

# THE RIGHT TO ADEQUATE HOUSING VIEWED THROUGH THE LENS OF THE SOUTH AFRICAN CONSTITUTIONAL COURT'S *GROOTBOOM* DECISION\*

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**Abstract:** *Prezentul articol încearcă o analiză a impactului pe care Decizia Curții Constituționale a Africii de Sud în cazul 'Grootboom', l-a avut asupra implementării și aplicării coerente a dreptului la locuință corespunzătoare, și nu numai. În acest sens, contextul istoric, social, politic, economic etc. în care cazul de față a fost soluționat și-a pus în mod evident amprenta asupra respectării drepturilor omului și asupra funcționării corespunzătoare a procesului democratic. Făcând parte din a doua generație de drepturi fundamentale (drepturi economice, sociale și culturale), dreptul la locuință adecvată a fost adesea caracterizat ca fiind extrem de dificil de implementat. Decizia Curții Constituționale a Africii de Sud în cazul amintit (în care practic, limitele acestui drept au fost testate), a adus însă un suflu nou, subliniind că realizarea dreptului în discuție are un efect profund asupra realizării a numeroase alte drepturi economice, sociale și culturale și, nu în ultimul rând, asupra vieților a milioane de persoane din Africa de Sud.*

**Keywords:** *Constitutional Court, Decision, Human Rights.*

**JEL Classification:** *K10*

## **1. Introduction**

One of the aspirations of the people of South Africa in adopting the Constitution of the Republic of South Africa was the establishment of a society based on democratic values, social justice and fundamental human rights. The Constitution therefore has entrenched economic, social and cultural rights provisions that bind all law, the legislature, the executive, the judiciary and all organs of state and has also provided for the establishment of state institutions like the South African Human Rights Commission

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\* „Dreptul la locuință corespunzătoare/adecvată - în lumina Deciziei Curții Constituționale Sud-africane în cazul *Grootboom*”.

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meant to strengthen constitutional democracy<sup>1</sup>. The 1996 "post-apartheid" Constitution of South Africa thus enumerates a variety of specific rights-among them a guarantee of access to adequate housing and a right to shelter for children. Yet many millions of South Africans continued to live in shantytowns or worse, even after the passage of the new Constitution. The *Grootboom* case<sup>2</sup> refers to one instance in which South African aspirations and realities collide.

The present article aims at assessing and analyzing the impact the outcome of the above mentioned case had on the realization of the right to adequate housing, but not only. Poverty by its very nature inhibits the full enjoyment of human rights and thus constitutes a threat to democracy and a challenge for the enjoyment of human rights. The right to adequate housing is a second generation human right, meant to ensure, in social terms, equal conditions and treatment for different members of the citizenry<sup>3</sup>; as we will see below, it has often been characterized as being *imperfectly justiciable*. However, the groundbreaking South African Constitutional Court decision (in which the limits of the right to adequate housing were practically tested) proved that the realization of this right has a profound effect on the realization of many other economic, social and cultural rights and, ultimately, on the lives of the poor, disadvantaged and vulnerable in South Africa.

In this context, bringing about access to adequate housing remains a key challenge in South Africa. In 1997, it was estimated that 2.2 million households in South Africa were without adequate housing. It was further estimated that this figure would increase by 204.000 every year because of population growth, barring any effective intervention<sup>4</sup>. Consequently, the housing crisis had and continues to have particularly devastating consequences for vulnerable and disadvantaged groups.

## ***2. The Right to Adequate Housing as Enshrined in International Instruments***

The right to adequate housing was inserted in the most important and influential international instruments with regards to the protection of human rights. In this respect, article 25, par. 1 of the Universal Declaration of Human Rights provides the following: "Everyone has the right to a standard of living *adequate* for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Further on, the International Covenant on Economic, Social and Cultural Rights provides in article 11 that "the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate* food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation

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<sup>1</sup> Lindiwe Mokate, Chief Executive Officer, South African Human Rights Commission, *Monitoring Economic and Social Rights in South Africa: The role of the SAHRC*, In Went, September 30<sup>th</sup>, 2003.

<sup>2</sup> *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC).

<sup>3</sup> See <http://www.encyclopedia4u.com/t/three-generations-of-human-rights.html>.

<sup>4</sup> Source: South African Department of Housing, 2000:2.

based on free consent.”

Although the analysis of the above stated provisions is not the purpose of this article, we believe it is necessary to underline their undoubted importance. In this respect, the UN Committee on Economic Social and Cultural Rights (CESCR) considered it appropriate to draw general comments on the implementation of the right in discussion. Thus, according to General Comment No. 4 of the CESCR<sup>5</sup>, certain core factors are associated with adequate housing. These include the legal security of tenure, availability of services, material and infrastructure, as well as the need for housing to be affordable, habitable, accessible, appropriately located and culturally adequate. In terms of services, materials and infrastructure, the CESCR suggests that these include access to clean drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

### ***3. The South African Constitutional Framework***

Taking into account the above said, during the constitution-making process there were fierce debates around the role of the State in the realization of economic, social and cultural rights. Those who preferred an increased role of the State in the realization of these rights argued that the Constitution would hold very little meaning for the majority of the poor if these rights were not included. The struggle against apartheid was also a struggle against poverty. On the other hand, a strong lobby urged that these rights - the right to housing, food and so on - not be included in the Constitution because, by their very nature, they are difficult for a court to enforce. Moreover they raise the risk that a court, seeking to adjudicate on an application for such a right, would be faced with the intractable problem of when to overrule policy decisions of the Government<sup>6</sup>. The argument that the inclusion of these rights would undermine the Constitution if the State proved incapable of fulfilling them due to unavailability of resources resulted in a compromise that would satisfy all relevant parties. For reasons of consistency, we will deal with the issues regarding the progressive realization and the resource availability in the forthcoming paragraphs.

#### ***3.1. Relevant Provisions of the Constitution***

The Constitution includes a wide range of legally enforceable socio-economic rights. But before dwelling on those provisions, it has to be stated that Section 7(2) of the South African Constitution mandates the State to respect, protect, promote and fulfill the rights in the Bill of Rights, including housing rights. Other parts of the Constitution make it clear as well, that the national, provincial and local spheres of Government all bear some of this responsibility in respect of the right to adequate housing. However, the Constitution does not specify the exact mechanisms and strategies for the effective realization of housing rights.

Section 26 of the Constitution is most definitely the one that played the key role in the *Grootboom* decision. It basically provides that "everyone has the right to have access to adequate housing" (par. 1), that "the State must take reasonable measures within its available resources to achieve the progressive realization of this right" (par. 2) and that

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<sup>5</sup> See UN Committee on Economic Social and Cultural Rights, *General Comment No.4: The Right to Adequate Housing*, Sixth Session, 1991, Undoc.E/1992/23.

<sup>6</sup> Carmel Rickard, *Testing Time for the Poor*, Sunday Times, the 7<sup>th</sup> of May, 2000, available on <http://www.sundaytimes.co.za/2000/05/07/>.

“no-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” (par. 3).

Section 28, par. 1, (c) provides that every child has the right to basic nutrition, shelter, basic health care services, and social services.

Further on, other substantial and procedural provisions of the Constitution have to be stated in this context. Accordingly, Section 184, par. 3 specifically mandates the Human Rights Commission to monitor the implementation of economic and social rights. The implications of the Human Rights Commission on the realization of economic, social and cultural rights, as well as the procedure to be followed in this respect will be assessed in one of the forthcoming paragraphs.

### 3.2. *The Right to Adequate Housing and the Right to Shelter*

Before proceeding in dealing with the actual facts of the *Grootboom* case, it seems appropriate to draw the distinction between the right to adequate housing and the right to shelter, as both of them are enshrined in the South African Constitution, and both played quite a significant role in the attempt of reaching a satisfying legal solution. The right to *shelter*, inserted in Section 28, par. 1 can be contrasted to the general right of access to *adequate housing*, provided for in section 26. Unlike the right to *shelter* which is a children’s right, the right to access to housing applies to everyone but it is qualified by the availability of resources and is subject to ‘progressive realization’. Both these rights were tested in *Grootboom* case.

The South African Constitutional Court did not provide a comprehensive definition of the concept of *adequate housing* in the *Grootboom* judgment. However, it did note: “For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling”<sup>7</sup>. The Court made it clear that shelter refers to something more rudimentary than housing. While it did not lay down what the authorities had to provide, it was indicated that it would most probably entail something like tents, portable toilets and water. The Court emphasized that access to housing must be enjoyed by everyone at all economic levels of society. It noted that the “poor are particularly vulnerable and their needs require special attention”<sup>8</sup>.

As stated above, in any case, certain core factors must be associated with adequate housing. In this respect the General Comments provide by the UN Committee on Economic Social and Cultural Rights provide an in-depth analysis of the elements entailed by the right to adequate housing.

## 4. *Facts of the Case*

The facts of the case have to be assessed taking into account the historical, social and economic South African realities. From a historical point of view, both colonial and apartheid laws and policies restricted black urbanization. These laws disproportionately affected men and women’s access to housing. In addition to the explicit legislation and policies, officials had vast discretionary powers, which were often exercised in an arbitrary manner with negative consequences. The economic context concerns especially the high level of poverty and unemployment, with the inevitable consequences that can further be drawn. The social context can constitute the basis for a separate gender

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<sup>7</sup> See the Constitutional Court’s Decision, par. 35.

<sup>8</sup> *Ibid.*, par. 36.

perspective of the current analysis, as well. The social context within which one seeks access to housing is informed by factors such as patriarchy, domestic violence, customary and religious laws and practices and HIV/AIDS<sup>9</sup>.

Mrs. Irene Grootboom was part of a group of 'squatters' (390 adults and 510 children) initially living in appalling circumstance (severe poverty, without any basic services such as water) in an informal settlement in Wallacedene, in the Cape Metropolitan area. The area was partly waterlogged and situated dangerously close to a main thoroughfare. Many Wallacedene residents had long since placed their names on a waiting list for low-income housing.

The poor living conditions made the group move to nearby areas, in the Oostenberg municipality, illegally occupying land which was ear-marked for low-cost housing. The private landowner obtained an eviction order and the sheriff was ordered to dismantle and remove any structures remaining on the land. In May 1999, the group was forcibly evicted, their shacks were bulldozed and burnt and their possessions destroyed<sup>10</sup>. Since they could not go back to their original settlement, the magistrate granting the eviction order said that the community and the municipality should negotiate in order to identify alternative land for the community to occupy on a temporary or permanent basis. In this difficult situation, the homeless attempted to erect temporary structures on the Wallacedene sports field. These, however, proved to be wholly inadequate, providing no protection at all, particularly for their children.

#### 4.1. *The Cape High Court's Decision*

With legal assistance, the *Grootboom* community formally notified the municipality of the situation and demanded that the municipality must meet its constitutional obligation to provide temporary accommodation. Without a satisfactory response from the municipality, the community - under the name of *Irene Grootboom and 900 others* - launched an urgent application in the Cape High Court for an order requiring the Government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. They based their argument on their constitutional right of access to housing (Section 26, par. 2) and the children's right to shelter (Section 28, par. 1, (c)). In *Grootboom v Oostenberg Municipality*<sup>11</sup>, the Cape High Court rejected the first argument. It said that Government's Housing Programme was reasonable and thus fulfilled the requirements of the Constitution. In terms of the second argument, the Court said that parents are primarily responsible to provide shelter for their children. If, however, they are unable to do this, section 28, par. 1, (c) places an obligation on the State to do so<sup>12</sup>. Further, the Court found that the parents should be able to live with their children in the shelter as it was not in the best interests of children to be separated from their families.

Of course, the Court could not order the authorities to provide *Grootboom* and her community with "housing": evidence had been produced of a policy in terms of which available resources were being used to provide housing for as many people as possible, as

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<sup>9</sup> See Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *Rights, roles and resources: An analysis of women's housing rights – the implications of the Grootboom case*, IDASA – Budget Information Service, Budget Brief no. 110, October 2002, available on <http://www.idasa.org.za/bis>.

<sup>10</sup> Jaap de Visser, *From the Courts: the Grootboom Judgment*, Local Government Project Community Law Centre, UWC, 2001, p. 1.

<sup>11</sup> 2000 (3) BCLR 277.

<sup>12</sup> See *Local Government Bulletin*, Volume 1, 2000, p. 4.

quickly as possible. The Court thus issued an order of injunction as against the Cape Metropolitan Council and the Oostenberg Municipality, to provide tents, portable latrines and a regular supply of water to the "*Grootboom* camp".

#### 4.2. *The Constitutional Court's Decision*

The case was then taken on appeal to the Constitutional Court, by the South African Government. The Human Rights Commission and the Community Law Centre were accepted as *amici curiae* ('friends of the Court') and submitted arguments to assist the Court.

As the decision at hand practically lifts the *Grootboom* case to the status of a landmark case in the matter of the right to adequate housing, we will focus in the following paragraphs on the insights of this decision and on its impact to the realization of the above mentioned right.

##### 4.2.1. *Analysis of Section 26*

The court noted that an interpretation of Section 26 requires a consideration in both its textual and social / historical contexts. The textual context illustrates the close relationship between housing rights and other rights. The social and historical context requires that housing rights be seen against the legacy of deep social inequality<sup>13</sup>.

In its judgment, The Court made it clear that it was not for the judiciary to enquire whether better measures could have been adopted but rather to determine whether or not the state had violated the right of access to housing of the people concerned<sup>14</sup>. From this point of view, it could be argued that the Constitutional Court in fact interpreted the right of access to adequate housing to be *imperfectly justiciable*. This concept is sourced in the provisions of Section 26, par. 2 of the Constitution. It suggests that as long as the Government can justify its response to this right in terms of a programme rationally conceived and implemented, the Court cannot 'question' the suitability of a programme<sup>15</sup>. Consequently it can be argued that the right to adequate housing, along with other economic, social and cultural rights) is most definitely a qualified right, but, as we will see below, the obligation of the State to fulfill this right is conditional.

However, the Court found that the extent of the State's obligation is defined by three key elements in Section 26: *reasonable legislative and other measures; progressive realization and resource availability*.

##### 4.2.1.1. *Measures to Be Adopted*

The Court noted that Section 26, par. 1 gives everyone the right of 'access' to adequate housing. This means that the State must create conditions through laws, budgets and other measures that enable individuals and groups to gain access to housing. Further, both the State and private actors such as banks and landlords must not prevent access to housing rights. Moreover, Section 26, par. 2 of the Constitution obliges the State to take "reasonable legislative and other measures" to progressively realize the right of access to adequate housing. The terminology implies that, in addition to legislative measures, administrative, judicial, economic, social and educational measures must be taken<sup>16</sup>. In the *Grootboom* case, the Court indicated that the measures adopted must establish a

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<sup>13</sup> Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *op. cit.*

<sup>14</sup> Jaap de Visser, *op. cit.*, p. 2.

<sup>15</sup> Ashraf Mahomed, *Grootboom and Its Impact on Evictions: Rudolph and Others v City of Cape Town*, ESR Review, vol. 4, no. 3, September 2003, University of Western Cape.

<sup>16</sup> Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *op. cit.*

coherent public housing programme, directed towards the progressive realization of the right of access to adequate housing within the State's available resources. It was noted that "legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive"<sup>17</sup>. Policies and programmes must thus be reasonable both in their conception and their implementation.

#### 4.2.1.2. The "Reasonableness" Test

In interpreting the term *reasonable*, the Court paid particular attention to the housing needs of those living in extreme conditions of poverty, homelessness or intolerable housing. It noted that a programme that excludes a significant segment of society cannot be said to be reasonable: "It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test"<sup>18</sup>. Acknowledging the wide range of possible measures could be adopted by the State to meet the requirement of reasonableness, the Court stated that in assessing the reasonableness of the measures, housing problems must be considered in their social, economic and historical context and in the light of the capacity of the institutions responsible for implementing the programmes.<sup>19</sup>

Although the State's long and medium term objectives could not be criticized, the Court found that the State had neglected the short term aspect. It was clear that no real policy existed which could be applied to people in need of housing in crisis situations. Apart from the normal channels, namely application for low-cost housing, which normally takes years, there was no relief for Mrs. Grootboom, her children and her peers. There was no provision in any policy, whether national, provincial or local, that applied to her desperate situation. As stated above, in order for a policy to be reasonable, it cannot ignore those whose needs are most urgent. A policy aimed at providing access to housing cannot be aimed at long term statistical progress only. Those in desperate need must not be ignored. Their immediate need can be met by 'second-best' facilities, which might fall short of acceptable housing standards, but which nevertheless provide a basic form of shelter. The Court also stressed that its judgment must not be seen as an approval of land invasion in order to 'jump the queue'.<sup>20</sup>

#### 4.2.1.3. The Progressive Realization of the Housing Rights

The Constitutional Court understood the term *progressive realization* as acknowledging that the right to housing could not be realized immediately for everyone, but that the State must take steps to achieve this goal. After all, it is made clear in the Constitution that the fact that economic, social and cultural rights can only be realized progressively, does not imply indefinite postponement in setting up measures for the realization of these rights. The Constitution includes a provision (Section 184, par. 3) through which organs of State are obliged to report on the measures that they have taken towards the realization of economic and social rights.

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<sup>17</sup> See the Constitutional Court's Decision, par. 42.

<sup>18</sup> *Ibid.*, par. 44.

<sup>19</sup> See Karrisha Pillay, *Socio-Economic Rights: How far will the courts go?*, Community Law Centre, University of the Western Cape, December 2000, available on: <http://web.uct.ac.za/depts/lrgu/newslets/2000-dec/serights.htm>.

<sup>20</sup> Jaap de Visser, *op. cit.*, p. 3.

The Court observed that housing must thus be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The Court also endorsed the view of the UN Committee on Economic Social and Cultural Rights that ‘retrogressive measures’ should not be taken without justification. These are measures which, for example, cut back on housing programmes without putting other measures in place to facilitate access to housing by the poor.<sup>21</sup>

#### 4.2.1.4. *The Availability of Resources*

The Constitution does not expect more than the state can afford<sup>22</sup>; but still, the Constitution obliges the State to act positively to ameliorate the conditions at hand. The qualification of *within its available resources* acknowledges possible budgetary constraints on what can be provided. On this point, the UN Committee on Economic Social and Cultural Rights stated that even where available resources are demonstrably inadequate, the State should still strive to ensure the widest possible enjoyment of the right under the prevailing resource constraints<sup>23</sup>. Further, available resources must be effectively and equitably utilized. Unfortunately, in the *Grootboom* case, the Constitutional Court gave minimal attention to the issue of resource availability. It also failed to address some of the sensitive issues in respect of how the availability of resources is determined. In this respect, of course, budgets are not the only resources, but they are a key resource without which the desired housing access will not be possible.

#### 4.2.2. *Analysis of Section 28*

The Court resolved that the obligation inserted in Section 28, par. 1, (c), to provide shelter for children, is imposed primarily on the parents or family and only alternatively on the State. Thus, the State’s obligation comes into play only when, for instance, children are removed from their families. However, the Court accepted that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by Section 28.

The respondents in this case were children being cared for by their parents and not in the care of the State, or abandoned. In the circumstances, the Court concluded, there was no obligation on the State to provide shelter to the children and through them, to their parents. After all, there were no leads that it would have been in the best interests of children to be separated from their families.

#### 4.2.3. *The Constitutional Court’s Order*

The Constitutional Court distinguished between the negative obligation to refrain from impairing the right to housing and the positive obligation to take measures to provide access to housing. The case tested the latter part of the right of access to adequate housing, namely the measures that the State had taken. The Court made it clear that it was not for the judiciary to enquire whether better measures could have been adopted but rather to determine whether or not the State had violated the right of access to housing of the people concerned.

The Court ordered the State to act in order to meet the obligation imposed upon it by Section 26, par. 2 of the Constitution. It emphasized that the State’s programme must include reasonable measures to provide relief to persons living in intolerable conditions

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<sup>21</sup> Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *op. cit.*.

<sup>22</sup> Jaap de Visser, *op. cit.*, p. 2.

<sup>23</sup> See UN Committee on Economic Social and Cultural Rights, *General Comment No.3: The Nature of States Parties Obligations*, Fifth Session, E/1991/23, par. 11.



or crisis situations. At the date of the submission of the “*Grootboom* application”, the State Housing Programme fell short of this obligation<sup>24</sup>.

### ***5. Implementation, Enforceability and Supervision. Aspects Regarding the Realization of the Right to Adequate Housing***

#### ***5.1. The South African Housing Programme***

One of the central issues of the *Grootboom* case, around which a great deal of debate occurred, concerns the viability and consistence of the State’s Housing Programme. This is way, it seems appropriate to address the relevant aspects with regards to the impact of the functionality of the programme.

But before assessing these issues, one question arises: what does the National Housing Programme consist of? As we have shown above, in addition to legislative measures, administrative, judicial, economic, social and educational measures must be taken. Thus, the legislation adopted has to be supported by appropriate policies, programmes and budgetary support. To go more into detail, all three spheres of South African Government play a role in the delivery of housing rights. The National Department of Housing is tasked to develop national housing policy, to manage national housing programmes, to monitor and assess the impact of housing delivery, to manage housing information and to provide the necessary support to housing institutions. Through the Housing Development Funding Programme, the national department allocates funds to the provincial governments to finance national and provincial housing programmes. Provincial housing departments are thus the main direct implementers of housing policies. Local governments meanwhile act as developers and providers of internal bulk and connector infrastructure<sup>25</sup>.

In this respect, when talking about the national legislative and policy framework, since 1994, various legislative and policy developments have been introduced at a national level to provide an adequate framework for housing development. In a brief manner, worth mentioning are aspects such as:

- The Adoption of the Housing Act<sup>26</sup>, a key piece of legislation in the housing sphere which sets out the principles that must underpin the realization of housing rights;
- The Housing Subsidy Mechanism, which is the main vehicle of the housing programme;
- The People’s Housing Process, which supports home-building initiatives by individuals, families or communities;
- The Rental Housing Act (No. 50 of 1999)<sup>27</sup>, which provides alternative tenure forms;
- The National Norms and Standards in respect of Permanent Residential Structures, which aims to promote affordable and quality housing;
- The Community Reinvestment (Housing) Bill of 2002 which aims to provide minimum targets for financial institutions’ lending to low- and medium-income households for housing purposes;

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<sup>24</sup> See Karrisha Pillay, *op. cit.*

<sup>25</sup> See Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *op. cit.*

<sup>26</sup> The Housing Act, No. 107 of 1997.

<sup>27</sup> The Rental Housing Act, No. 50 of 1999.

- The Draft of the Prevention of Illegal Eviction and Unlawful Occupation of Land Amendment Bill;
- The Accelerated Managed Land Settlement Programme, initiated to facilitate the progressive access to basic services for people in crisis situations;
- Last, but not least, the budget allocation, at national, provincial and local levels.<sup>28</sup>

Assuring the realization of the right to adequate housing is a competency on national and provincial Government. The responsibility for implementation is generally given to the provinces. However, all levels of Government must ensure that the housing programme is reasonably and appropriately implemented; every step at every level of the Government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.

In the above paragraphs we tried to draw in schematic lines the most important features of the State's Housing Programme. The Constitutional Court examined this programme and concluded that what had been done so far was a major achievement. The programme at national, provincial and local level represents a systematic response to a pressing social need. Considerable thought, energy and resources have been devoted to housing delivery and the overall programme is aimed at realizing access to housing for all. Its long- and medium-term objectives could not be criticized. After all, we are facing a programme that is aimed at achieving the progressive realization of the right of access to adequate housing.

However, the Court found that the State had neglected the short-term aspect. It was clear that no real policy existed which could be applied to people in need of housing, in crisis situations. There was no provision in any policy, whether national, provincial or local, that applied to the *Grootboom's* group desperate situation.<sup>29</sup> In this context, the question whether the programme is sufficiently flexible to respond to those in desperate need and to cater for their immediate and short-term requirements, may be raised. The nationwide Housing Programme falls short of the obligations imposed upon the national Government to the extent that it fails to recognize that the State must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium- and long-term objectives. The national Housing Programme must plan for the fulfillment of immediate needs and the management of crises and thereby ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately<sup>30</sup>.

### 5.2. *The Role of the Human Rights Commission*

As we have seen, the Human Rights Commission was involved in the *Grootboom* case, as it was accepted in the proceedings, along with the Community Law Centre, as *amici curiae*. Assisting the Court in reaching a decision by submitting its opinions and arguments is, practically, one of the tasks that the Human Rights Commission fulfills. The South African Constitution specifically mandates it to monitor the implementation of economic and social rights. In this respect, Section 184, par. 3 provides that each year, the Human Rights Commission must require relevant organs of the State to provide the Commission with information on the measures that they have taken towards the

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<sup>28</sup> See Karrisha Pillay, Rashida Manjoo, Elroy Paulus, *op. cit.*.

<sup>29</sup> See Jaap de Visser, *op. cit.*, p. 2.

<sup>30</sup> Patrick Laurence, *Watershed Rights Ruling In Favor Of The Poor*, Financial Mail, 11<sup>th</sup> of October 2000, available on <http://www.fm.co.za/00/1013/currents/acurrent.htm>.

realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and environment. Further on, every year the Commission sends out questionnaires (referred to as protocols) to organs of the State as defined in the Constitution. These protocols aim to establish policy, legislative, administrative and budgetary measures put in place by these organs of the State to realize in particular, economic and social rights. The responses to these questionnaires are analyzed and released as the Socio-Economic Rights Report, which is sent to the Parliament. The Parliament uses this information to hold the Government departments accountable for their realization of the rights.

The Human Rights Commission is also involved in the enforcement of economic and social rights. This is done through:

- The handling of complaints on the violations of economic and social rights in the same way as it does with civil and political rights: members of the public lodge complaints on the violations of economic and social rights by the State or private persons including institutions;
- Raising awareness on the meaning and implementation of the rights as well as resources available for redress, if those rights have been violated;
- Training on the rights - workshops and training courses are organized from time to time to train people and institutions on accessing the rights;
- Research and public enquiries, including the monitoring of the realization of these rights.<sup>31</sup>

### *5.3. The Consequences of the Failure of Implementation and the Accountability of Government's Decisions*

Above all, it was noted that social movements are extremely important in the enforcement of economic, social and cultural rights and in the implementation of decisions regarding these rights. One of the major challenges faced by economic, social and cultural rights litigants is that, even where the courts issue favorable decisions, competent authorities of the State often fail to implement them. In this respect, it has been stated that the good judgment in *Grootboom* case likely had little follow up because there did not exist an effective social movement focused on housing. In contrast, the Treatment Action Campaign<sup>32</sup> has mobilized citizens to take maximum advantage of a decision regarding HIV/AIDS. It was stated that, if there are not social movements to enforce judicial rights, they are just *paper rights*. It was also emphasized that effective lawyering and litigation on economic, social and cultural rights matters involve having an understanding of social movements so that one proceeds with cases that are supported by victims, rather than by selecting an issue and subsequently seeking plaintiffs<sup>33</sup>.

For example, the case of *Grootboom*, which was decided in 2001, has yet to result in a significant increase in housing funding from the Government, and petitioners are still likely to return to court, in order to argue that the Government has failed to comply with the judgment of the Constitutional Court.

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<sup>31</sup> See Lindiwe Mokate, *op. cit.*.

<sup>32</sup> *TAC case*, 2002 (5) SA 721 (CC).

<sup>33</sup> Julieta Rossi, Bruce Porter, Geoff Budlender, Carol Pollack, *Creating New Paths towards Social Justice*, International Network for Economic, Social and Cultural Rights Inaugural Conference, 8-11 June 2003, Chiang Mai Thailand, p. 2-3.

Last but not least, even where implementation fails to take place, successful litigation can result in improvements regarding governmental negative obligations. For example, after the *Grootboom* case, the South African Government has been slower to evict people and courts have increasingly upheld the rights of those fighting evictions<sup>34</sup>.

All in all, good governance dictates that decision-makers account for their actions. Governments need to be responsive to the needs of the people over whom they govern. While there are many ways in which governments can be held accountable not all these are available especially in poor and developing countries, where in some cases the judiciary is weak and civil society is not adequately organized. Reporting on progress made toward the realization of economic and social rights by governments is crucial to the accountability process. In this respect, this is where, most definitely, the Human Rights Commission's role fits into this frame. Nevertheless, in a system where the principle of separation of powers operates, judges have a constitutional obligation to act as a check on the executive and the legislature and to protect and uphold the Constitution. The purpose of the Constitution is to provide for rights that can be enjoyed by people. Where such rights are not enjoyed it is the responsibility of the courts to enforce them<sup>35</sup>.

#### 5.4. *Grootboom* case – Precedent Setting?

When talking about evictions, the impact of the *Grootboom* case, although not primarily dealing with this issue, has to be taken into account. Thus, from many points of view, the *Rudolph* case can be regarded as quite a similar case to the one above mentioned. Briefly, in the situation of illegal occupation of land by people living in intolerable circumstances or truly homeless, the issue regarding the State failing to comply with its constitutional obligations as set out by the Constitutional Court in the *Grootboom* case, has once again been stressed<sup>36</sup>.

The precedent-setting *Grootboom* case inevitably began to chart a new course for the judiciary in South Africa as it sought to give substantive meaning to the economic, social and cultural rights in the Constitution. It allows for the evolution of constitutional thinking that impacts on the economic and social disparities between the rich and the poor. However, the extent to which individuals can rely on the judgment to obtain individual relief when faced with situations of homelessness is still an open question<sup>37</sup>.

The case of Neville Rudolph may become "*Grootboom II*", in that it seeks to apply and develop the principles established in both the *Grootboom* case and the case of *Minister of Health v TAC* on the rights of access to adequate housing and health care services. These cases require the Government to have in place and implement a reasonable programme to give effect to economic, social and cultural rights. The *Rudolph* case illustrates how this jurisprudence can practically assist people who are homeless or living in intolerable conditions.

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<sup>34</sup> Ibid.

<sup>35</sup> Steven Friedman, *Cross-checking Legislative Decisions*, 2000, available on [http://www.legalbrief.co.za/view\\_1.php?artnum=402](http://www.legalbrief.co.za/view_1.php?artnum=402).

<sup>36</sup> The judgment was delivered on the 7<sup>th</sup> of July 2003 by Justice Selwyn Selikowitz of the Cape High Court. The Court declared, *inter alia*, that the housing programme of the City of Cape Town fails to comply with its constitutional and statutory obligations in several aspects, among which: it did not make short-term provision or any form of relief for people in crisis or desperate situations, it fails to give adequate priority and resources to the needs of these people, it has not been implemented in such a manner that the right to access to housing is progressively realized etc.

<sup>37</sup> Ashraf Mahomed, *op. cit.*.

## ***6. The Impact of the Realization of the Right to Adequate Housing on the Realization of Other Economic, Social and Cultural Rights. Final Remarks***

The *Grootboom* Judgment is bold and provocative<sup>38</sup>. The case marks a significant milestone in the advancement of economic, social and cultural rights through its particular emphasis on people in desperate need.

In its decision, the Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting. Realizing economic, social and cultural rights enables people to enjoy one another and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. After all, the right to adequate housing cannot be separated from other fundamental rights. "A house isn't just protection from the elements. It's a little space in which you can study, you can work, you can love, you can connect up with your family . . . if you are in a situation of such desperation that all you can do is look for some shelter, it frustrates your enjoyment of all the other rights."<sup>39</sup>

For example, the *Grootboom* judgment is also important with regard to other economic, social and cultural rights where local governments are even more closely involved, such as the provision of water. The provision of potable water is clearly one of a municipality's critical competencies. The *Grootboom* case makes it clear that when local governments deal with issues such as the provision of water or basic municipal health care, they cannot ignore the needs of the people in desperate situations simply to achieve a better statistical result in the long term. Short-term needs of the most disadvantaged cannot be ignored. If they are, local governments will be at risk of violating the Bill of Rights<sup>40</sup>.

As a non legal follow-up of the *Grootboom* case, it can be affirmed that we might be facing a turning point in the relations between government and civil society. Although, as stated above, probably not supported by an appropriate social movement, the case at hand proved it had the potential of building a strong alliance with key pillars of civil society such as trade unions, churches, media and so on. It showed how the Constitution, which represents the best ideals and values of a country, can be, if properly used, a powerful tool for holding the Government accountable for its actions or omissions. In this respect, the case demonstrates that economic, social and cultural rights are only as strong as the willingness of civil society to enforce them. Thus, the Constitution creates a powerful tool in the hands of civil society, to ensure that the government gives proper attention to the fundamental needs of the poor, the vulnerable and the marginalized.

Above all, democracy is not only about voting once every few years. It is also about the ability of ordinary people to influence their Government, to ensure that it is responsive to their needs. The *Grootboom* case shows how this desideratum can be achieved. Creating intense debate in political and legal circles, the Court's decision strengthened the democracy and the promotion of economic, social and cultural rights.

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<sup>38</sup>BDFM, The Business Media Company, *Court sparks revolution or does it?*, 2004, available on <http://www.bday.co.za/bday/index/direct>.

<sup>39</sup> Anne Kelleher, *South African Judge Explains the Right to Housing*, available on [http://veracity.univpubs.american.edu/103100/story\\_5.html](http://veracity.univpubs.american.edu/103100/story_5.html).

<sup>40</sup> See Jaap de Visser, *op. cit.*, p. 2.