

## **Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy Conference to be held from 13-16 November 2014 at New York Law School**

“Developing the Right of Access to Adequate Housing In a Transformative Society: From Grootboom to Lwandle Residents”<sup>1</sup>

### **1. Introduction**

The Constitution of Republic of South Africa has been enacted with the view to transform South African society from an unequal society based on the basis of race to one in which there is opportunities for all in a democratic, participatory and egalitarian society. Prof Klare published a widely celebrated article in which he described the South African Constitution as a “transformative constitution”.<sup>2</sup> By this he meant “...a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.”

The transformative role of the Constitution was acknowledged by the then Chief Justice in **Soobramoney v Minister of Health, Kwazulu-Natal** when he wrote “A historic bridge reached between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition human rights,

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<sup>1</sup> Prepared and submitted by Mr Tshepang Monare and Mr Achmed Mayet (Legal Aid South Africa) for the “Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence, and Transition to Democracy Conference” to be held from 13-16 November 2014 at New York Law School.

<sup>2</sup> Klare K “Legal culture and transformative constitutionalism” (1998 14 *SAJHR* 146 – 188 at 150. Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351 352; and AJ Van der Walt ‘A South African reading of Frank Michelman’s theory of social justice’ (2004) 19 *SA Public Law* 253 255. See also **Road Accident Fund v Mdeyinde** 2011 (2) SA 26 (CC); **Biowatch v Registrar Genetic Resources** 2009 (6) SA 232 (CC) and **Batotar Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004 (4) SA 490 (CC) where the court recognized the transformative nature of the Constitution.

democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of sex, race, belief or class. South Africa has to contend with unequal and insufficient access to housing, food, water, health care and electricity”.<sup>3</sup>

This notion of transformative constitutionalism has found deep resonance not only in academic scholarship on the Constitution, but also in the jurisprudence of the Constitutional Court.<sup>4</sup> It can thus be seen to be embedded within the fabric of our South African Constitutional culture.<sup>5</sup> This notion is important as it is incorporated in the constitutional framework of addressing the injustices of the past.<sup>6</sup> The transformative process to be achieved is to ensure that those who were deprived of rights are able to claim and enforce those rights in a democratic society. Achieving this requires courts that are willing to develop a ‘jurisprudence which opens up sustained and serious engagement with the normative purposes and values which socio-economic rights should advance within the historical and social context of South African society’.<sup>7</sup>

Under apartheid the majority of black South Africans were deprived of the most basic services needed for survival and development. These services were construed as privileges to be distributed on the basis of apartheid’s distorted logic.<sup>8</sup> Resources,

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<sup>3</sup> 1998 (1) SA 765 (CC).

<sup>4</sup> See, for example: **S v Makwanyane** 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 262; **Du Plessis v De Klerk** 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) para 157; **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism** 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) paras 73–74; **Minister of Finance v Van Heerden** 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) para 142; **Hassan v Jacobs NO** 2009 (5) SA 572 (CC), para 28; **Biowatch v Registrar of Genetic Resources** 2009 (6) SA 232 (CC); **Road Accident Fund v Mdeyide** (2011) (2) SA 26.

<sup>5</sup> Liebenberg S “Human Rights in South African’s Constitutional Pact” a Human Rights Lecture delivered on 3 April 2012 which can be access at [www.casac.org.za/?page\\_id=24#ftnref20](http://www.casac.org.za/?page_id=24#ftnref20) last accessed on 06 July 2014.

<sup>6</sup> The Preamble to the **Constitution of the Republic of South Africa**, 1996 provides that “... We Therefore , through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”

<sup>7</sup> Klare Legal Culture and Transformative Constitutionalism SAJHR 1998at p146.

<sup>8</sup> South African Human Rights **Commission Reflections on Democracy and Human Rights; A Decade of the South African Constitution ( Act 108 of 1996)** 2006 at p53.

services and entitlements were distributed along racial lines, with blacks<sup>9</sup> and especially Africans being refused adequate services. Each of the expressions of apartheid has serious implications for the quality and affordability of basic services in South Africa today.<sup>10</sup> These inferior living conditions robbed the majority of their human dignity and deprived them of basic rights and laid the bedrock for gross social inequalities, social dislocations and destruction experienced by the majority in South Africa.<sup>11</sup>

Under that regime, housing was seen not as a basic human need and right but as an element of control within a policy which placed racial separation above the viability of communities within the town and cities and on the land.<sup>12</sup>

Also during apartheid, millions of black people were arbitrarily evicted on a regular basis from informal settlements as a result of “influx control” policies. Evictions have continued after the end of apartheid and affect the most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of the society, including the poor, women and children, who are engaged in a daily struggle to survive. These evictions at times result in homelessness and, in most instances, they occur in a manner that is incompatible with the fundamental human rights contained in the Constitution as well as other procedural safeguards on evictions.<sup>13</sup>

The infamous **Group Areas Act** of 1950 and 1966 went about designating every square inch of land for occupation by one of four 'racial' groups ('African', 'Indian', 'coloured', and 'white'). In an unusual display of irony and euphemism combined, the task was entrusted

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<sup>9</sup> The term blacks “is a term which includes all those who were previously disadvantaged under apartheid i.e. ( Coloureds, Indians and Africans)

<sup>10</sup> South African Human Rights **Commission Reflections on Democracy and Human Rights; A Decade of the South African Constitution ( Act 108 of 1996)** 2006 at p53.

<sup>11</sup> Louw PE *The Rise and Fall of Apartheid* 2004 Library of Congress Cataloguing-in-Publication Data, USA.

<sup>12</sup> See Housing Accord 27 October 1994 which can be accessed at [www.dhs.gov.za/sites/default/files/BOTSHABELO\\_ACCORD](http://www.dhs.gov.za/sites/default/files/BOTSHABELO_ACCORD) PDF last accessed on 8 August 2014.

<sup>13</sup> Chenwi L **Evictions In South Africa: Relevant International and National Standards** Community Law Centre (University of Western Cape) 2008 at p2.

to a 'Community Development Board' for most of the apartheid years. Within cities, 'coloured' and 'Indian' people were most affected, whereas 99.7 per cent of whites already lived in what became white group areas. Africans were effectively excluded from white areas, with the exception of domestic workers.<sup>14</sup>

Those with permission to do so resided in the distant townships, increasingly in grossly overcrowded conditions. Most whites were comfortably housed at low densities, and increasingly in fortress-like conditions of security. Indians were concentrated in much poorer housing, some built for owner-occupation by the state, in small 'group areas', sometimes after resisting removal from inner-city locations. 'Coloureds', concentrated in the Cape area, were removed to the Cape Flats townships, far from the city centre, where overcrowding and shack developments inevitably resulted.<sup>15</sup>

This paper will focus on how the judiciary has given effect to the right to housing beyond the scope of section 26 of the Constitution to address the critical shortage in state housing available to people who were previously disadvantaged under apartheid. The courts have used innovative ways to interpret the right of access to adequate housing enshrined in the Bill of Rights in such a creative way that not only delivers housing to the poor, but also enhances the powers of the court to make headway into the separation of powers doctrine to impose on government departments the need to make access to adequate housing a reality for South Africans.

This paper will also track all the relevant case law to illustrate the incremental development with regard to access to adequate housing in the context of separation of powers. In so doing the courts, in particular the Constitutional Court, has utilised judicial activism in such a manner that it is now clear that the rights enshrined in the Bill of Rights have both vertical and horizontal application between the individual and the State, and between private entities and the State. Reference will also be made to matters that have

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<sup>14</sup> Ronina Goodland "The housing challenge in South Africa" Urban Studies 1 November 1996.

<sup>15</sup> Ibid.

been undertaken or funded by the Impact Litigation Unit of Legal Aid SA in constitutional litigation to ensure access to adequate housing for indigent persons.

## **2. The state of housing in South Africa**

The housing sector is concerned with the delivery of basic services and houses within a spatial framework that relies on good location and transport infrastructure to ensure sufficient access to services. Therefore, a functional housing sector comprises a complex relationship between market forces, private sector firms, governmental rules and regulations, financing and facilitative interventions, as well as inputs and investments by the households.<sup>16</sup>

The Government of National Unity established after the April 1994 elections, which replaced the apartheid regime inherited a housing policy that has been designed by and for the private sector.<sup>17</sup> With an estimated 86% of households earning less than R3500 per month, housing affordability was seriously constrained and in obvious need of subsidy support. However, existing subsidies from the previous regime were designed to support the racially-defined framework of the government's apartheid policy. They were also expensive and unable to support the breadth of the need defined by a post-democratic administration.<sup>18</sup>

Twenty years since the advent of our constitutional democracy and after the Botshabelo Housing Summit (Housing Accord), South Africans still face challenges with regard to access to adequate housing. The goal of the Housing Accord was to increase housing delivery on a sustainable basis to a peak level of 350 000 units per annum within a five

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<sup>16</sup> Financial and Fiscal Commission **Exploring Alternative Finance and Policy Options For effective and Sustainable Delivery of Housing in South Africa** October 2013 at p 11.

<sup>17</sup> Bolnick J "UTshani Buyakhuluma (The grass speaks): People's Dialogue and the South African Homeless People's Federation (1994-1996) Environment and Urbanization 1996 Vol 8 at p153.

<sup>18</sup> Rust K "Analysis of South Africa's Housing Sector Performance" Finmark Trust December 2006 at p6.

year period to reach the government of national unity`s target of one million houses within five years.

At the Housing Accord government stated that : “Government strives for the establishment of viable, socially and economically integrated communities which are situated in areas allowing convenient access to economic opportunities, health, educational and social amenities and within which South Africa’s people will have access on a progressive basis to: a permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; portable water and adequate sanitary facilities including waste disposal and domestic electricity supply”<sup>19</sup>

The Housing Accord paved way for the development of a white paper which was a new housing policy and strategy for South Africa. Its aim was to enhance delivery of housing at a level unprecedented in the history of our country and to give provincial and local government the capacity to fulfill their constitutional obligations thus ensuring housing development. The principles, goals and strategies of the policy were transformed into legislation in the form of the **Housing Act** (107 of 1997).<sup>20</sup> This Act introduced individual housing subsidy programmes and a national housing code to eligible households that is persons with dependents, resident in South Africa, earning less than R3500 per month and who did not own a home.<sup>21</sup>

The **Housing Act** provides , among others, for the establishment of the housing data bank which is aimed at recording information for the purposes of the development

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<sup>19</sup> Address by the then Minister of Housing Joe Slovo at the Housing Summit held in Botshabelo October 1994.

<sup>20</sup> Khan F & Thurman S “setting the Stage: Current Housing Policy and Debate in South Africa Isandla Institute 2001 at p3.

<sup>21</sup> Section 3(5) of the **Housing Act** 107 of 1997 provides that :”

(5) The following housing assistance measures , which were approved for financing out of the Fund in terms of section 10A, 10B, 10C or 10d of the Housing Act are deemed to be national housing programmes instituted by the Minister under section 4(g)

(a) The Housing subsidy scheme;

Section 4 provides that:

(1) The Minister must publish a code called the National Housing Code”.

implementation and monitoring of national housing policy, providing reliable information for the purposes of planning for housing development and collecting, compiling and analyzing categorized data in respect of housing development, including, but not limited to, data categorized according to gender, race, age and geographical location.<sup>22</sup> This involves compiling a housing list where applicants for housing may ascertain their status on the waiting list.

The **Housing Act** paved the way for the adoption of the National Housing Subsidy Scheme, which is one of the key measures that Government has adopted to assist poor people to purchase a service site and to build their own home or improve the quality of their housing. Substantial reform of the common law has occurred as a result of two pieces of legislation that give effect to section 26 being **Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998** and **Extension of Security of Tenure Act (ESTA)**. **ESTA** extends protection against eviction to rural occupiers whose occupation was based upon consent and was initially lawful. **PIE** extends protection against eviction from certain categories of unlawful occupiers in both urban and rural areas. **PIE** gives effect to the constitutional protection of the right not to be evicted from one's home without a court order made after considering all the relevant circumstances.<sup>23</sup>

By the end of 1999 only 712 813 houses were completed, almost 300 000 houses below the target of 1 million housing units. Within the same period, the demand for new housing

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<sup>22</sup> Section 6 of the **Housing Act** provides that: "The Director-General must establish and maintain a national housing data bank (in this section referred to as the 'data bank') and, associated therewith, a national housing information system (in this section referred to as the 'information system').

(2) The objects of the data bank and information system are to-

(a) record information for the purposes of the development, implementation and monitoring of national housing policy;

(b) provide reliable information for the purposes of planning for housing development;

(c) enable the Department to effectively monitor any aspect of the housing development process;

(d) provide macro-economic and other information with a view to integrating national housing policy with macroeconomic and fiscal policy and the co-ordination of housing development with related activities;

(e) serve and promote housing development and related matters; and

(f) collect, compile and analyse categorized data in respect of housing development, including, but not limited to, data categorized according to gender, race, age and geographical location.

<sup>23</sup> Section 26 of the **Constitution of the Republic of South Africa**, 1996 provides that:

(3) 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.

was estimated at 3 million units. Ten years later, by the end of 2004, the government had only succeeded in building approximately 1.5 million housing units instead of 2 million. The situation left the government with a new challenge of closing the huge housing backlog. The backlog is more acute in townships found in the Western Cape and Gauteng provinces and also in poor rural areas of South Africa.<sup>24</sup>

Although there have been various reasons why government could not close on the backlog for the provision of subsidized housing, the reality is that in South Africa, the gap market is growing, as more and more people do not qualify for a subsidy or for a mortgage bond. This gap market is made worse by the lack of commercial incremental housing products. The finance-linked individual subsidy programme (FLISP) has not succeeded in encouraging the private sector to provide mortgages for households in the gap market. This burden has been passed onto the State. Population growth and migration to cities add to the demand for housing and housing subsidies. Increasing costs over time imply that more subsidies will be required to deliver on promises. The high levels of unemployment in South Africa mean that households are potentially eligible for fully subsidised houses. This has resulted in an increasing burden and dependence on the State for housing.<sup>25</sup>

The general house survey (GHS) found that 14, 1% of households (13,6% for Census 2011) lived in informal dwellings, nationally. Households in North West (22,8%), Gauteng (20,9%), and Western Cape (15,4%) were most likely to live in informal dwellings, while the smallest prevalence of informal dwellings was observed in Limpopo (4,2%) and Northern Cape (7,9%). The percentage of households that lived in informal dwelling increased by less than a percentage point nationally. In North West, the percentage of households living in informal dwellings, however, increased by 10,5%. The largest decline

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<sup>24</sup> Radikeledi L “The assessment of the role of local government”

<sup>25</sup> See Financial and Fiscal Commission report on **Exploring Alternative Finance and Policy Options For effective and sustainable Delivery Of Housing In South Africa 2013** at p 10-11.

was noted in Mpumalanga. With the possible exception of the Northern Cape, survey estimates compare well to the statistics derived from Census 2011.<sup>26</sup>

The percentage of households that maintained what is described as other tenure arrangements increased from 11,7% in 2002 to 13,1% in 2012. These arrangements include living in dwellings rent-free, for example with parents or other relatives, and are a sign of financial stress as households bundle together their living arrangements to save some money on rent or perhaps rates and taxes. It is important to note that these arrangements started to become more prevalent after the financial crisis of 2008 – a time during which an increasing number of households started to experience financial strain. It was found that across the country, 16,3% of households felt that the walls of their dwellings were weak or very weak, whilst 16,4% felt that the roof was weak or very weak.<sup>27</sup>

At the time of the survey, 14,2% of South African households were living in an RDP or state-subsidised dwelling while a further 13,3% had at least one household member on a demand database/waiting list for state-subsidised housing. The percentage of households that received a government housing subsidy increased from 5,5% in 2002 to 8,2% in 2012. Female-headed households were more likely to have received housing subsidies than male-headed households in 2012 (10,1% compared to 6,9%). This is in line with government policies that give preference to households headed by individuals from vulnerable groups, including females and individuals with disabilities.

Some of the issues that contributed to slow or lack of delivery of houses are that applicants for subsidised housing have not received communication on the status of their applications, there is no proper coordination of an audited housing waiting list, there are no clear remedies available to applicants on a waiting list who allege corruption in the allocation of house. Some of the RDP houses were without doors, roofs and windows and

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<sup>26</sup> See Statistics SA on **General Household Survey** released 2012 and revised 4 October 2013 at p21.

<sup>27</sup> Ibid.

others were half complete. Some residents said they had been told that the houses could not be completed because the government had no funds. Other residents claim that constructors abandoned the project after the government failed to pay them.<sup>28</sup>

The above dissatisfaction has led to the escalation of popular protest throughout the country that is generally recognised to have started in 2004 and has been attributed to failures in service delivery.<sup>29</sup> These protests are viewed as “service delivery”, “rebellion of the poor”, “municipal revolt” or “ring of fire”. Most of the recorded protests had taken place in the informal settlements or poor urban areas in the country’s biggest metro such as Cape Town, Johannesburg and Ekurhuleni. Although there is no consensus on how to classify the protests, it has been acknowledged that majority of the protest were about service delivery.<sup>30</sup>

Whereas the reasons for the protests either violent or non-violent vary, most of the protests were attributed to the failure in service delivery. Poor service delivery of housing, electricity, water and sanitation topped the grievances in various communities.<sup>31</sup> In certain areas residents demanding for houses, water and electricity indicated that they spent years waiting for RDP housing units which have never materialised and there has been a failure by the state to get title deed for the land to develop RDP houses.<sup>32</sup> In terms of the GHS there was considerable variation between provinces in the perceptions about housing quality. Most complaints were noted in the Western Cape, Northern Cape and KwaZulu-Natal. Households in Limpopo, and particularly Gauteng seemed most content with the general quality of their homes walls and roofs.<sup>33</sup>

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<sup>28</sup> Seleka N “Unfinished RDP houses leaves residents fuming” Sowetan 20 June 2012.

<sup>29</sup> Booyesen S “Public Participation in democratic South Africa: From popular mobilization to structural cooptation and protest” *Politeia* 28 (1) 1-27.

<sup>30</sup> See SA History Online “Public Protest in Democratic South Africa” which can be accessed at [www.sahistory.org.za/article/public-protest-democratic-south-africa](http://www.sahistory.org.za/article/public-protest-democratic-south-africa) last accessed 2 September 2014.

<sup>31</sup> See SA History Online “Public Protest in Democratic South Africa” which can be accessed at [www.sahistory.org.za/article/public-protest-democratic-south-africa](http://www.sahistory.org.za/article/public-protest-democratic-south-africa) last accessed 2 September 2014.

<sup>32</sup> Magubane K “Police intervene in Mooiplaas service-delivery protest” *Business Day* 30 September 2013.

<sup>33</sup> See Statistics SA on **General Household Survey** released 2012 and revised 4 October 2013 at p2.

The economic recession has resulted in the closure of many small and medium companies in the rural areas and commercial farmers have reduced the land under cultivation so as to keep commodity prices from falling. This has led to an influx of unemployed people migrating to the urban areas in search of jobs. As a result of the shortage and available accommodation they have set up shacks in the backyards of those occupying state funded housing. Current statistics indicate there are approximately 1 million backyard shacks in South Africa. Until recently the state assumed that most people staying in backyard shacks in informal settlements and in backyards would eventually be housed in state housing. The steady growth of households leaving gin shacks has forced government to acknowledge the intractability of the problem of backyard dwellers.

In the Eastern Cape a report by the public protector has found that the municipality does not have a defined process to deal with applications for RDP houses and its record management system is not efficient. The report also found that the municipality did not inform all people who applied for RDP houses of the outcome of their applications and some complainant`s names did not appear on the list of approved applications that the municipality received from departments.<sup>34</sup>

Following an investigation into the housing situation in South Africa, the Financial and Fiscal Commission (FFC) produced a report titled Exploring Alternative Finance and Policy Options for Effective and Sustainable Delivery of Housing in South Africa and estimated that it would cost government approximately R800 billion to eradicate the housing backlog by 2020.<sup>35</sup>

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<sup>34</sup> See Office of Public Protector Report: **Investigation into Alleged Of failure To Keep Records Of Application for RDP Houses By The Ngqushwa Local Municipality, Eastern Cape Province** 2009.

<sup>35</sup> See Financial and Fiscal Commission report on **Exploring Alternative Finance and Policy Options For effective and sustainable Delivery Of Housing In South Africa 2013**

### 3. Access to adequate housing in a constitutional context

The Constitution provides for right of access to adequate housing and places an obligation on the state to progressively realise access to adequate house by using legislation and other measures within its available resources.<sup>36</sup> The provision further provides protection from evictions. The right to housing is recognised as adequate shelter that fulfils a basic human need which is vital to the socio-economic well-being of the nation and product of human endeavour and enterprise.<sup>37</sup> This right is related to other rights including adequate security, health <sup>38</sup> and a healthy environment,<sup>39</sup> privacy <sup>40</sup> and to participate in decision making about housing.

The Constitution does not provide for what “access to adequate housing’ means. This is left to the implementers of the legislation to provide for houses that may be habitable. Since this right is entrenched in the Constitution the state is duty bound to respect, protect, promote and fulfil the right of access to adequate housing.<sup>41</sup> The state is also obliged to

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<sup>36</sup> Section 26 of the **Constitution of the Republic of South Africa**, 1996 provides that:

- (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 of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

<sup>37</sup> The Preamble to the **Housing Act** 107 of 1997 provides that: “..AND WHEREAS the Parliament of the Republic of South Africa recognises that housing, as adequate shelter, fulfils a basic human need; housing is both a product and a process; housing is a product of human endeavour and enterprise...

<sup>38</sup> Section 27 of the **Constitution of the Republic of South Africa**, 1996 provides that:

- (1) Everyone has the right to have access to-
  - (a) sufficient food and water ;

<sup>39</sup> Section 24 of the **Constitution of the Republic of South Africa**, 1996 provides that: “ everyone has the right-

- (a) to an environment that is not harmful to their health or wellbeing ; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures”

<sup>40</sup> Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

<sup>41</sup> Section 7 of the **Constitution of the Republic of South Africa**, 1996 provides that :  
“(2) The state must respect, protect, promote and fulfill the Rights in the Bill of Rights”.

give priority to the needs of the poor in respect of housing development and to consult meaningfully with individuals and communities affected by housing development. Such housing developments must, among others, provide a choice and tenure that is reasonably possible. To further provide access to adequate housing, the state must provide an information system that is able to monitor any aspects of housing developments and to be able to collect, compile and analyse categorised data in respect of housing development, including, but not limited to, data categorised according to gender, race, age and geographical location. In performing its obligations, government must perform them diligently and without delay.<sup>42</sup>

The word “access” has various dimensions. It includes physical, geographical, information and affordable access. Physical access means that adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be given some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing, needs of these groups.

Geographical access, implies that houses must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

Information access, implies that everyone must have access to information on housing opportunities and developments. This information must include the information regarding

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<sup>42</sup> Section 237 of the **Constitution of the Republic of South Africa**, 1996 provides that: “All constitutional obligations must be performed diligently and without delay”.

the status of housing applications, allocation of houses and areas earmarked for developments.

Affordable access implies that personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by State to guarantee the availability of such materials.

Adequate house means that the way housing is constructed. The building materials used must provide protection from the elements and suitable space for eating, sleeping, relaxing and family life.<sup>43</sup> In other words, it must provide the inhabitants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and diseases. The physical safety of occupants must also be guaranteed.<sup>44</sup>

The state is obliged by section 26 to achieve the progressive realisation of this right through reasonable legislative and other measures within its available resources. This provision has been the most contentious issue in the litigation against the state to provide adequate housing. Courts have been called upon to determine if the measures taken by the state have been reasonable in the realisation of the right.

Subsection 3 provides that 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. The obligation to consider all relevant circumstances is significant in the context of evictions because it represents a drastic departure from the common law

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<sup>43</sup> Smit W "Towards the Right to Adequate Housing" 2000 at p2.

<sup>44</sup> General Comments and UN Fact Sheet: The Right to adequate Housing No 21.

position where eviction was dealt with as, on the one hand, an abstract or absolute remedy for a private land owner without regard for the personal circumstances of the occupiers and, on the other hand, an instrument of state-sponsored eviction from either public or private land with little or no court intervention and no regard for the harsh consequences that the eviction may have on the occupiers. The impact of section 26(3) of the Constitution lies in the fact that courts are required to consider the personal circumstances of the unlawful occupiers to satisfy themselves of the justice and equity of the eviction.<sup>45</sup>

The **Prevention of Illegal Eviction from Unlawful Occupation of Land (PIE) Act** was enacted to deal with evictions. Its purpose is to provide for the prohibition of unlawful eviction and to provide for procedures for the eviction of unlawful occupiers. Prior to the adoption of the PIE Act, the apartheid-era **Prevention of Illegal Squatting Act (PISA)** rendered unlawful occupiers' subject both to summary eviction and criminal prosecution. Even if individuals had lived their entire lives on the land occupied, a new owner could withdraw permission to remain, and the occupiers would be quickly and forcibly removed. **PISA** was an integral part of the residential segregation that was a "cornerstone of the apartheid policy."

**PIE ACT** was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people. It acknowledges their quest for homes, while recognising that no one may be deprived arbitrarily of property. The preamble quotes sections 25(1) and 26(3) of the Constitution. Section 7 protects persons from being evicted unless it is just and equitable to do, after considering all the relevant circumstances including, except where the land is sold in a sale of execution pursuant to a mortgage, 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

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<sup>45</sup> Muller G "The Impact of section 26 of the Constitution on the Eviction of Squatters in South African Law" Dissertation presented in partial fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University 2011 at p99.

<sup>45</sup> 1995 (3) SA 632; 1995 (7) BCLR 861 (CC).

unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

The question of “just and equitable” is a constitutional issue and as such it must meet the requirements of the Bill of Rights in the Constitution.<sup>46</sup> Courts are empowered when deciding a constitutional matter within its power to make any order that is just and equitable when it has declared any law or conduct inconsistent with the Constitution invalid.<sup>47</sup>

In **PE Municipality** it was stated that the court is required —to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case.

It contains two central operative provisions: Section 4 governs evictions brought by owners of land, and Section 6 governs evictions brought by organs of state. Both require courts asked to order an eviction to consider whether it would be “just and equitable” to grant the eviction. Section 4 differentiates between occupiers who have occupied the land for less than or more than six months, but in both cases requires the court to consider “all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.” Where the occupier has occupied the land for more than six months, the Act also requires the court to consider whether

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<sup>46</sup> See **Haakdoornbult Boerdery CC v Mphela & Others (553/05) [2007] ZASCA 69** at para 36.

<sup>47</sup> Section 172(1) of the **Constitution of the Republic of South Africa, 1996** provides that : “ When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

“land has been made available or can reasonably be made available by a municipality or other organ of state or other land owner for the relocation of the unlawful occupier.”<sup>48</sup>

Where the state fails to realise the right of access to adequate housing, it shall have failed in its constitutional duty to progressively realise the right.

#### **4. Adequate housing in international law context**

Prior to 1994 South Africa was in conflict with both the international community and international law. Apartheid, premised on race discrimination and the denial of human rights, was contrary to both to the law of the UN Charter and to the norms of human rights, non-discrimination and self-determination generated by the post-World War II order.<sup>49</sup>

In its preamble, the Constitution announces an intention to build a united democratic South Africa able to take its rightful place as a sovereign state in the family of nations. At a historical and practical level, the first object was to transform the international status of our country from a pariah or rogue state to a worthy participant in the international scene. At a jurisprudential level, our constitutional democracy embraces globalised standards and norms set by international law subject to very modest pre-conditions. To that end, our Constitution has adopted a mixed approach to the incorporation of international law into or domestic law.<sup>50</sup>

In terms of section 39(1) (b) of the Constitution courts, tribunal or forums, may consider international law when interpreting the Bill of Rights. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament<sup>51</sup> and when interpreting any legislation every court must prefer any reasonable interpretation of

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<sup>48</sup> Williams A “The Right to Housing in South Africa: An Evolving Jurisprudence” January 01, 2014

<sup>49</sup> Dugard J “International Law and the South African Constitution” EJIL 1997 77-92.

<sup>50</sup> Justice Dikgang Moseneke “The role of comparative law and public international law in domestic legal systems: a South African perspective” Advocate December 2010.

<sup>51</sup> Section 232 of the **Constitution of the Republic of South Africa**, 1996.

the legislation that is consistent with international law over any alternative interpretation that is consistent with international law.<sup>52</sup> This interpretation ensures that courts will be guided by international norms and the interpretation placed upon these norms by international courts and other institutions.<sup>53</sup>

In **S v Makwanyane and Another** the Constitutional Court found that the ambit of international law, envisaged as an interpretive guide, included both binding and non-binding international law.<sup>54</sup> This is significant because many of the provisions in the Bill of Rights were inspired by and closely resemble the structure and language used in the formulation of comparable provisions in international law instruments.<sup>55</sup>

International law has been used in a range of cases including **S v Williams**,<sup>56</sup> **Coetzee v Government of Republic of South Africa**,<sup>57</sup> **Ferreira v Lenin N.O**,<sup>58</sup> **S v Rens**,<sup>59</sup> **Bernstein v Bester**,<sup>60</sup> **S v Bassoon**,<sup>61</sup> **Kaunda v President of South Africa**,<sup>62</sup> **Sidumo & Another v Rustenburg Platinum Mines**<sup>63</sup> and **Centre for Child Law v Minister for Justice and Constitutional development**.<sup>64</sup>

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<sup>52</sup> Section 233 of the **Constitution of the Republic of South Africa**, 1996.

<sup>53</sup> Dugard J "International Law and the South African Constitution" EJIL 1997 85.

<sup>54</sup> 1995 (6) BCLR 665; 1995 (3) SA 391; (1996) (2) CHRLD 164; 1995 (2) SACR (1).

<sup>55</sup> Muller G "The Impact of section 26 of the Constitution on the Eviction of Squatters in South African Law" Dissertation presented in partial fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University 2011 at p158.

<sup>56</sup> 1995 (3) SA 632; 1995 (7) BCLR 861 (CC).

<sup>57</sup> 1995 (10) BCLR 1382; 1995 (4) SA 631.

<sup>58</sup> 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

<sup>59</sup> 1996 (2) BCLR 155; 1996 (1) SA 1218.

<sup>60</sup> 1996 (4) BCLR 449; 1996 (2) SA 751.

<sup>61</sup> 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC).

<sup>62</sup> 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

<sup>63</sup> [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 ( ) BCLR 1558 (CC).

<sup>64</sup> 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

The right to adequate housing is a universal right, recognized at the international level and in more than one hundred national constitutions throughout the world. It is a right recognized as valid for every individual person.<sup>65</sup> It is founded and recognized under international law.

Adequate housing was recognized as part of the right to an adequate standard of living in the 1948 **Universal Declaration of Human Rights** and in the 1966 **International Covenant on Economic, Social and Cultural Rights**. The UDHR instrument has ripened themselves into customary international law and thus is applicable to even those states that are not members of the United Nations.<sup>66</sup>

Enunciated under article 25(1) of the **Universal Declaration of Human Rights**, the right to adequate housing has been codified in other major international human rights treaties. Article 11(1) of the **ICESCR** provides that "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate housing, and to the continuous improvement of living conditions." This article is generally accepted as one of the most significant legal sources of this right.<sup>67</sup>

**International Covenant on Civil and Political Rights**,<sup>68</sup> article 17(1), protects persons from arbitrary or unlawful interference with their homes. The **International Convention on the Elimination of All Forms of Racial Discrimination**,<sup>69</sup> prohibits discrimination on account

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<sup>65</sup> Golay C & Ozden M "The Right to Housing A fundamental Human Right by the UN and recognized in regional Treaties and Numerous National constitutions"

<sup>66</sup> Thiele B "The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health" American Public Health Association 2002 712-715.

<sup>67</sup> Pierhurovica L, Kucs A & Sedlova Z "The Right to Housing: International, European and national Perspective" at p103.

<sup>68</sup> International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UNTS 171, entered into force March 23, 1976.

<sup>69</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, entered into force January 4, 1969

of race, color, or national or ethnic origin with respect to the right to housing. Likewise, the **Convention on the Elimination of All Forms of Discrimination Against Women**,<sup>70</sup> article 14(2) (h), obliges states parties to eliminate discrimination against women in rural areas to ensure that such women enjoy adequate living conditions, particularly in relation to housing.<sup>71</sup>

The **United Nations Committee on Economic, Social and Cultural Rights** has underlined that the right to adequate housing should not be interpreted narrowly. Rather, it should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified mainly in the Committee's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions. The right to adequate housing contains freedoms. These freedoms include: Protection against forced evictions and the arbitrary destruction and demolition of one's home the right to be free from arbitrary interference with one's home, privacy and family; and the right to choose one's residence, to determine where to live and to freedom of movement.<sup>72</sup>

The right to adequate housing contains entitlements. These entitlements include: security of tenure; housing, land and property restitution; equal and non-discriminatory access to adequate housing; participation in housing-related decision-making at the national and community levels.

The **African Charter on Human and Peoples' Rights** makes no specific mention of the right to adequate housing. However, other provisions such as the right to life (art. 4) and the right to physical and mental health (art. 16) arguably provide a basis for the assertion of the right to housing.

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<sup>70</sup> Convention on the Elimination of All Forms of Discrimination against Women, GA Res 34/180, UN GAOR Suppl (No. 46) at 193, UN Doc A/34/180, entered into force September 3, 1981.

<sup>71</sup> Thiele B "The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health" American Public Health Association 2002 712-715.

<sup>72</sup> UN Higher Commissioner for Human Rights **The Right to adequate Housing** Fact Sheet No 21/Rev.1

## 5. How has the right developed since the advent of democracy?

### 5.1 Introduction

The right of access to adequate housing has been largely litigated in our courts since the advent of democracy and today 20 years later it is being litigated in our courts. As it will be seen from the discussion hereunder, litigation has stemmed from providing access to adequate housing to the protection of being evicted from a home without a court order.

On 4th October 2014, it will be 14 years since the Constitutional Court handed down its landmark judgment in the Grootboom case.<sup>73</sup> The judgment explained some of the key duties imposed on the State by the right of access to adequate housing as contained in section 26 of the Constitution. While the ruling has gone a long way in transforming evictions laws in South Africa, it was too little too late for Mr Irene Grootboom the main applicant who died without receiving a roof over her head.

Four years ago, the Constitutional Court observed that seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved and The quest for a roof over one's head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy. In view of prevailing socio-economic conditions, this is understandable.<sup>74</sup>

Justice Yakoob observed that housing rights in section 26 must be understood in their social and historical context. It is in this context that we discuss the incremental development of housing law and the constitutional obligation of the state to provide access to adequate housing. The sheer volume of litigation over the right has meant that

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<sup>73</sup> Liebenberg S "What the law say about evictions" Mail & Guardian 1 September 2014.

<sup>74</sup> **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another** (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC)

the applicable law is constantly being re-interpreted and the related rights and underling principles have been more significantly developed than any other socio-economic right.<sup>75</sup>

In discussing and analysing the cases below, reference will also be made to matters that were funded by the Impact Litigation Unit of Legal Aid SA. The Unit was established in January 2004 to assist in making the Constitution a living reality for the marginalised segments of our population. It provides Legal Aid SA with the opportunity to undertake and fund litigation or other legal work that can truly live up to the Unit's name and have a profound "impact" on a group or significant segment of a group. This is where the opportunity exists to establish a legal precedent, jurisprudence or clarify aspects of the law that will be followed in dealing with indigent persons, either by class action or by litigating of a small number of matters calculated to bring about the settlement of a much larger group of disputes, the matters have a potential to resolve a large number of disputes or potential disputes.

## **5.2 Discussion and analysis of case law on housing**

### **(a) Grootboom case, invasion of land and subsequent eviction<sup>76</sup>**

This case was decided after the Constitutional Court held that the issue of whether socio-economic rights are justiciable at all in South Africa was put beyond question by the text of the Constitution as construed in the judgment **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa**.<sup>77</sup> In this case, the court decided that the question of how socio-economic rights were to be enforced, however, was a difficult issue which had to be carefully explored on a case-by-case basis, considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case.

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<sup>75</sup> Tissington K "SERI submission to the Lwandle Ministerial Enquiry" 15 September 2014. at p4.

<sup>76</sup> **Government of the Republic of South Africa and Others v Grootboom and Others** [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) par 33.

<sup>77</sup> 1996 (4) SA 744 (CC).

In the **Grootboom** case, the respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to a High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held

- that, in terms of the Constitution the State was obliged to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children;
- that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of the Constitution and
- that the State was bound to provide this rudimentary shelter irrespective of the availability of resources. The appellants were accordingly ordered by the High Court to provide those among respondents who were children, as well as their parents, with shelter.

The appellants appealed against this decision.

The *Grootboom* judgment has finally settled any doubt around the justiciability of the socio-economic rights enshrined in the Constitution. It emphasised that, as was held in the first Certification judgment, socio-economic rights are justiciable despite the fact that the enforcement of these rights has budgetary implications for the state. The judgment also placed people in destitute in the forefront of the recipients of access to housing.

*Pillay*, submits that the other impact of the *Grootboom* judgment is on international law and, in particular, on the interpretation of the **International Covenant on Economic, Social and Cultural Rights** (ICESCR). While South Africa has not yet ratified the ICESCR, the Constitutional Court, at the invitation of the *amicus curiae*, relied in *Grootboom* on the interpretation of the ICESCR to give meaning to section 26 of our Constitution, in particular the words “progressive realisation” contained in section 26(2). In view of this, *Grootboom*, is perceived as contributing to the development of a “transnational consensus” on international law obligations in relation to socio-economic rights.<sup>78</sup>

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<sup>78</sup> Pillay K “Implementation of Grootboom: Implications for the enforcement of socio-economic rights”.

The *Grootboom* judgment became the foundation case in assessing the state's responsibilities on socio-economic rights and has been used as the basis of other legal arguments. It was a key component of the Treatment Action Campaign's successful court case against the government for its delays in providing effective measures to cut mother-to-child transmission of HIV.

The *Grootboom* further provides that the right imports "at the very least, a negative obligation . . . upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".<sup>79</sup>

**(b) Kayalami Ridge, property rights and government obligation<sup>80</sup>**

Alexandra Township, a densely populated township in the Greater Johannesburg Municipal area, was one of the affected areas. The Jukskei River that runs through the Township had come down in flood during March 2000 destroying the homes of approximately 300 people living on the banks of the river below the flood line. Some of the Alexandra flood victims were given shelter by the Rhema Church in one of its halls and others in army tents erected on land owned by the Sandton Municipality in Marlboro.

The flood victims were living there in overcrowded and unhealthy circumstances without sufficient water and sanitation. Huts were later erected on the land in place of the tents, but this did little to improve the conditions in which the flood victims were living.

At a meeting attended by the Premier of Gauteng, the Gauteng MEC for Housing and representatives of the Command Centre it was agreed that there was an urgent need to make provision for the accommodation of the Alexandra flood victims and to establish a

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<sup>79</sup> 2000 ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

<sup>80</sup> 2001 3 SA 1151 (CC).

transit camp for this purpose. After considering various options a portion of state land on which the Leeuwkop Prison stands was identified as the most suitable site for the transit camp. No discussions were, however, held with residents in the vicinity of Leeuwkop. They first learned of the government's plans when a contractor moved onto the prison site and started work. Those residents formed a group of residents and applied for an order restraining the respondents from proceeding with an informal settlement on the land near Leeuwkop Prison

In the High Court, the Kyalami residents contended that there was no legislation that authorised the government to take the action it took and that, absent legislation authorising it to do so, the government's decision to establish a transit camp for the flood victims on the prison farm was unlawful. This the government disputed, saying that it had a constitutional obligation to assist the flood victims, and that as owner of the land it was entitled, and indeed obliged, to make the land available for such purposes. It contended that the only decision that had been taken was to consent to the transit camp being erected on state property

The Court further ruled that procedural fairness did not require government to do more in the circumstances than it had undertaken to do, namely to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. According to the Court "To require more would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it".

The Court used the proportionality test to uphold the right of access to adequate housing against the right to property. The Court held that although the property interests of the Kyalami residents was only a factor, the interest of the flood victims and their constitutional right of access to housing was also a factor to be considered.<sup>81</sup> According

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<sup>81</sup> Par 106.

to the court the argument that property values may be affected by a low-cost housing development on neighbouring land is a fact that is relevant, but it is one of many factors and could not in the circumstances of the case stand in the way of the constitutional obligation that the government has to address the needs of homeless people.<sup>82</sup>

The test as applied by the courts strengthens the remedies granted in socio-economic rights litigation, it also shows how the proportionality test can be applied to cases that invoke purely positive obligations.<sup>83</sup>

The decision empowered the government to provide relief for victims of disaster and was therefore a 'victory' for housing rights since the government successfully defended its obligation to provide adequate shelter for vulnerable residents

### **(c) Port Elizabeth Municipality v Various Occupiers safeguard rights by joining relevant organs of state**

This matter was funded by the Impact Litigation Unit of Legal Aid SA to obtain clarity on the role and responsibility of a municipality in eviction proceedings that take place within its jurisdiction.

Port Elizabeth Municipality filed an eviction application in response to a neighbourhood petition against 68 adults and children occupying shacks erected on privately owned land. They had been living on this undeveloped land for between two to eight years and were willing to vacate the property subject to reasonable notice and suitable alternative land. The legislation required that before granting an eviction order, the courts must be of the opinion "that it is just and equitable to do so", after considering all the relevant circumstances and where occupants have been there more than six months, whether land has or can be made available for relocation.

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<sup>82</sup> Par 107.

<sup>83</sup> Mbazira C **Litigating Socio-economic Rights in South Africa A Choice Between corrective and distributive justice** PULP 2009 at p89.

The Municipality had embarked on a comprehensive housing development programme. Relying on the Constitutional Court's decision in *Grootboom*, it argued that if it were obliged to provide alternative land, the Court would effectively be requiring preferential treatment to this particular group of occupiers,. The High Court granted the eviction order, but on appeal, the Supreme Court of Appeal (SCA) held that the eviction order should not be granted without an assurance that the occupiers would have some measure of security of tenure. On appeal to the Constitutional Court, the Court held that, considering the lengthy period during which the occupiers have lived on the land, the fact that eviction was not necessary for the land to be put to productive use, the Municipality's failure to consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appeared to be genuinely homeless and in need, it is was not “just and equitable” to order the eviction.

The Court found that the State has a constitutional responsibility to satisfy both property rights (section 25) and housing rights (section 26) and that solutions to difficult problems must be found on a case by case basis, considering all relevant circumstances, including the manner in which the occupation was effected, its duration and the availability of suitable alternative accommodation or land.

**(d) Occupiers of 51 Olivia Road, Berea Township, meaningful engagement<sup>84</sup>**

More than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) applied for leave to appeal against a decision of the Supreme Court of Appeal. They challenged the correctness of the judgment and order of that Court authorising their eviction at the instance of the City of Johannesburg (the City) based on the finding that the buildings they occupied were unsafe and unhealthy. The City was ordered to provide those of the occupiers who were “desperately in need of housing assistance with relocation to a temporary settlement area.

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<sup>84</sup> 2008 3 SA 208 (CC).

The City sought these evictions as part of broader regeneration strategy, one aspect of which was the identification, clearance and ultimate redevelopment of 'bad' buildings in the inner-city district. The **National Building Regulations and Building Standards Act** (NBRA), an apartheid-era law that grants municipalities the power to evict tenants of any building deemed unsafe or unhealthy, provided the legal basis for the City's emergency applications. The residents of these buildings opposed the applications on several statutory and constitutional grounds, including the fact that the City's failure to provide access to adequate housing as required by section 26 of the South African Constitution precluded their eviction.

Rather than imposing a direct remedy, the Court instead constitutionalised a novel 'engagement' requirement in housing-rights cases. Engagement, which requires government entities to consult with residents affected by policy decisions that may involve eviction and publicly report on that process, offers a novel and potentially powerful mechanism for enforcing socio-economic rights that limits court intervention in policy decisions.<sup>85</sup> Meaningful engagement is a factor under PIE to be taken into account by the court in deciding whether an eviction will be just and equitable.

The Court observed that: "Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the

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<sup>85</sup> Ray B "Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through "Engagement". Human Rights law Review (2008) 8 (4): 703-713. See also Liebenberg S "Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of meaningful engagement" African Human Rights law Journal 2012.

engagement process should preferably be managed by careful and sensitive people on its side.”<sup>86</sup>

The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to “improve the quality of life of all citizens and free the potential of each person”. Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.

But other aspects of engagement offer a stronger remedial ‘bite.’ Under this new engagement requirement, local governments seeking to evict residents for any reason must now develop a process for consulting those residents. To be ‘meaningful’, as the Court requires, that process must offer real opportunity for negotiating a mutually acceptable solution that respects the right to adequate housing under section 26. Civil society groups are specifically empowered to act as facilitators in this process, thus expanding the range of perspectives and enhancing the residents’ bargaining power.

At its best, engagement will avoid the need for court involvement altogether. Over the short term, the municipality will be able to proceed, perhaps with some modifications to accommodate the residents, with whatever plan involves the eviction. The displaced residents will be provided with some form of housing that may be, as was the case in *City of Johannesburg*, superior to the housing they give up.<sup>87</sup>

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<sup>86</sup> Occupiers of 51 Olivia Road, Berea Township and 197 Main Streets, Johannesburg v City of Johannesburg par 15.

<sup>87</sup> Ray B “Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through “Engagement”. Human Rights law Review (2008) 8 (4): 703-713.

The issue of meaningful engagement is equated with the principle of public participation in matters affecting people in the process. It is one of the fundamental principles of constitutional democracy which provides an obligation on the state to respond to the “people`s needs” and to encourage public participation in policy making.<sup>88</sup> This principle fosters transparency by providing the public with timely, accessible and accurate information.<sup>89</sup> At local government level, municipalities are also obliged to encourage the involvement of communities and community organisations in the matters of local government<sup>90</sup> and to involve the communities in matters regarding housing. Parliament and its committees are also obliged to facilitate public involvement in its legislative and other processes.<sup>91</sup> This obligation combines representative and participatory elements where the latter complements the former.<sup>92</sup>

The issue of meaningful engagement is embedded in the **Housing Act** which obliges that national, provincial and local government to consult meaningfully with individuals and communities affected by housing development<sup>93</sup> and to facilitate active participation of all relevant stakeholders in housing development.<sup>94</sup>

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<sup>88</sup> Section 195 (e) of the **Constitution of the Republic**, 1996 provide that “People`s needs must be responded to, and the public must be encouraged to participate in policy-making”.

<sup>89</sup> Section 195 (g) of the **Constitution of the Republic**, 1996 provide that “Transparency must be fostered by providing the public with timely, accessible and accurate information”.

<sup>90</sup> Section 152 (1) of the **Constitution of the Republic**, 1996 provide that the object of local government are : “(e) to encourage the involvement of communities and community organisations in the matters of local government”

<sup>91</sup> **Doctors For Life International v Speaker National Assembly and Others** 2006 (12) BCLR 1399 (CC); 206 (6) SA 416 (CC).

<sup>92</sup> Psygkas AE “Revitalising the liberty of the ancients through citizen participation in the legislative process” Yale Law School ANNUAIRE INTERNATIONAL DES DROITS DE L’ HOMME VOL. V/2010 at p 732. See also Czapansky KS and Manjoo R “The Right of Public Participation in the law making process and the role of legislature in the promotion of this right” 19 Duke Journal of Comparative and International Law 1 (2008).

<sup>93</sup> Section 2(1) (b) of the **Housing Act** 107 of 1997.

<sup>94</sup> Section 2(1) (l) of the **Housing Act** 107 of 1997.

The National Developmental Plan, which is a government vision for 2030, provides that access to information and the right to administrative justice are crucial to enabling the achievement of other socio-economic rights. This provide a foundation for open, transparent and accountable government.<sup>95</sup>

The **Occupiers of 51 Olivia Road, Berea Township** case, reinforces the minimum standard of reasonableness on public involvement for government to go beyond formalistic compliance with the requirement to engage the public to substantive compliance. If the decision or policy has important and far-reaching consequences, the government must invest in facilitating public participation.

To achieve minimum meaningful engagement, government must priorities the issues of communities, identify the urgency of such communities and dedicate appropriate resources to address the issues, build trust with communities and provide a fair platform for consultation with communities.<sup>96</sup> The obligation on state institutions to engage meaningfully prior to taking a decision to institute eviction proceedings is an important one, and adds a significant requirement to the list set out in *Grootboom* for reasonable state action

*Mclean*,<sup>97</sup> submits that, there are two observations to be made of this judgment. The first is positive, and recognises the value of rendering explicitly an obligation on municipalities to engage meaningfully prior to instituting eviction orders. The Court located this obligation within the constitutional obligation of the state to act reasonably in section 26(2) of the Constitution, and the ‘need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity’.

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<sup>95</sup> National Planning Commission **National Developmental Plan: Vision for 2030** November 2011 at p 402.

<sup>96</sup> See also Jeffery N **Stakeholder Engagement: A Road Map to meaningful Engagement** July 2009 at p 9.

<sup>97</sup> Mclean K **Constitutional Deference, Court and Socio-economic Rights in South Africa** 2009 PULP at p171

The second, is the failure of the Court to engage with the substance of the attack on the constitutionality of the city's housing policy and to seek to resolve the dispute through encouraging the parties to settle. The Court noted that there were a number of outstanding issues between the parties which remained in dispute, namely, the failure of the city to formulate and implement a housing plan for persons similarly situated to the appellants; the city's policy in dealing with so-called 'bad buildings'; the constitutionality of section 12(4)(b) of the NBRA; the review of the city's notices to the occupiers; the applicability of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998; and the 'reach and applicability of sections 26(1), 26(2) and 26(3) of the Constitution'.

**(e) Schubart park residents, difference between evacuation and eviction of occupiers**

This matter was funded by the Impact Litigation Unit of Legal Aid SA to clarify eviction procedures and to establish the precedent that a proper application for eviction must be placed before court.

The occupiers were 'evacuated' after a localised fire broke out in one of the three occupied block of flats. Once it became clear to the occupiers that the City had no plans to reinstate their occupation of the properties, they launched an urgent application in the North Gauteng High Court, seeking an order directing the City to restore their occupation of the properties.

Schubart Park is a residential complex close to the city centre of Pretoria in the City of Tshwane Metropolitan Municipality. It consists of four high rise blocks, A, B, C and D. The complex was erected in the 1970s as part of a state-subsidised rental scheme for the benefit of civil servants. On 21 September 2011, a number of residents started a protest about living conditions at the complex. The protest involved the burning of tyres, the lighting of fires and the throwing of stones and objects from the buildings at vehicles and the police. Two localised fires broke out in block C. The police cordoned off the streets

around Schubart Park, removed the residents of block C from the building and denied access to all other residents returning to Schubart Park after work on that day. Residents in blocks A and B were not removed that day. The police were assisted by the City Metropolitan Police and fire brigade officers. The fires were extinguished later in the evening and by the next day the police operation relating to the protest was effectively over.

At 5pm that evening, the applicants brought an urgent application before Prinsloo J in the North Gauteng High Court, Pretoria (High Court), seeking an order allowing them to return to their homes. The City and the Minister of Police (Minister) were cited as respondents.

The application for re-occupation of their homes was dismissed that night, but the High Court ordered the City and the Minister to ensure that the temporary accommodation offered in terms of a tender made by the City was available

The applicants sought leave to appeal to the Constitutional Court after leave to appeal was refused by both the High Court and the Supreme Court of Appeal. They also sought leave to introduce further evidence relating to the structural condition of the buildings. In the event of leave to appeal being granted, they proposed that the r the High Court orders to be set aside; for declaratory orders that the refusal to allow them to return to Schubart Park, and their removal, were unlawful; that they be allowed to return to their homes; that the City be ordered to reconnect the water and electricity services; and for a costs order against the City on a punitive scale.

The Court declared that the High Court orders did not constitute an order for the residents' eviction as required by section 26(3) of the Constitution and that the residents were entitled to occupation of their homes as soon as is reasonably possible

The judgment of the Constitutional Court delivered in 2011 in **City of Johannesburg v Blue Moonlight** held that local authorities are obliged to plan and budget for housing emergencies and ensure adequate provision for alternative accommodation for those

facing homelessness. They must consider whether they can provide for emergency housing from their own finances, and if necessary, they must apply to their provinces for help in terms of Chapter 12 of the National Housing Code.

The court has also reinforced the administrative principle of meaningful consultation as per **Occupiers of 51 Olivia Road, Berea Township** case which encouraged in depth consultations between local municipality, communities, occupiers and civil societies.

The principle which has been laid down by the Constitutional Court is that health and safety cannot serve as a pretext for bypassing the requirements of section 26(3) of the Constitution. And persistence in an argument that the immediate removal of residents on grounds of safety and temporary impossibility could result in the permanent lawful deprivation of the occupation of their homes, would have foundered on the authority of the decisions in the **Occupiers of 51 Olivia Road, Berea Township**.

Normally supervisory orders, structural interdicts and engagement orders accompany eviction orders where they relate to the provision of temporary accommodation pending final eviction. But there is no reason why they cannot be made in other circumstances where it is appropriate and necessary – section 38 is wide enough to accommodate that.

**(f) Blue Moonlight duty to provide alternative accommodation<sup>98</sup>**

This matter concerns the fate of 86 people (Occupiers), who are poor and unlawfully occupy a property called —Saratoga Avenue in Berea in the City of Johannesburg (property). The property comprises old and dilapidated commercial premises with office space, a factory building and garages. The case deals with the rights of the owner of the property, Blue Moonlight Properties 39 (Pty) Ltd (Blue Moonlight) and with the obligation of the City of Johannesburg Metropolitan Municipality (City) to provide housing for the

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<sup>98</sup> 2012 (2) BCLR 150 CC; 2012 (2) SA 104 CC

Occupiers if they are evicted. Ultimately we must decide whether the eviction of the Occupiers is just and equitable

The practical questions to be answered in this case are whether the Occupiers must be evicted to allow the owner to fully exercise its rights regarding its property and, if so, whether their eviction must be linked to an order that the City provide them with accommodation. The City's position is that it is neither obliged nor able to provide accommodation in these circumstances.

The crucial question before the Court was whether it is just and equitable to evict the Occupiers, considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place.

The Court found that a municipality is not entitled to deflect its obligations onto national and provincial government. It has the obligation to plan and procure resources to meet emergency housing needs within its area of jurisdiction. It cannot rely on an absence of resources to do so if it has not at least acknowledged its obligations and attempted to find resources to allocate to emergency housing projects. This obligation becomes particularly apparent when one considers that municipalities are ideally suited to react, engage and plan to fulfil the needs of local communities. Moreover, a municipality cannot pick and choose which housing crises it responds to. Instead, it must prioritise its response to emergency housing situations in a reasonable manner. To differentiate between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of her homelessness is.<sup>99</sup>

Blue Moonlight court case became an important court case for the jurisprudence around evictions and the requirement for municipalities to provide alternative accommodation for

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<sup>99</sup> SERI **Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government** November 2013 at p18.

people that are evicted and become homeless. The outcome of this case impacts significantly on the responsibilities of local governments in eviction cases, either from public or private stock.

As a result, the outcomes of the Blue Moonlight case and other legal cases concerning evictions have impacted on the way municipalities must operate in terms of evictions that lead to homelessness. No one may be evicted without a court order. However municipal responsibilities do not stop there. Because of the responsibilities that fall to municipalities when evictions are taking place, municipalities need to plan and prepare for these situations and ensure that alternative accommodation is available when required.

#### **(g) Dladla, rights of homeless in temporary accommodation**

In this case the applicants were residing at a shelter known as Ekuthuleni Overnight/Decant Shelter after they were relocated from 7 Saratoga Avenue. They were housed pursuant to the order in **Blue Moonlight**, which is a category of persons wholly different from those only seeking overnight accommodation.

The applicants applied to the Court to interdict the respondents from enforcing rule 3 and 4 respectively. Rule 3 provided that “the gate for the shelter opens at 17h30 Monday to Sunday and closes at 22h00 and all residents are required to sign the register every night” and rule 4 provided that “ All residents will be required to vacate the shelter by 08h00 in the mornings Monday –Friday and 09h00 Saturday and Sunday”. The shelter also had a policy to separate genders to the extent that it also disallows spouses or permanent life partners from staying together.

The applicants applied to court alleging that the limitations contained in rule 3 and 4 and the prohibition of spouses of living together violated their right to dignity, security of person and privacy which any human being is entitled to associate with a home.

The court decided that the rules and the limited gender separation have humiliating consequences as it compromises and disrupts the family as a unit, creates emotional distance in a relationship. The court also declared that the inability to live as a family represents a loss of support for them of one another, it creates a financial burden on the couple's limited financial resources. The court further declared that the splitting up of families at the shelter cuts to the very heart of the right to dignity and the right to family life.

**(h) SANRAL v Lwandle residents, interdict vs eviction order<sup>100</sup>**

On 2 and 3 June 2014 a few hundred residents of Cape Town watched their homes being demolished in Lwandle, near Strand. An area as large as six soccer fields was cleared of its human inhabitants. Poor and working class families were pushed behind barbed wire to watch their homes being destroyed. These evictions initiated by SANRAL have left hundreds destitute.

The Lwandle site is owned by the South African National Road Agency Limited (SANRAL), a national government agency. This land falls within a road reserve that SANRAL needs for the implementation of the controversial E-Tolling project, scheduled to begin in six months. People have been squatting on parts of the SANRAL land for years. Every time some are moved out, others move in.

In this matter SANRAL applied for an interdict at the Western Cape High Court on for an order interdicting or restraining the respondents from entering or being in Erf 32524 Nomzamu, Strand (Lwandle) for the purposes of unlawfully occupying or invading that property or erecting structures there for those respondents currently occupying the property at the date of the granting of the order and erecting, completing and or occupying any structures there or extending their current structures. Save except those respondents currently occupying the property at the date of the granting the order were not interdicted from occupying the property.

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<sup>100</sup> Western Cape Division Case No 1114/14.

The applicants also requested an order demolishing any structure unlawfully erected on the property subsequent to the service of the order, and removing any possessions found at or near such structures including building materials, which shall be kept at the custody by applicant. The rule nisi was granted on 24 January 2014 and was extended four times to 17 March 2014, to 14 April 2014, 12 May 2014 and 23 June 2014. At all material times the respondents did not file to oppose the interim order of January 2014.

Their shacks were demolished and set alight. Many lost their personal possessions and were left with nothing but the clothes they were wearing. The evictions were carried out in the middle of a very cold and wet Western Cape winter and when children were writing exams. A group of about 10 were arrested on the day, incarcerated at police holding cells for a few days and then all moved to Pollsmoor Prison. Many others were arrested on the same charges for asking questions about what was happening and trying to retrieve their possessions.<sup>101</sup> The South African Human Rights Commission, has since condemned the manner in which the evictions were executed, with the delay in providing shelter and failure to timeously plan for the provision of alternative accommodation afforded to the victims who were left homeless in the rainy cold Cape Town weather.<sup>102</sup>

Lwandle evictees were forced to find shelter in the Nomzamo community hall. Just over 300 people were still living in the hall three months after the eviction. The brutal and inhuman manner in which the evictions were conducted 20 years into our constitutional democracy sent shock waves throughout the country because it struck a chord especially with people who were removed from their ancestral lands under the 1913 **Land Act** and those who were removed from black spots to make way for white occupation of prima land under the **Group Areas Act**.

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<sup>101</sup> Ethetidge J "Lwandle evictions brutal: NGO" IOL News 21 July 2014.

<sup>102</sup> See South African Human Rights Commission "SAHRC investigate Lwandle evictions" 8 June 2014 which can be accessed at [www.sahrc.org.za/home](http://www.sahrc.org.za/home).

The Minister of Human Settlement established a commission of inquiry to investigate all the circumstances under which the evictions took place, and the history of evictions including the facts leading to the application for an obtaining of the court order on 24 January 2014 by SANRAL, the execution of the said court by SANRAL, the role of relevant sheriff of the jurisdiction of Cape Town, the roles of the law enforcement officials of the South African Police Services, the Cape Town Metro Police and any other official of the national, provincial and local government involved and any other person. The terms of reference included also to establish the identity of the members of the informal settlement community of Lawndle, how the community came to be on the land in question when there is a waiting list for the provision of housing in terms of government programmes.<sup>103</sup>

Since the evictions of residents was granted on the basis of an interim interdict, the evictions fell short of the provisions of section 26(3) which provides that no eviction or demolition of a home may be carried out without an order of court made after considering all the relevant circumstances. This is also reinforced by section 7 of the **PIE Act** which provides that a court may grant an eviction when it is just and equitable to do so, after considering all the relevant circumstances.

The eviction also go against the principle of meaningful engagement as provided in the Constitution and as laid in the **51 Olivia Road, Berea Township** case.

## 5. Conclusion

Since the decision of Grootboom, the State has grappled with its obligation to provide access to a core right within its available resources. In the case the Constitutional Court accepted the approach adopted in Soobramoney that section 26(2) “ does not require the state to do more than its available resources permit. However the reality on the ground is that there is a huge demand for housing from about 45% of the population who can be classified as unemployed and therefore indigent. This is further aggravated by the

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<sup>103</sup> See Department of Human Settlement **Terms of Reference of The Ministerial Enquiry Into The Eviction of The Informal Settlement Community of Lwandle** 5 June 2014 at p2. The enquiry was to commence on the day of the appointment of members and was to conclude its work by 5 August 2014.

realization that “the complexity of the housing crisis requires much more than a straightforward approach to building houses. Our crisis is not just about an enormous backlog, but also about a dysfunctional market, torn communities and a strained social fabric , spatial as well as social segregating and a host of all other problems. Our response must be innovative and diverse. If we only respond to the numbers that must be built we risk replicating the distorted apartheid geography of the past”.<sup>104</sup>

20 years into our constitutional democracy the right to housing remains elusive to poor and marginalized communities who find themselves living in the fringes of society without any means of escaping the day grinding poverty on informal settlements and no job prospects on the horizon. Many suffer the further indignity of raising families with young children in unhygienic and cramped conditions with no access to basic services such as clean drinking water and waterborne sewerage. With despair reaching plummeting depths many occupiers of informal settlements have taken to the streets with protest marches sometimes marred by violence and in some cases police brutality .The dissatisfaction with the slow pace of housing delivery was translated into loss of votes for the ruling party mainly in the cities and urban metropolitans in the 2014 elections.

The quest to provide access to adequate housing within the normative conception of the rights carved out by the Constitutional Court in the **Grootboom** case and expanded upon and refined in the various decisions discussed above show that this remains a highly contested terrain.

The judgments handed down by the Constitutional Court in particular, have advanced the rights of access to adequate housing by the vulnerable and the poor. The injustices of the past have always been at the forefront in the determination of such a right. The courts have not shied away from encroaching on the separation of powers doctrine to make demands on the budget of the executive arm. This was done, among others, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom thus improving the quality of life of all citizens and to build a united

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<sup>104</sup> National Department of Housing **National Housing Code** 2000 Part 1. 5

democratic South Africa that is able to take its rightful place as a sovereign State in the family of nations.