to deliver one million new housing units within five years.<sup>67</sup> These goals were to be met by issuing credit to the poor in order to enable them to build their own homes, and by the Reconstruction and Development Program,<sup>68</sup> that aimed to build and deliver low-cost housing to the very poor.

### C. Leading to Grootboom

<sup>61</sup> Comments by Joe Slovo, *Prodder Newsletter*, Nov. 1994, in *Cohen*, *supra* note 56, at 131.

<sup>62</sup> Reconstruction and Development White Paper, GN 1954 in GG16085 of 23 Nov. 1994, available at [www.gov.za/whitepaper/](http://www.gov.za/whitepaper/) (last accessed May 25, 2004).

<sup>63</sup> Symposium, *Social and Economic Rights: Can They be Made Justiciable?*, 53 SMUL. REV. 1381, 1382 (2000).

<sup>64</sup> See e.g., Dennis Davis, *Democracy and Integrity: Making Sense of the Constitution*, 14 S. AFR. J. HUM. RTS. 127 (1998); Nicholas Haysom, *Democracy, Constitutionalism, and the ANC's Bill of Rights for a New South Africa*, 18 SOC. JUST. 40 (1991); Johan van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L. J. 745 (1991).

<sup>65</sup> In Re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) at para. 78.

<sup>66</sup> *Cohen*, *supra* note 56, at 132 (discussing the National Housing Summit and its participants).

<sup>67</sup> Housing White Paper, *supra* note 52, at para. 4.3.

<sup>68</sup> Housing White Paper, *supra* note 52, at para. 3.1.5.

Despite the determination in 1994 that “the time for delivery [of housing] ha[d] arrived,”<sup>69</sup> the actual delivery and practice of the government did not eradicate the housing crisis. Throughout the 1990s, the government fell short of their targets, only beginning to make an inroad into the housing backlog in 1997, after which the average rate of subsidized housing delivery decreased, while the housing backlog continued to grow at a staggering rate, located primarily at the low end of the income spectrum.<sup>70</sup> Between 1994 and 2000, the government spent R14.8 billion (US\$2 billion) building over one million subsidized homes,<sup>71</sup> figures that clearly fell short of both need and government’s stated intent. The failure to deliver on the promise of “homes for all” in the first few years of ANC-rule<sup>72</sup> led to a marked increase in land invasions,<sup>73</sup> leaving the government in a catch-22 situation. The government had to discourage land invasions onto land which had been set aside for the development of low income housing, but evicting those “queue jumpers” would create scenes reminiscent of apartheid days. And clearing the earmarked land or not, the housing crisis built by apartheid and exacerbated by people increasingly returning to the cities to look for work, would continue to build. The government was slow on delivery of housing not only because of poor resources, but also because of a lack of legitimate government structures, the slow release of land for development, and bureaucratic red tape.<sup>74</sup>

It was within this context that the community living at Wallacedene, an informal settlement in the Western Cape<sup>75</sup> challenged the government for failure to meet its constitutional obligation under sections 26 and 28(1)(c) of the constitution:

#### Section 26

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order from the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.<sup>76</sup>

#### Section 28

- (1) Every Child has the right—

...

---

<sup>69</sup> Housing White Paper, *supra* note 52, at para. 1.

<sup>70</sup> DAVID GARDNER, HOUSING FINANCE RESOURCE PROGRAMME, GETTING SOUTH AFRICANS UNDER SHELTER: AN OVERVIEW OF THE SOUTH AFRICAN HOUSING SECTOR 8–9 (August 2003) [hereinafter GARDNER, HOUSING FINANCE RESOURCE PROGRAMME].

<sup>71</sup> SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, SOUTH AFRICA SURVEY 44 (Johannesburg, 2002).

<sup>72</sup> Donald Schnell, *Land and Housing*, 7 S. Afr. Hum. Rts. Y.B. 154, 157–158 (1996).

<sup>73</sup> *Cohen*, *supra* note 56, at 140.

<sup>74</sup> *Schnell*, *supra* note 72, at 157–158.

<sup>75</sup> The community was situated on the edge of Oostenberg, a town on the eastern outskirts of Cape Town.

<sup>76</sup> SA CONST. § 26.

(c) to basic nutrition, shelter, basic health care services and social services . . .<sup>77</sup>

The constitutionalization of the right to housing gave it the powerful rhetoric of “rights” often available in courts only to those claiming civil and political rights. It was the power of rights-speak that the Grootboom community latched onto in the struggle for social empowerment, and ultimately proved a powerful tool in court.

## II. THE GROOTBOOM CASE

### *A. Bringing the Right to Housing to the Constitutional Court*

Mrs. Irene Grootboom<sup>78</sup> was one of approximately four thousand residents<sup>79</sup> living in appalling circumstances in Wallacedene in 1998. The inhabitants of the community were desperately poor: one quarter of the households survived on no income at all, and over two thirds lived on less than R500 (US\$70) per month.<sup>80</sup> The area was partially waterlogged, positioned right next to a highway, and lacked running water, sewage, and refuse collection; only five percent of the households had electricity.<sup>81</sup> Many of those living in Wallacedene had been on the municipal waiting list for housing for as long as seven years. In light of the fact that the government made no attempts to improve their desperate situation despite the community’s attempts to elicit a response, three hundred and ninety adults and five hundred and ten children moved their homes to a neighboring vacant lot, which was privately owned and had been ear-marked for low-cost housing. They called their home New Rust (Afrikaans for “New Rest”).

On December 8, three months<sup>82</sup> after moving onto the land, the owner of the land obtained an ejectment (eviction) order. The community refused to move, and over their protestations that they had nowhere else to go, was forcibly removed on May 18, 1999, right at the beginning of

---

<sup>77</sup> *Id.* at § 28.

<sup>78</sup> The facts of this case are taken largely from the Constitutional Court’s decision, *Grootboom*, 2000 (11) BCLR 1169 (CC).

<sup>79</sup> Steven Budlender, Giving Meaning to the Right to Housing: The *Grootboom* Litigation in South Africa 8 (April, 2004) (unpublished case study, on file with author) [hereinafter *The Grootboom* Litigation].

<sup>80</sup> *Id.* citing a needs assessment of Wallacedene compiled in December 1997 on behalf of Oostenberg.

<sup>81</sup> The court notes as an example of the deplorable conditions in which the Respondents in the *Grootboom* case lived, that Mrs. Grootboom herself lived with her family and her sister’s family in a shack that was just twenty meters square. *Id.*

<sup>82</sup> Note that the timing of eviction orders is critical in South Africa for both ejectors and ejectees. PIE implements section 26(3) of the constitution stating that “[n]o one may be evicted from their home . . . without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” S. AFR. CONST. §26(3). The Act differentiates between unlawful occupiers that have occupied the land in question for more than six months, and those that have occupied it less than six months. If persons have occupied the land for less than six months, a court presented with an application for an eviction order may grant the eviction if it is just and equitable to do so, but must consider “all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.” PIE, §4(6). If there has been occupation for more than six months, the court must consider the above, and additionally must consider “whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner” for the relocation of the occupiers (except where the land in question is sold in sale of execution pursuant to a mortgage). PIE, §4(7). *See also* discussion *infra* Part III.B.2.

the winter season on the Cape. The homes at New Rust were bulldozed and burnt; other property destroyed. Residents who were not at home were given no chance to retrieve their personal belongings. The community was forced to create make-shift shelters on the Wallacedene sports field and in a local community hall, finding their original lots at Wallacedene occupied. Following an unsatisfactory response by the municipality to their situation, on May 31, 1999, the community filed an urgent application in the Cape Good Hope High Court seeking an order against all three levels of government to provide them with “adequate and sufficient basic temporary shelter and/or housing”<sup>83</sup> until they obtained permanent housing, as well as “adequate and sufficient basic nutrition, shelter, health and care services and social services.”<sup>84</sup> This was the first time anyone had attempted to claim the right to access to adequate housing in South Africa.<sup>85</sup>

Over two days in court, lawyers for the Grootboom community relayed to the judges the destitute situation in which the community, and in particular over five hundred children, was living.<sup>86</sup> Two judges of the High Court then rendered an opinion<sup>87</sup> stating that there had been no section 26 (right to access to adequate housing) violation. The state had limited resources, and section 26 only requires the government to take measures “within its available resources” to “progressively implement” the right of access to adequate housing.<sup>88</sup> The judges were convinced that a rational housing policy was in place and was implemented to the extent that the government had the resources to do so. However, the judgment held that there had been a breach of section 28(1)(c) which is an unqualified right for *every child* to basic shelter.<sup>89</sup> Where parents are unable to shelter their children, the court said, the obligation falls to the state.<sup>90</sup> The court ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality to immediately provide children and their parents with tents, latrines and a regular supply of water to constitute minimum shelter until the parents were able to provide appropriate accommodation for their children. The court required the government to report back to it within three months of the decision.

The government appealed, but when the oral arguments were due to be heard in the Constitutional court, the Western Cape Provincial government and Oostenberg Municipality made an offer “in the interests of humanity and pragmatism”<sup>91</sup> to the Grootboom community, which was accepted. The arrangement was that the provincial and local governments would provide temporary accommodation constituting roofs, sanitation and water, until housing could be made available through the provincial housing program. Four months after the agreement was reached, however, the community made an urgent application to the Court alleging that the

---

<sup>83</sup> *Budlender*, *The Grootboom* Litigation, *supra* note 79, at 12.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 13 (noting that although the right had been in the constitution at this point for eighteen months, and that many communities had been faced with eviction and forced to live in similarly terrible conditions, there had been no litigation or even negotiations by communities claiming the right).

<sup>86</sup> *Id.* at 18.

<sup>87</sup> *Grootboom and Others v. Oostenberg Municipality and Others*, 2000 (3) 277 BCLR (C) (Hereinafter *Grootboom* (High Court)).

<sup>88</sup> SA CONST. § 26(2).

<sup>89</sup> *Id.* at § 28(1)(c).

<sup>90</sup> Over half the applicants to the high court were children.

<sup>91</sup> *Grootboom*, at para. 91.

agreement had been breached. This timeline led to the Court handing down two orders: an order directed specifically at the reinstated urgent application, and a general order (dealt with in the *Grootboom* judgment) to dispense with the case.

### B. The Constitutional Court Decision

#### 1. Adjudicating the right to housing

*Grootboom* was the second case heard by the Constitutional Court by applicants seeking to enforce social/economic rights enshrined in the Constitution. In the first, *Soobramoney v. Minister of Health, KwaZulu-Natal*,<sup>92</sup> an individual applied to the court under section 27(3),<sup>93</sup> in an attempt to secure the right to dialysis treatment. *Grootboom*, however, was the first case brought before the Court where its decision could potentially impact both wide-spread government policy at the national, provincial and local levels, and a large group of particular applicants. In fact, the amici curiae interveners in the case, the Human Rights Commission and the Community Law Centre broadened the issue before the court beyond the housing rights of the Grootboom community specifically, to the wider issues of poverty and lack of housing in South Africa generally.<sup>94</sup>

The amici attacked the High Court judgment, contending that the government does not fulfill its obligations under section 26 simply by adopting a housing policy, and that it cannot mean only that people “are entitled [] to have their names on a waiting list for housing . . . to wait for their names to come to the top of that list, at which time they will receive a housing subsidy in terms of the government [] programme.”<sup>95</sup> Such an interpretation would divest section 26 of any meaningful application for hundreds of thousands of South Africans who had already signed up for government grants as a part of programs that were overwhelmed with applicants. The amici were also responsible for drawing the court’s attention to the international legal standard of the right to housing, an interpretation which the Court is bound to consider when interpreting a provision of the Bill of Rights, though not bound to adopt.<sup>96</sup> The amici excerpted lengthy portions of the General Comments of the UN Committee on Economic, Social and Cultural Rights,<sup>97</sup> language that clearly informed the decision of the Court, though it ultimately rejected the “minimum core content” approach advocated by the Committee.<sup>98</sup>

The Court accepted as a starting point the *Certification* and *Soobramoney* decisions, that presumes that economic and social rights are justiciable despite their budgetary implications,<sup>99</sup>

<sup>92</sup> 1997 (12) BCLR 1696 (CC).

<sup>93</sup> SA CONST. § 27(3) (“No one may be refused emergency medical treatment.”).

<sup>94</sup> *Budlender, The Grootboom Litigation*, *supra* note 79, at 21.

<sup>95</sup> Heads of Argument on Behalf of the Amici Curiae, In the matter between Government of the Republic of South Africa, Premier of the Province of the Western Cape, and Cape Metropolitan Council, and Irene Grootboom and Others, the Human Rights Commission of South Africa and the Community Law Center, Case CCT 11/00, para. 2 [hereinafter *Grootboom Amici Heads*].

<sup>96</sup> SA CONST. § 39(1)(b) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law . . .”).

<sup>97</sup> *See, e.g. Grootboom Amici Heads*, *supra* note 95, at para. 26.

<sup>98</sup> UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT 3, at para. 10.

<sup>99</sup> *In Re Certification of the Constitution of the Republic of South Africa*, at para. 78.

but that the Court will not “interfere with rational decisions taken in good faith by political organs” whose responsibility it is to deal with the matters before it.<sup>100</sup> However, the *Grootboom* Court significantly added to South African rule on economic and social rights generally, and on the right to access to adequate housing specifically, laying out the scope of the State’s obligations. The court rejected the decision of the High Court, holding that the respondents had no immediate rights to shelter under any provision in the constitution: the right established by *Grootboom* is the right to a reasonably implemented, reasonable State program that at a minimum provides for those living in intolerable or crisis situations.

## 2. *The need to unlock the system*

The State’s primary obligation lies in “unlocking the system.”<sup>101</sup> This is principally the “negative”<sup>102</sup> aspect to the housing right, fulfilled by removing barriers that would otherwise prevent individuals from themselves securing access to housing, and establishing a legislative housing framework. Much of that obligation was undertaken by the ANC government after securing office in 1994—by removing laws, for example, which previously prevented black Africans from owning land. In addition, “unlocking” the system requires the establishment of a legislative framework that creates viable entry points to gaining access to adequate housing—including entry points for private actors that may facilitate other South Africans’ rights to access to adequate housing.<sup>103</sup>

---

<sup>100</sup> *Soobramoney*, at para. 29.

<sup>101</sup> *Grootboom*, at para. 36.

<sup>102</sup> See discussion and sources cited *supra* note 4.

<sup>103</sup> *Grootboom*, at para. 35.

## 2. *The reasonableness standard*

In its interpretation of section 26(2), the Court departed from previous jurisprudence, by setting a *reasonableness* standard as the baseline requirement for government policies to be constitutional.<sup>104</sup> The Court arrived at that interpretation by suggesting that although not all the economic/social rights in the bill of rights are subject to an “available resources” constraint,<sup>105</sup> all are subject to the limitations clause in section 26 which itself states that any limitation on rights must be reasonable.<sup>106</sup> For the economic and social rights provisions in the Bill of Rights to mean anything by way of taking steps in order to “meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing,”<sup>107</sup> the programs established by the state must therefore be reasonable. The adoption of the reasonableness standard of review for government policy is significant. First, it establishes that government policy is subject to review; it is not always beyond the reach of the court simply for being promulgated by “good faith [] political organs.”<sup>108</sup> Reasonableness is assessed not only as to legislation and policy itself, but also as to the implementation of the policy.<sup>109</sup> The *Grootboom* Court undertook a detailed analysis of State housing programs and their implementation, including the local government programs that are fairly fact-specific.<sup>110</sup>

Second, by adopting a reasonableness standard, the Court rejected the position of the amici that the United Nations Committee on Economic, Cultural and Social Rights’s (“CESCR”) “minimum core” should be the standard. In reaching this conclusion, the Court suggests that the difference in the language of section 26 of the constitution on the one hand, and that in article 11(1) of the ICESCR on the other, creates two different rights, and that therefore the minimum core standard is an inappropriate test for use in assessing the constitutionality of South African government housing policy.<sup>111</sup> While the Covenant provides a *right to adequate housing*,<sup>112</sup> the constitutional right is one of *access* to adequate housing. The Covenant requires that *all appropriate* steps be taken by States Parties; the Constitution requires *reasonable* measures. A minimum core standard for constitutional rights, the Court noted, would impose a complex and time-consuming task each time economic/social rights are brought before courts and is therefore inappropriate to adopt,<sup>113</sup> though that standard may at times be useful for the court to consider when assessing reasonableness.<sup>114</sup> Indeed, the Court’s suggestion that a program excluding a significant portion of society as failing their standard, tends to mirror the minimum core test.

By rejecting the minimum core standard, the Court was to some extent setting a lower bar—language of a “minimum” or a “floor” makes it easier to see where policies have fallen beneath it.

---

<sup>104</sup> *Id.* at para. 33.

<sup>105</sup> The rights of children and rights to education are unqualified.

<sup>106</sup> SA CONST. § 36(1).

<sup>107</sup> *Grootboom*, at para. 24.

<sup>108</sup> *Soobramoney*, at para. 29.

<sup>109</sup> *Grootboom*, at para. 42.

<sup>110</sup> *See Id.*, at paras. 47–80.

<sup>111</sup> *Id.* at para. 28.

<sup>112</sup> ICESCR, art. 11(1).

<sup>113</sup> *Grootboom*, at paras. 30–33.

<sup>114</sup> *Id.* at para. 33.

Although the decision has been criticized precisely for failing to adopt the test of the Committee,<sup>115</sup> it is easy to sympathize with its decision to set the bar somewhat “lower”: by wholeheartedly adopting the language of the UN Committee, the Court could have put itself in the position where “minimum core” could later be more fully established in international law, and the Court would be pressured to substitute international policy prescripts for those of the domestic legislature. Second, by adopting a standard that is less content-focused, the Court allows the legislature more room to establish its housing scheme, education scheme or health scheme, and prioritize some over others. This also comes through in the discussion of the reasonableness standard in the later *TAC Case*.<sup>116</sup> The discussion there suggests that reasonableness was a comfortable standpoint for the Court as regards economic/social rights that impact budgetary allocations: “determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.”<sup>117</sup> That is, remedies that have budgetary implications are feasible, but arguments that suggest the transfer of government funding from one program or budget to another will not be seriously considered.<sup>118</sup>

Finally, the Court determined that reasonableness means the public housing program, notwithstanding the constraints that *progressive realization* and *available resources* create, must be coherent and “capable of facilitating the realization of the right”;<sup>119</sup> any program that “excludes a significant segment of society cannot be said to be reasonable.”<sup>120</sup>

### 3. Responsibility

For a state housing policy to be reasonable, each sphere of government must accept responsibility for its implementation.<sup>121</sup> The Court set out the broad contours of national, provincial and local government responsibility: budgetary allocation falls to the national government,<sup>122</sup> most implementation tasks to the provinces and delegated to local government,<sup>123</sup> and otherwise references the Housing Act. Yet the Court also backtracks from that division somewhat, affirming that all spheres are “intimately involved in housing delivery.”<sup>124</sup> While such language may have been included so as not to allow varying levels of government an excuse

---

<sup>115</sup> See, e.g., Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, CTR. APPLIED LEGAL STUDIES, L. & TRANSFORMATION PROGRAMME 5–6 (nd) (chastising the *Grootboom* Court for taking “full advantage” of its “discretionary gap” created because South Africa had not ratified the CESCRC, thereby establishing a standard on economic/social rights that gives the legislature much more room to maneuver), at [www.law.wits.ac.za/cals/lt/publications.htm](http://www.law.wits.ac.za/cals/lt/publications.htm) (last accessed May 24, 2004).

<sup>116</sup> *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 2), 2002 (5) SA 721 (CC).

<sup>117</sup> *Id.* at para. 38.

<sup>118</sup> Steve Budlender, *Making Socio-Economic Rights Effective: Judicial Remedies for Breaches of the State’s Duty to Respect, Protect, Promote and Fulfill Socio-Economic Rights*, 2003, unpublished paper on file with author (citing Geoff Budlender, *Using the South African Constitution as a Mechanism for Addressing Poverty*, 5, 2000, unpublished paper).

<sup>119</sup> *Grootboom*, at para. 41.

<sup>120</sup> *Id.* at para. 43.

<sup>121</sup> *Id.* at para. 40.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at para. 47.

<sup>124</sup> *Id.*

when litigants claim they have breached their duties, the confusion has led to some difficulty in subsequent cases.<sup>125</sup>

#### 4. *The need to provide for people “in crisis”*

Finally, the Court’s reasonableness test revolves substantially around whether the policy in place is able to meet the needs of South Africa’s most destitute population. Throughout the opinion there is an acute awareness of the housing crisis faced by the respondents particularly, and by millions of South Africans generally, even though the court recognizes that self-help of the sort originally exercised by the respondents by “invading” New Rust cannot be tolerated by the Courts<sup>126</sup> due to the implications it can have on the housing rights of others.

The Court held that the housing policy in place for the Grootboom community and others similarly situated failed section 26(2)’s reasonableness test because it did not have a program that grants relief for people living in intolerable and “crisis situations.” One commentator, James Thuo Gathii, has suggested that the Court’s use of “urgent need” departs from the strict test for emergency laid out by *Soobramoney*.<sup>127</sup> In that case, an individual’s application to the Court on the basis of section 27(3), whereby no one may be refused emergency medical treatment, was denied. While Mr. Soobramoney was an individual facing imminent death without access to regular dialysis, the Court held that the emergency care provision of 27(3) obligated the State only to provide emergency care in the case of sudden catastrophe or emergency, not to prolong the lives of those with chronic illness. To hold otherwise, would “make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to ‘everyone’ within [] available resources.”<sup>128</sup> Gathii’s observation that *Grootboom*’s requirement that a reasonable housing program provide for those “in crisis situations” (citing floods, fires, etc.) is broader than the “emergency” requirement in *Soobramoney* is somewhat misplaced, and can be attributed in part to the Court’s need to prioritize crises. While Mr. Soobramoney individually was certainly in crisis, the Court’s emphasis in *Grootboom* and in the subsequent *Kyalami Ridge*<sup>129</sup> and *TAC* judgments have been on widespread urgent need. While at first glance this may suggest that the Court is acting as a distributive justice agent, ignoring legislative policy, it must be remembered that the “crisis situation” or “urgent need” requirement in *Grootboom* is a component of the reasonableness standard that seeks to assess a policy. The “emergency” in section 27(3) is not similarly related to the implementation of the national healthcare policy, and was interpreted to apply to imminent catastrophe situations only. In *Grootboom*, the court held that the policy was unreasonable as it made

no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and

<sup>125</sup> See discussion *infra* Part III.C.1.

<sup>126</sup> *Grootboom*, at para. 2.

<sup>127</sup> James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT’L L. 261, 289 (2002).

<sup>128</sup> *Soobramoney*, at para. 19.

<sup>129</sup> *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC).

fires, or because their homes are under threat of demolition. These are people in desperate need.<sup>130</sup>

This language has come to be some of the most crucial in subsequent proceedings.<sup>131</sup>

### III. GROOTBOOM'S IMPACT

The *Grootboom* case was significant in that it was the first time, save, perhaps, in some criminal cases, that the ANC was challenged on its own policy. The precedent was set that ANC policies are not necessarily a panacea for the wrongs of the past and problems of the present, and people who continue to be “in crisis” can bring an application to court to challenge those policies. A chief researcher for the Human Rights Commission stated that the effect of the decision would be precisely that “government could no longer pay lip-service to the housing crisis by telling the homeless to join the queue for a brick house in ten years’ time.”<sup>132</sup> Unfortunately, figures available from the years following the decision do not suggest that this hope has been realized. In 2000, the Housing Minister confirmed a housing backlog of between two and three million houses,<sup>133</sup> and in 2001, the Director-General of Housing was quoted as saying it would be impossible for the government to address that backlog in the near future.<sup>134</sup> Provinces and local governments are weighed down by the sheer number of applicants for housing. For example, someone who put their name on a list in 2003 Gauteng can only expect to receive housing seven and a half years later.<sup>135</sup>

As for the litigants in the *Grootboom* case itself, Mrs. Grootboom seems to have vanished into obscurity,<sup>136</sup> while the area of Wallacedene named for her, where over half of the original nine hundred applicants involved in the original *Grootboom* litigation still live, remains destitute.<sup>137</sup> The applicants remain in the Wallacedene sports complex; due to lack of sanitation utilities, the surface is waterlogged and the inhabitants constantly face threats of fire because their units have to be built so close to each other.<sup>138</sup>

---

<sup>130</sup> *Grootboom*, at para. 52.

<sup>131</sup> See discussion *infra* Part III.B.

<sup>132</sup> *ConCourt Tells Govt to Shelter the Poor*, ANC DAILY NEWS BRIEFINGS, Oct. 4, 2000, at [www.anc.org.za/anc/newsbrief/2000/news1005.txt](http://www.anc.org.za/anc/newsbrief/2000/news1005.txt) (last accessed Feb. 12, 2004).

<sup>133</sup> *Housing Ministry Media Briefing*, Sept. 12, 2000, at [www.pmg.org.za/briefings/000912housing.htm](http://www.pmg.org.za/briefings/000912housing.htm) (last accessed May 20, 2004). A 2003 estimate puts the figure at between 1.9 and 2.4 million. GARDNER, HOUSING FINANCE RESOURCE PROGRAMME, *supra* note 70, at 8.

<sup>134</sup> BUSINESS DAY, Dec. 2001 (*cited in Pillay, supra* note 17).

<sup>135</sup> ANNETTE CHRISTMAS, SOCIO-ECONOMIC RIGHTS PROJECT, COMMUNITY LAW CENTRE: EVALUATION OF THE HSRC REPORTS ON THE GAUTENG DEPARTMENT OF HOUSING'S POLICY AND PROGRAMME FRAMEWORK 3 (2003).

<sup>136</sup> Bogani C. Majola, *National Director's Report*, in ANNUAL REPORT : LEGAL RESOURCES CENTRE 2 (2000–2001); Bonny Schoonakker, *Treated With Contempt*, SOUTH AFRICAN SUNDAY TIMES, Mar. 21, 2004, at [www.suntimes.co.za/2004/03/21/insight/in01.asp](http://www.suntimes.co.za/2004/03/21/insight/in01.asp) (last accessed May 18, 2004).

<sup>137</sup> *Schoonakker, supra* note 136 (noting “all that the site of Grootboom has to show for [the court] victory is the smelly ablution block, built over a donga that had served as a latrine for the squatters who went to court,” and quoting one Grootboom-resident as saying the community is still “in crisis”).

<sup>138</sup> *Pillay, supra* note 17.

The outlook for a positive impact of the decision—beyond serving as reinforcement of the fact that economic/social rights are justiciable<sup>139</sup>—is therefore somewhat bleak: taking both a broad and narrow view of those implicated by the case tends to suggest no change in South Africa’s housing situation. However, several recent cases suggest that *Grootboom* has impacted the way in which housing rights can be litigated on a case-by-case basis by advocates for persons similarly situated to those in *Grootboom*.

#### A. Compliance with *Grootboom*’s Orders

In *Grootboom*, the Constitutional Court handed down two declaratory orders: first, a specific order addressing the breach by the government of its agreement with the Wallacedene community that required its reinstatement,<sup>140</sup> and second, a general order declaring (1) that section 26(2) requires the state to devise and implement a program to progressively implement the right to access to housing, (2) that the program must include measures that provide for people in crisis situations, and (3) that the program currently in place falls short of constitutional requirements.<sup>141</sup>

The Court’s specific order has been implemented “to a limited extent.”<sup>142</sup> Kameshni Pillay has recorded that after the judgment, R200,000 (US\$28,000) was made available to the community from which zinc sheets, windows and doors were purchased.<sup>143</sup> While the Court’s specific, or interlocutory, order required some on-going supervision of the improvement of the community, the Oostenberg Municipality has neglected to carry out that aspect of the order. The result is the continuation of deplorable conditions<sup>144</sup> and lack of security for the community due to the *ad hoc* nature of the arrangement whereby they have only been given “temporary shelter,” and may be moved at anytime.

The specific chronology of *Grootboom* dictated that the urgency of the application by the *Grootboom* community had dissipated following the instatement of the interlocutory order. Because the applicants themselves had already been dealt with before the delivery of the opinion, the court was free to craft a judgment that addressed the wider issues in the case. The broad nature of the court’s remedy has been harshly criticized—the order required a program but no plan, and thus left wide discretion to the legislature: a “remedy without a sanction.”<sup>145</sup> However, the nature of the order that emphasizes *reasonableness* and *crisis* has also enabled subsequent parties to attack the housing program for broad failures of policy for specific groups of persons.<sup>146</sup> This strategy will be discussed below.

#### B. The Power of “Crisis Situations”

<sup>139</sup> See discussion and sources cited *supra* note 17.

<sup>140</sup> See discussion *supra* Part II.A.

<sup>141</sup> *Grootboom*, at para. 99.

<sup>142</sup> Pillay, *supra* note 17.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* notes 136–138 and accompanying text.

<sup>145</sup> Theunis Roux, *Understanding Grootboom: A Response to Cass Sunstein*, CONST. FORUM 17 (2001).

<sup>146</sup> Many of these cases are High Court proceedings, meaning that other courts will be free to dispense with their reasoning. However, as many of these cases are fairly recent, subsequent proceedings at the Supreme Court of Appeals or Constitutional Court may build on *Grootboom*.

*Grootboom* was not an evictions proceeding, but an application to the court to compel the government to comply with its section 26 constitutional obligations. Yet housing rights issues are clearly implicated in evictions proceedings, and *Grootboom*'s language and tone has been taken up in numerous evictions cases. One year after *Grootboom*'s decision, the Constitutional Court rendered its only other opinion on housing rights, *Kyalami Ridge*. In that case a local residents' Association brought an application to restrain the government from establishing a temporary camp on government-owned land to house people who had been displaced by severe floods in Alexandra Township—persons who under *Grootboom*'s test are in “a crisis situation.” The High Court granted the injunction on the grounds that there had not been adequate consultation with local residents, but the Constitutional Court reversed, holding that the housing rights for people in crisis as delineated by *Grootboom* trumped the Association's unproven argument that the settlement would damage the local environment and town planning.<sup>147</sup> The court emphasized that although the law requires that the government carries out its constitutional obligations lawfully, the limited consultation it undertook with the residents was in this case enough to pass procedural fairness requirements given the “urgent needs of flood victims.”<sup>148</sup> The urgency and crisis language of *Grootboom* was thus brought into the world of evictions, and has subsequently been used in numerous lower court cases leading to considerable protections for those facing ejection.

### 1. Judicial sympathy

The use of crisis-language on the papers, in oral argument and thereafter in judicial decisions is aptly illustrated by the case of *City of Cape Town v. Various Occupiers of the Road Reserve of Applicant Parallel to Sheffield Road, Phillipi*.<sup>149</sup> In that case, an eviction order had been granted by a magistrate's court against the respondents in the appeal: several hundred persons who had moved onto land owned by the city. Many of the respondents had moved onto the land at Sheffield Road because their previous accommodations in backyard dwellings had become unavailable due to renovations undertaken by the owners who received government subsidies to improve their own homes.<sup>150</sup> The judge granted the eviction, but required that the eviction be stayed pending the availability of alternative land.<sup>151</sup> Both the City and the occupiers appealed the decision. The occupiers' Heads of Argument emphasized in particular the *Grootboom* language of urgency and crisis:

The Respondents say they have nowhere else to go. The Council says that the Respondents should go somewhere else, but it does not suggest where that somewhere else might be, where they can lawfully live.

The respondents accordingly are and upon eviction will be, in the words used by the Constitutional Court, people who are in desperate need because they are “people who have no

<sup>147</sup> *Kyalami Ridge*, at paras. 114–116.

<sup>148</sup> *Id.* at 104.

<sup>149</sup> Unreported judgment delivered 30 Sept., 2003, Case no. A 5/2003 (hereinafter *Sheffield Road*).

<sup>150</sup> See, e.g., Affidavit of Khutala Jizana, Court Record Volume 2, p. 131 para. 7 (on file with author).

<sup>151</sup> See discussion *infra*, Part III.B.2.

access to land, no roof over their heads, and people who are in crisis because of natural disasters . . . or because their homes are under threat of demolition.”<sup>152</sup>

*Grootboom*'s crisis-language suggests that an eviction will *per se* lead to “a crisis situation”—a *prima facie* breach of the Constitution. Because the City of Cape Town did not have a program in place that could effectively deal with the respondents that it was trying to evict,<sup>153</sup> seeking an eviction was an act that had the effect of creating a crisis situation. The crisis argument was particularly effective during oral argument, heard by Judges Blignault and Erasmus of the High Court on August 8, 2003. Counsel for the Respondents in the Main appeal<sup>154</sup> argued that if they are evicted, they will be in crisis, and will have no where else to go. Judge Erasmus redirected this concern to the City of Cape Town<sup>155</sup> during their presentation of oral argument that focused chiefly on the notion that the respondents are “queue jumpers” who have neither shown that they have no alternative land, nor that they are worse off than hundreds of thousands of other similarly situated persons, and should not be given preference:<sup>156</sup> “[I]t’s raining outside . . . if we grant your appeal today, where must these people go? Where must they sleep tonight?”<sup>157</sup> Judge Erasmus was clearly moved by the occupiers’ oral argument during which lengthy portions of their affidavits were read,<sup>158</sup> and interrupted the lawyer for the City of Cape Town at another point to state “we can’t set a date for this eviction yet, because we don’t know when you will provide alternative land, or, for that matter, when you will comply with your constitutional obligations . . . .”<sup>159</sup> The *Grootboom* crisis-language is therefore an effective tool for the representatives of communities faced with evictions.

## 2. Requiring alternative land: Sheffield Road

The most significant inroad that has been made using *Grootboom*'s crisis-language has been the linkage of crisis to requiring the state to provide alternative land. Under the Prevention of Illegal Evictions Act, a court considering an application for evictions must consider all the relevant circumstances, and if the occupiers have been on the land for more than six months, the court must also consider “whether land has been made available or can reasonably be made available” by an organ of the state or another land owner for their relocation.<sup>160</sup> Eviction proceedings are therefore typically brought before six months has passed under section 4(6) of the act, if possible, in order to bypass that requirement in section 4(7). The effect that *Grootboom*'s crisis-language has recently had on this distinction in a High Court case, however, is significant.

<sup>152</sup> Heads of Argument on Behalf of the Respondents in the Main Appeal, *Sheffield Road*, Case A5/2003, paras. 12–13 [hereinafter *Sheffield Road Respondents Heads*].

<sup>153</sup> See also discussion *infra* Part III.C.1.

<sup>154</sup> Geoff Budlender of the Legal Resources Centre.

<sup>155</sup> Fairbridge Arderne & Lawton, Inc.

<sup>156</sup> *Sheffield Road Appellant's Heads*, paras. 15, 23.

<sup>157</sup> Notes taken on August 8, 2003, on file with author.

<sup>158</sup> The affidavits demonstrated the abject poverty of all the respondents, many of whom are disabled, are women or children heading households, had been evicted previously, are unemployed, or are ill. *Sheffield Road*, Court Record Vols. 1–11.

<sup>159</sup> Notes taken on August 8, 2003, on file with author.

<sup>160</sup> PIE §4(7) The language of relevant provisions are reproduced *supra* note 82.

In *Sheffield Road*, the City of Cape Town appealed the proviso attached to the granted eviction order regarding alternate land, on the grounds that it was not required because the court had accepted that the occupiers had been on the land for less than six months, and in the alternative the City stated that it simply did not have alternative land available.<sup>161</sup> The respondents appealed the eviction itself on the grounds that certain procedural requirements had not been met by the City, and cross-appealed against the City's appeal.

The final judgment in the *Sheffield Road* case dismissed the appeal as to the eviction itself, stating that despite the fact that the City did not comply with all procedural requirements in the PIE Act, it had complied substantially.<sup>162</sup> The appeal by the City, however, was also dismissed: "In my view the principles laid down in *Grootboom* [] govern the present case. Appellant has not shown what measures it has taken to provide some form of relief for 'people in desperate need' such as respondents."<sup>163</sup> In addition, the consideration of alternative land was held to be appropriate regardless of the 4(6)/4(7) differentiation in PIE.<sup>164</sup> *Grootboom*'s crisis-language has therefore made it much more difficult for the state to evict people living illegally on their land without creating a program—itsself required by *Grootboom*—to deal with people in crisis. In *Sheffield Road*, although the state's breach of section 26 of the constitution was not directly before the court, the judgment suggests that in evictions proceedings, an underlying concern will be that the government may be in breach of the constitution and *Grootboom* requirements by failing to have an appropriate program in place. If *Sheffield Road*'s interpretation is adopted by other courts, eviction orders against people in crisis will simply not be granted until such a program is in place. Although the court's ruling that substantive compliance with the PIE Act is all that is needed is disturbing for future cases where the City may decide to cut corners, the judgment is a significant victory insofar as evictions proceedings are enacted against a vacuum of state support for the evictees, and is directly attributable to the wording of the judgment in *Grootboom*.

---

<sup>161</sup> Heads of Argument on Behalf of the Appellants, *Sheffield Road*, Case A5/2003, para. 15 [hereinafter *Sheffield Road Appellant's Heads*].

<sup>162</sup> *Sheffield Road*, at para. 21.

<sup>163</sup> *Id.* at para. 25 (emphasis in original).

<sup>164</sup> *Id.*

### 3. *The problem of contending with property rights: Modderklip*

Not all courts have been as enthusiastic in building on *Grootboom*. In *Modderklip*,<sup>165</sup> a case currently awaiting judgment at the Supreme Court of Appeal, an eviction was granted against a large group of people living on private land, and the South African police were authorized to carry it out.<sup>166</sup> Subsequently, the land owner, having been granted the eviction application but refusing to pay the necessary deposit to the Sheriff to carry out that order, applied to the High Court for the enforcement of the eviction via section 38(5) of the constitution,<sup>167</sup> which binds all organs of the state to court orders. That order was also granted even though this would require breaching one party's section 26 rights by putting them in a crisis situation, in order to fulfill another party's property rights. Interested amici were granted the right to intervene in the state's appeal. The amici argue in essence that if the court chooses to uphold the *Modderklip Enforcement Judgment*, it must also make an order that ensures *Grootboom* obligations are implemented so that the community will not be left in crisis. The amici note that "a reasonable balancing of [the property and housing] rights leads to a conclusion that the rights of the owner must temporarily give way to the rights of the 40,000 homeless people, while the state makes reasonable provision for them."<sup>168</sup>

Although the consolidated judgment at the Supreme Court of Appeals has not yet been rendered,<sup>169</sup> the case will make an important impact one way or the other because that court binds all lower courts in South Africa. It would be inimical to the basic pretense of *Grootboom* if the court grants the enforcement of the eviction. Not only would this turn the South African police into an agent for private landowners seeking to evict the homeless reminiscent of the apartheid era, but it would pour the government's resources into financing evictions rather than into establishing shelter for those evicted.

#### *C. Implementing "[A] Comprehensive and Co-Ordinated Program . . . to Realise the Right of Access to Adequate Housing"*<sup>170</sup>

One of the most disappointing aspects of *Grootboom* is that it did not lead immediately to the implementation of a substantive housing program that meets its reasonableness test by dealing with the destitute population in South Africa.<sup>171</sup> This has been attributed to the fact that the order

<sup>165</sup> *Modderklip Boerdery (Pty) Ltd v. Modder East Squatters and Another* 2001 (4) SA 385 (W) [hereinafter *Modderklip Eviction Judgment*], and *Modderklip Boerdery (Edms) Bpk v. President van die RSA en Andere* 2003 (6) BCLR 638 (T) [hereinafter *Modderklip Enforcement Judgment*]. The decision on both matters has not yet been rendered; the LRC, representing the Community Law Centre, the Programme for Land and Agrarian Studies and the Nkuzi Development Association has intervened as amici.

<sup>166</sup> The judgment also dealt substantially with "balancing" the section 26 rights to housing and against evictions against section 25 property rights, holding that PIE's "just and equitable" evictions language applies also to what is just and equitable for the land owner, and further holding that the broad *right to access to housing* language of 26(1) is only applicable to state, not private, land owners. *Modderklip Eviction Judgment*, at 390.

<sup>167</sup> SA CONST. § 38(5). The section reads "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

<sup>168</sup> Geoff Budlender, Letter to the State Attorney, July 1, 2004, on file with author.

<sup>169</sup> *But see infra* Part VI.

<sup>170</sup> *Grootboom*, at para. 4.

<sup>171</sup> *But see* discussion *infra* Part III.C.3.

handed down by the court, while suggesting one possible program that may pass the constitutionality test,<sup>172</sup> was too broad and gave the government too much latitude in fashioning a response to its breach of section 26.<sup>173</sup> In fact, the government's attitude in subsequent cases has largely been the same as its position in *Grootboom*: it has various policies in place, has limited funding and land, and the persons against whom they are seeking to enforce evictions are no worse off than hundreds of thousands of other people in that city or province. The attitude of the government in evictions proceedings, at times shockingly dismissive of persons in desperate need, is in stark contrast to the rights-speak that was evident in the lead up to 1994. To a great extent, the difference between promise and product must be attributed to the lack of funding. Local, provincial and national programs are completely overwhelmed. At the same time, however, the government did not, until late 2003 adopt any policy of the sort envisioned by *Grootboom* aimed at people in crisis.<sup>174</sup>

### *1. Attitude of the government*

The attitude of various branches of government that emerges from subsequent litigation regarding their responsibility following the *Grootboom* case has tended to be two-fold: first, provincial and local governments point to their housing programs that are progressively being implemented, stating that the policy itself fulfills their obligation. Second, where there are gaps and inadequate implementation, provincial and local government have pointed their fingers at each other, each suggesting that the other is responsible for the shortfalls.

The attitude of local governments in evictions proceedings has also been dismissive of the situation in which the evictees will be left. To some extent this can be explained by the adversarial nature of litigation. In the *Sheffield Road* litigation, however, the extent to which the government shirks any responsibility for improving the lives of those living in Phillipi suggests that *Grootboom* has done little or nothing at all to change the attitude of local authorities. In that case, the respondents in evictions proceedings submitted in lengthy affidavits that they were in crisis and had nowhere to go. The City of Cape Town's representative dismissed the contention that the occupants were desperate, stating repeatedly that the very fact that they had materials to build shacks at Phillipi enabled them to take those materials elsewhere.<sup>175</sup> In addition, the City's

<sup>172</sup> The Court suggested that a program that was in planning but had not yet been implemented, the Accelerated Managed Land Settlement Program, may be "reasonable," but was a "starting point only." *Grootboom*, at para. 99(b), 57.

<sup>173</sup> See Pillay, *supra* note 17; Roux, *Understanding Grootboom*, *supra* note 145, at 17.

<sup>174</sup> NATIONAL DEPARTMENT OF HOUSING, NATIONAL HOUSING PROGRAMME: HOUSING ASSISTANCE IN EMERGENCY CIRCUMSTANCES, POLICY PRESCRIPTS AND IMPLEMENTATION GUIDELINES, April 2004. The policy was officially approved on April 1, 2004, available at [www.housing.gov.za/content/legislation\\_policies](http://www.housing.gov.za/content/legislation_policies) [hereinafter HOUSING ASSISTANCE IN EMERGENCY CIRCUMSTANCES]. See discussion *infra* at Part III.C.3. Previous programs, including the Accelerated Managed Land Settlement Program originally offered as evidence of a developing policy by the City of Cape Town in the *Grootboom* litigation dealt primarily with the provision of housing subsidies to qualified persons, not specifically to persons in crisis. The AMLSP has been poorly implemented, and does not meet the *Grootboom* test. Pillay, *supra* note 17.

<sup>175</sup> See, e.g., *Sheffield Road*, Court Record, Vol. 8, p.725, para. 5 ("It is noteworthy that [the respondent] [was] able to purchase materials [to shelter themselves on the present lot] and accordingly are able to provide shelter for their families elsewhere."); *Id.* at Vol. 9, p. 773, para 6, p. 777, para. 10.2 (in response to the contention of single women with minor children that they have nowhere to go, Bester notes "[i]t is noted that the Applicant has been able to provide shelter . . . accumulated funds with which to obtain materials and build her shack . . . [c]learly as she resides

responses themselves show that their policy does not aim to deal with large numbers of people in desperate need, in contravention of *Grootboom*:

Many people are as needy or more needy than Deponent. Many of the Applicant's on the waiting lists are single mothers with one or more dependents, many of whom are sickly because of the conditions in which they live, many of whom are also disabled or retarded and unemployed and who receive state grants from which they are attempting to save money in order to qualify in terms of the Applicant's policy.<sup>176</sup>

The City's argument is simple: the *Sheffield Road* respondents "can only expect to progressively realize [their] right to adequate housing in terms of either national, provincial or in terms of Applicant's housing policy."<sup>177</sup> Yet these statements—made three years after the decision—themselves fail to satisfy *Grootboom* that dismissed the contention that any policy works.

In addition to failing to inform the attitude of the government, the fact that *Grootboom* was not more explicit in defining scope of responsibility for each sphere of government has led to finger-pointing by various levels of government.<sup>178</sup> In *South African Rail Commuter Corporation v. Unlawful Occupants of the Western Cape Commuter Area Between Nolongile and Nonkqubela Stations, Khayelitsha* ("SARCC"),<sup>179</sup> SARCC, a state-owned entity sought to evict persons living next to the railway line on the outskirts of Khayelitsha, a township near Cape Town. The national, provincial, and local governments were joined by the respondents as third parties, whom the respondents claimed had each breached their constitutional duty in view of the *Grootboom* judgment by failing to provide for people in crisis situations.<sup>180</sup> In the responses filed by the City and Province, each claimed to fulfill its constitutional duty through its established program, and stated that any constitutional breaches were due either to lack of funding or breaches by other spheres of government.<sup>181</sup> The city argued that *Grootboom* said the National government bears the overall responsibility for the implementation of section 26 of the constitution, and the City is not required to take any such steps.<sup>182</sup> This directly contravenes *Grootboom*'s dictate that all spheres are "intimately involved in housing delivery."<sup>183</sup> The City argued that even if it was required to implement a policy to deal with people in crisis it would be wholly unable to do so, already being owed millions of rand in rental arrears, and facing nonpayment for services and lack of land.<sup>184</sup> The provincial government, in turn, argued that it was bound by the national

---

in a shack, and she received materials . . . she [will] be in a position to shelter her children"); *Id.* at Vol. 9, p. 783, para. 18.2 ("If indeed the court accepts that the Respondent is a single mother with three minor children, it is clear that she gets some income from selling sweets and has been able to purchase materials to shelter her children. . . . She does not take the court into her confidence as to whether she has family elsewhere where she can seek alternative accommodation or whether she can afford to pay to live in a backyard or elsewhere.").

<sup>176</sup> *Id.* at Vol. 9, p. 771, para. 5.1 and 5.2.

<sup>177</sup> *Id.* at Vol. 9, p. 773, para. 6.2.

<sup>178</sup> See *supra* notes 121–124 and accompanying text.

<sup>179</sup> Case No. 2453/2003. As of writing, the case has not yet moved into oral argument.

<sup>180</sup> SARCC, Notice to Third Parties, June 5, 2003. It should be noted in this situation that both the Respondents and the SARCC agreed that the respondents were living in intolerable conditions, with shacks placed fewer than two meters from the railway line.

<sup>181</sup> See, e.g., SARCC, Affidavit of the Council of the City of Cape Town, p. 66, para. 66.

<sup>182</sup> *Id.* at p. 64 para. 43.

<sup>183</sup> *Grootboom*, at para. 47.

<sup>184</sup> SARCC, Affidavit of the Council of the City of Cape Town, at pages 9–13.

housing policy alone, and was unable to do anything beyond that.<sup>185</sup> The City and Province both argue that although SARRC is a government corporation, it alone is responsible for making land available—the respondents have no recourse elsewhere.<sup>186</sup>

This confusion and finger-pointing on the part of the various branches of government does nothing to ameliorate the position of persons in crisis. In fact, that different spheres of government contend that another sphere is responsible violates the *Grootboom* precept that the government’s housing program must be *coherent*. Further, by refusing to publicly pronounce which level of government is directly responsible for the various aspects of implementing the right to access to housing, the government may be in breach of the constitution, which requires “[a]ll spheres of government and all organs of state within each sphere [to] . . . provide effective, transparent, accountable and coherent government for the Republic as a whole.”<sup>187</sup> While this has not been raised in high court cases directly challenging the housing program, it may be a useful argument that can be bolstered both by language in *Grootboom* and in the constitution.

## 2. *Emphasizing the standard: Neville Rudolph*

In 2003, the non-compliant attitude of the government was directly challenged in *Neville Rudolph*,<sup>188</sup> a High Court case. There, the City of Cape Town sought to evict a group of persons, many of whom had been on the housing wait-list for ten years. Much like the community in the *Grootboom* proceedings, the *Neville Rudolph* community decided to move onto vacant land owned by the city in order to escape the intolerable situation in which they were living. The City contended that this was a pure case of “land grabbing,” self-help of the sort disapproved of in *Grootboom*,<sup>189</sup> argued that the respondents were not “in crisis,” challenged the applicability of PIE, and further argued that given that they had a policy in place, with which it was complying, the government was doing all it could do with respect to housing rights.<sup>190</sup> The respondents opposed the application and in addition brought a counter application, contending that the City’s housing policies had failed to give effect to *Grootboom*. Unlike the *Sheffield Road* case, for example, the *Neville Rudolph* respondents were re-challenging the policies that *Grootboom* had held were required and which had not been delivered.

The court therefore had a direct opportunity to utilize the specific requirements of *Grootboom* and require more of the government. Judge Selikowitz dismissed the eviction application, and much like the court in *Grootboom*, focused on the desperate situation in which the respondents were living:

[I]t is astonishing to find that the Applicant[] . . . makes the assertion that none of the Respondents are “persons in crisis” as contemplated in *Grootboom*.

<sup>185</sup> *SARRC*, Affidavit of the Province of the Western Cape, at p. 10, para. 19.

<sup>186</sup> As of May, 2004, the litigation was postponed following negotiation. The third parties have said they will offer alternative land once there is an audited list of the hundreds of residents. The LRC lawyer on the case, Steve Kahanovitz, notes that although a delay in eviction proceedings is usually to the advantage of clients, in this case, they are “so exposed to danger” that this may not be true.

<sup>187</sup> SA CONST. § 41(1)(c).

<sup>188</sup> *City of Cape Town v. Neville Rudolph and Others*, 2003 (11) BCLR 1236 (C) [hereinafter *Neville Rudolph*].

<sup>189</sup> *Grootboom*, at para. 2.

<sup>190</sup> *Neville Rudolph*, at 4–5 of typed judgment.

This statement is indicative of a state of denial on Applicant's part and a failure to recognise and acknowledge that there is, in fact, any category of persons to which it has any obligation beyond the obligation to put them on the waiting-list for housing in the medium to long term, because they are people "with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations." It is, in my view *precisely the same failure as was held, in Grootboom, to constituted a breach of the Constitution.*<sup>191</sup>

Judge Selikowitz further stated that the City had failed to show that its policy gave adequate prioritization to those in desperate need. The court delivered a detailed order that not only declared a constitutional breach, but also required the City to take specific steps: to deliver a report stating the steps it has taken to comply with the order and what future steps it will take, after which the respondents can file comments, and consideration will be undertaken by a judge.<sup>192</sup> The Court's order, then, goes some way to responding to critics of *Grootboom* that suggest the lack of actual policy implementation was due to the broad language in the order. The City has filed its intent to appeal, leading one commentator to suggest that the case could become "*Grootboom II*."<sup>193</sup>

### 3. A new beginning? Housing assistance in emergency circumstances

In 2004, four years after the decision in *Grootboom*, a national housing program explicitly geared towards the amelioration of persons in crisis situations was adopted as a new chapter of the National Housing Code.<sup>194</sup> If the new policy is adequately implemented, it will go a long way towards improving the lives of millions of South Africans that live in deplorable circumstances. The policy takes as its starting point the obligations imposed on the government in *Grootboom*:

Events, such as . . . the landmark judgment of the Constitutional Court in the [] *Grootboom* case, led [to] . . . the development of a National Housing Programme to expedite action in order to relieve the plight of persons in emergency situations with exceptional housing needs.<sup>195</sup>

The objectives listed in the chapter emphasize the creation of an *appropriate* framework, proactive planning with regard to the provision of land, and a streamlined development and implementation process.<sup>196</sup> Although the program is limited to those who are in desperate need owing to situations "beyond their control,"<sup>197</sup> that definition is fairly broad, and includes all

<sup>191</sup> *Id.* at 56–57 of typed judgment (emphasis added).

<sup>192</sup> *Id.* at 70 of typed judgment.

<sup>193</sup> Ashraf Mahomed, *Grootboom and Its Impact on Evictions*, 4 ESR Review 3, Sept. 2003, at [www.communitylawcentre.org.za/esr/esr2003/2003sept\\_grootboom.php](http://www.communitylawcentre.org.za/esr/esr2003/2003sept_grootboom.php) (last accessed May 15, 2004).

<sup>194</sup> See HOUSING ASSISTANCE IN EMERGENCY CIRCUMSTANCES, *supra* note 173. See also Press release, Housing Assistance in Emergency Circumstances, Dept. of Housing, April 1, 2004, at [www.housing.gov.za/content/media\\_desk](http://www.housing.gov.za/content/media_desk) (last accessed April 8, 2004) (noting that the amendment comes in reaction to the Constitutional Court's judgment in the *Grootboom* case).

<sup>195</sup> HOUSING ASSISTANCE IN EMERGENCY CIRCUMSTANCES, *supra* note 173, at 5.

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.* at 8.

persons in situations of “exceptional housing need . . . that can reasonably be addressed” who are evicted/threatened with eviction, whose homes were demolished/threatened with demolition, or who are displaced/threatened with imminent displacement.<sup>198</sup> The program states that the only eligibility requirement is that the persons in desperate need are not in a situation to help themselves. Although it is too early to tell whether the policy will be effective in practically improving the lives of persons living in housing crises, it is clear that its actual implementation could have an enormous impact. Successful implementation of the policy may turn on the funds that are made available to the program, and how “exceptional need” and being in a situation unable to help oneself are interpreted.

#### IV. CONCLUSIONS

*Grootboom* did not immediately implement the right to access to adequate housing enshrined in the South African constitution. Millions of people continue to live in desperate, intolerable informal housing. Despite that fact, *Grootboom*'s legacy is to have gone a great length to create weighty tools that have subsequently been used by communities in crisis. Although this likely impacts who has the opportunity to seek to enforce the right to access to adequate housing,<sup>199</sup> the benefits to those communities are clear where courts have begun to require much more substantive action on the part of the government. Where, for example, no policy is implemented, or no alternative land made available, the courts may simply not grant applications for evictions. Certainly the rights that people have actually secured in recent litigation are limited: not being evicted from shacks in deplorable situations is a far cry from securing “the dignity that comes from having a solid roof over your head, running water and other services in an established community,”<sup>200</sup> but it is a start. One of the greatest challenges to implementing housing rights specifically, and socio/economic rights broadly will likely be the institution of coherent government policy and practice: if the various levels of government do not cooperate, applying to enforce one's rights will lead to lengthy court battles circling the issue of responsibility, leaving applicants—literally—out in the cold. A creative way to challenge continued government confusion on implementing housing rights may be to bring an application through section 41 of the constitution requiring effective, coherent governance. The willingness of the judiciary to push the envelope, coupled with meaningful implementation of the new emergency housing policy suggests that section 26's right to access to adequate housing may yet have a meaningful impact on the lives of millions that was originally intended by *Grootboom*.<sup>201</sup>

#### V.

---

<sup>198</sup> *Id.*

<sup>199</sup> See, e.g., Emily Bazelon, *After the Revolution*, LEGAL AFFAIRS, Jan. 2003 (quoting Wim Trengove, SC as noting “If you don't have clean water, you have to prove that the government's entire water policy, in all its facets and levels, is unreasonable given the available resources . . . You tell me where a poor community in some godforsaken village gets the wherewithal to do that. That means these rights are only for people who get the help of the big, well-funded law centers. And then even if the lawyers win, that doesn't mean the litigant actually gets any water”). *But see* DESAI, *supra* note 48, at 73 (arguing that although struggles for social/economic rights must primarily be fought by communities, that is, not in courts, litigation can be an effective tool—it “rip[s] aside the mask of political rhetoric and forc[es] [local governments] to reveal in sworn affidavits the brutality of its anti-poor policies”).

<sup>200</sup> Comments by Joe Slovo, *supra* note 61.

<sup>201</sup> *Grootboom*, at para. 96.

ADDENDUM: THE *MODDERKLIP* JUDGMENT

On May 27, 2004, the Supreme Court of Appeal handed down its judgment in the *Modderklip* case.<sup>202</sup> In a press release issued on June 8, 2004, the amici applauded the decision. The court held

- (1) that the state breached its constitutional obligations to both the landowner *and* the unlawful occupiers in failing to provide alternative land for them, and citing the fact that an implemented program to cater to those in desperate need was still lacking;
- (2) that the state *at all three levels of government* did not have a *Grootboom*-policy in place; and
- (3) that the state has an obligation to ensure that evictions are executed humanely.

The court further held that the residents were entitled to remain on the land until alternative land is made available. However, it “emphasized that landowners should not be unduly prejudiced by the failure of the state to fulfill its obligations to vulnerable occupiers,” and ordered the landowner to be paid damages.<sup>203</sup>

This balancing of rights therefore allowed the court to keep the eviction order in place pending the government’s compliance with *Grootboom*, and also granted some relief to the landowner who had no use of his land. The *Modderklip* decision allows the intent of *Grootboom* to stand without encroaching on section 25, and can be seen as an—albeit removed—means of facilitating, through the award of damages, the involvement of non-state actors in the provision of housing.<sup>204</sup>

---

<sup>202</sup> Unreported, case SCA 213/2003.

<sup>203</sup> Press Release, Landmark Ruling on Evictions, Nkuzi Development Association, The Community Law Centre, and the Programme for Land and Agrarian Studies on their Amici Intervention, *available at* <http://groups.yahoo.com/group/INESCR/>.

<sup>204</sup> *See Grootboom*, at para. 35.