

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

**Section 26, Grootboom, and Breaking New Ground:
South Africa's Constitutional Right to Housing in Theory and Practice**

Alexandra Yannias
(YNNALE001)

A minor dissertation submitted in *partial fulfillment* of the requirements for
the award of the degree of MPhil
(Political Studies, Justice and Transformation Programme)

Faculty of the Humanities
University of Cape Town
2008

COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature:

Signed by candidate

Date: 3^o Oct 08

Acknowledgments

This thesis is dedicated to the people of Freedom Park (Tafelsig, Mitchell's Plain). Thank you for inspiring me with your dedication to your struggle and for allowing me to work in your community. I also wish to thank the Development Action Group (Observatory, Cape Town), Ardiel Soeker in particular, for giving me the opportunity to work in Freedom Park and to learn from your organisation.

I am very grateful to Professor Mary Simons, my supervisor for this project, for her constant support and guidance and to Professor Andre du Toit, the director of my programme. I would also like to thank Professor Lidwien Kapteijns at Wellesley College (USA) who supervised my undergraduate thesis nearly three years ago and motivated me to come to South Africa. I could not have completed this research or come to Cape Town without the support of the Wellesley College Graduate Fellowship and I am very grateful to Wellesley for allowing me to have this opportunity.

Thank you to my parents, Kate and Dean Yannias, for their willingness to edit my thesis and for all of their support in my globe-trotting endeavours. Finally, I wish to thank my colleagues and friends in Cape Town who supported me, listened to my rants, and shared their experiences in the writing process with me. Thank you especially to Meritt Buyer and Natalie Jaynes for printing and binding the final versions.

Table of Contents

| | |
|--|----------|
| Introduction, Methodology, and Limitations..... | page 4 |
| <i>“How We Must Make Our Voices Heard”</i> | |
| Chapter 1..... | page 18 |
| <i>Socio-economic Rights and Duties in the South African Constitution</i> | |
| Chapter 2..... | page 40 |
| <i>Claiming a Right to Housing: The Implications of the Court’s Approach</i> | |
| Chapter 3..... | page 64 |
| <i>Housing Policy and Informal Settlements after Grootboom</i> | |
| Chapter 4..... | page 86 |
| <i>Policy in Practice: Cape Town Informal Settlements</i> | |
| Conclusion..... | page 105 |
| <i>South Africa’s Right of Access to Housing in Theory and Practice</i> | |
| Bibliography..... | page 110 |

Introduction

“How We Must Make Our Voices Heard”

In July 2007, Cape Town residents in Khayelitsha began lighting fires on Mew Way in protest of government’s perceived failure to provide access to housing and service delivery. As Kanyisa Barumame, one of the protesters, proclaimed:

Our homes are flooded, no one will help us and we do not have a council here to represent us. This is how we must make our voices heard.¹

The upsurge in protests in the townships around Cape Town in 2007 reflected some citizens’ on-going frustration with government’s delivery of housing and other essential services such as water and sanitation. Lindiwe Sislulu, the National Minister of Housing, expressed government’s view on the same page of the *Cape Argus*. Sislulu stated that, although housing in the Western Cape was a “real challenge,” the department wished to emphasise that “citizens have as much responsibility in this as the government.”² As these quotes illustrate, government and many South Africans, the majority of whom are economically poor and people of colour, disagree on the questions of what adequate housing is and who has a responsibility to provide it.

The 1996 South African Constitution has been hailed as one of the most progressive in the world³ and includes a Bill of Rights with extensive political, civil, and socio-economic rights. The inclusion of a “right” to housing as one of the rights in the

¹ Matt Medved, “Protest about services flares up: Khayelitsha fires burn,” *Cape Argus*, p. 5. (31 July 2007)

² Candice Bailey, “Plan for transit areas to help those waiting for homes,” *Cape Argus*, p. 5. (31 July 2007)

³ “Constitution of the Republic of South Africa, 1996,” South African Government Information. Online: <http://www.info.gov.za/documents/constitution/index.htm>

Bill of Rights suggests that addressing the extreme inequalities in housing provision is one of the South African government's priorities. Government's commitment is enshrined in Section 26 of the Constitution:

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 realisation 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.⁴

Despite this constitutional provision, however, the housing issue continues to be a political battlefield in present-day South Africa. The current government's delivery of housing is critically important to South Africa's transition and to the government's attempt to legitimate its power at the national and local level. As Huchzermeyer and Karam articulated in 2006:

One of the most urgent and challenging questions of South Africa's democracy is how to translate these rights into safe, secure, and affordable living conditions for the poor.⁵

In 1994, the African National Congress (ANC) inherited a massive housing backlog from the previous regime: the 1996 Census reflected a housing backlog of 2,202,519 households.⁶ In the 1994 White Paper on Housing, government stated that "relatively small formal housing stock" and low rates of housing delivery had resulted in

⁴ "Constitution of the Republic of South Africa, 1996," (Act 108 of 1996). South African Government Information. Online: <http://www.info.gov.za/documents/constitution/index.htm>
Chapter 2: Bill of Rights, Section 26, "Right to Housing." South African Government Information. Online: <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#26>

⁵ Albertyn, C, "Foreward." In Marie Huchzermeyer and Aly Karam, *Informal settlements: a perpetual challenge?* (Cape Town: University of Cape Town Press, 2006), vii.

⁶ "Houses for Everyone," South Africa's official gateway website. Online: http://www.southafrica.info/ess_info/sa_glance/social_delivery/govthousing.htm

a “massive increase” in the number of households living in informal settlements.⁷

Government also indicated that there was a shortage of basic services in South Africa in 1994. For example, government estimated that 48% of all households did not have access to flush toilets and that 16% of all households had no access to any kind of sanitation system.⁸

In March 2007, the Department of Housing reported that it had delivered more than 2 million houses since 1994.⁹ In 2006, however, a national treasury review had concluded that “[d]espite these delivery rates, the housing backlog has grown.”¹⁰ In particular, the review found that the number of dwellings classified as “inadequate” increased from 1.5-million in 1996 to 1.8-million in 2001. This was in large part because of the pace of urbanisation which, at 2.7% per year, was vastly larger than the 1994 White Paper anticipated.¹¹

The central question in this minor dissertation is how having a constitutional right to housing has affected the government’s housing policies and, ultimately, the lived reality of poor South Africans. The inclusion of a constitutional right to housing in the South African constitution is a political experiment and the idea that socio-economic

⁷ 1994 White Paper, Housing. “Ch. 3: The Current Housing Context,” Section 3.1.3 Living Conditions, Existing Housing Stock and Rate of Supply, <http://www.info.gov.za/whitepapers/1994/housing.htm#3>.

⁸ 1994 White Paper, Housing. “Ch. 3: The Current Housing Context,” Section 3.1.3 Living Conditions, Existing Housing Stock and Rate of Supply, Section B: Sanitation, <http://www.info.gov.za/whitepapers/1994/housing.htm#3>.

⁹ “Housing Statistics at March 2007,” Department of Housing webpage. Accessed 07 November 2007, <http://www.housing.gov.za/default.htm>

¹⁰ “Housing backlog increases despite new homes,” Mail & Guardian Online (18 October 2006), http://www.mg.co.za/articlePage.aspx?articleid=287072&area=/breaking_news/breaking_news_national/

¹¹ “Housing backlog increases despite new homes,” Mail & Guardian Online (18 October 2006).

rights are not perfectly reflected in the lived realities of the poor is certainly not a novel conclusion. Rather than highlighting government's failings in housing delivery, therefore, this report attempts to analyse how the right itself has been interpreted. As suggested in the first paragraph of this minor dissertation, government and the intended beneficiaries of state housing often perceive the meaning of the right of access to adequate housing and government's duty in vastly different ways.

The right to housing is both an interesting theoretical query and a crucial political question. On a theoretical level, analysing the right to housing raises the question of the purpose of socio-economic rights and the extent of the duties they impose on states. In this analysis, however, it is critical to remember that housing is a basic human need and that how socio-economic rights are interpreted often affect citizens' living conditions. This minor dissertation, therefore, seeks to combine an analysis of the theory behind the socio-economic right to housing with an analysis of the initiatives the state has put forth to produce tangible results in communities.

This minor dissertation began as an analysis of national housing policies, inspired by the on-going struggle over the N2 Gateway Project in Cape Town and the South African government's approach to housing development. In the course of undertaking research into South African housing policy, however, the more interesting question became how the right to housing influenced important shifts in informal settlement policies at the local level in Cape Town. Although politicians, lawyers, and non-government organisations have extensively analysed the housing issue, the varied

approaches and interpretations of these groups has to date not been comprehensively examined. In particular, there have been few attempts to analyse how housing policy changed after the decision in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC) (“*Grootboom*”) that the state was not fulfilling its constitutional obligation of protecting the rights of those living in informal settlements. The argument of this minor dissertation is that the *Grootboom* decision had a significant impact on local government’s informal settlement policies and raised public awareness of the constitutional “right to housing.”¹² This report aims to bring together these different perspectives to provide a more comprehensive understanding of how the Court and the South African state have interpreted the right to housing since 1996 and how this interpretation has influenced government’s housing policies for informal settlements.

Methodology and Limitations

In the course of researching and writing, this minor dissertation changed direction from a literature review and analysis of national housing policy to a multidisciplinary analysis of the housing issue. Housing is a popular area of research amongst academics, legal practitioners, and non-governmental organisations (“NGOs”). Many academics have evaluated the results of South African housing policy,¹³ but there is little research on the focus of this minor dissertation, namely, the multiple and varied perceptions of housing as a right.

¹² Huchzermeyer and Karam (2006), 33.

¹³ The housing bibliography on the website of the Postgraduate Housing Programme at the University of the Witwatersrand is an example of “policy community” which has emerged in South Africa. [Udesh Pillay, Richard Tomlinson and Jacques du Toit. *Democracy and delivery: Urban policy in South Africa*. (Cape Town: HSRC Press, 2006), 306].

As a citizen of the United States, I came to the University of Cape Town to continue studying South African politics with a particular interest South African housing policies since 1994. I wanted to learn more about how socio-economic rights impacted state housing initiatives after working as a litigation paralegal in fair housing lawsuits in the United States (Washington, D.C.). My interest became more focused after completing a public law course about the South African Constitution at the University of Cape Town. In particular, I became interested in further assessing the extent to which South Africa's progressive constitution translated into real action for the most economically vulnerable members of society.

This minor dissertation compares and contrasts the interpretations of housing as a right in order to demonstrate how these interpretations have influenced particular kinds of state housing initiatives in South Africa. The analysis considers the various theories of socio-economic rights, the legal analysis of the *Grootboom* decision, analysis of housing policies, and current statements by the local and provincial government in Cape Town. The methodology in this report is primarily document-based and consists of research work of both secondary sources, including housing policy analysis and analysis of the theory of socio-economic rights, and primary sources, including housing policies and unpublished surveys of informal settlement. However, this minor dissertation also draws from lectures and interviews with legal scholars, current statements by the Western Cape provincial government, interviews with informal settlement residents, and from my field

experience in a housing upgrade project in Cape Town.¹⁴ In addition to utilising diverse sources, therefore, this minor dissertation is also based on my experience in and conversations with individuals from different fields who have all considered the right to housing and its implications.

In considering these diverse areas, I found that there were three important limitations in my research. First, as matters of law are central to the issue of the right to housing and as I am a student of Political Studies, the entry into the field of law and the analysis of the *Grootboom* judgment was the most challenging area. The course I completed under Professor Christina Murray entitled “Governing Under the Constitution” in 2007 and the Student Seminar for Law and Social Justice in September 2007 allowed me both to learn about the Constitution and to listen to and interview influential legal practitioners and legal scholars.

Secondly, this minor dissertation refers to national housing policy, but it is primarily focused on the housing policy and strategies employed in the Western Cape and in Cape Town. Although this is a possibly limited perspective, since the *Grootboom* case concerned a community in the Western Cape Province, the focus on Cape Town and the Western Cape in this minor dissertation allows one to compare housing initiatives over a period of time and thus, it is argued, provides the most relevant context for this analysis. In order to understand the current political climate, I studied the Department of Local

¹⁴ From August 2007 to December 2007, I was an intern in the Citizen and Participation Programme in the Development Action Group (DAG). As an intern, I attended meetings with the Steering Committee in Freedom Park, a Mitchell’s Plain community that was in the final stages of a housing upgrade project. In addition to documenting this process, I also created and helped to facilitate a homeowners’ education programme for the new homeowners in the community.

Government and Housing in the Western Cape's Annual Report from 2006/2007. In addition, as an intern with the Development Action Group, I attended a meeting with representatives from the Department of Local Government and Housing in Cape Town in November 2007.

The third limitation concerns the fourth chapter of this minor dissertation which draws from my experience as an intern in the Development Action Group (DAG). My overall methodology in this minor dissertation was document-based but, after significant research, I realised that a strictly document-based approach was too limiting to encompass the full issue of the constitutional right to housing. As I came to understand the significant changes in informal settlement policy since 1994, I realised that a full understanding of the right to housing would involve research into the implications of housing policies "on the ground." In order to gain this perspective, I worked in an informal settlement upgrading project in Cape Town as an intern with DAG from August to December 2007.

The fourth chapter is limited by the fact that I did not engage in a large-scale interview project in Freedom Park because I lack the research background that would allow me to design a study based on human subjects. I was able to gain significant insight into the implications of informal settlement policies, however, by attending meetings with the Freedom Park Steering Committee over a period of four months. In addition, I conducted three interviews with leaders in the Freedom Park who have been advocates for their community over the past several years. These interviews were

extraordinarily helpful because these individuals had a unique and informed perspective: they have both lived in informal settlements and have been involved in extensive negotiations with the local government. In these interviews, I asked questions designed to allow the leaders to share their experiences in the informal settlements and to help me understand their perception of how government had succeeded or failed in fulfilling their right to housing. Their observations provide insight into how citizens have understood their rights and also how they have been able to achieve their rights even in the absence of a comprehensive policy for informal settlements.

Chapter Overview

Each chapter in the minor dissertation examines one discourse of the meaning of housing as a right. Overall, this report compares and contrasts the ways in which different groups have interpreted the right to housing and also analyses how the interpretations have influenced housing policies and results.

The first chapter analyses the debate in South Africa over the inclusion of socio-economic rights, including housing. Several politicians and academics argued that socio-economic rights, such as housing (which require positive actions by the government), should either not be included in the Constitution or should only be included as so-called “directive principles.” The arguments for and against the inclusion of socio-economic rights shaped the way in which they were ultimately enshrined in the 1996 South African Constitution and remain important in present-day South Africa. The objections raised

against socio-economic rights also remain important because they have shaped and continue to influence the direction of government's housing policy.

Chapter two considers how the Constitutional Court and legal scholars have interpreted the right to housing. In particular, it analyses the Court's interpretation of the right to housing in the *Grootboom* decision in 2000 and what guidelines the Court created for government's future housing interventions. In addition to a critical reading of the *Grootboom* judgment, this chapter also draws from significant legal analysis of socio-economic rights in South Africa by South African legal scholars and from lectures given in 2007 by former Justice Arthur Chaskalson, advocate Geoff Budlender of the Legal Resources Council, and prominent South African legal scholar David Bilchitz. In 2007, each of these legal scholars gave lectures and answered questions about the meaning of the right to housing from the Court's perspective and how socio-economic rights could be enforced through Constitutional Court cases.

The third chapter evaluates how government policies have changed in the Western Cape Province and in Cape Town to reflect the Court's interpretation of the government's duty in relation to Section 26. The *Grootboom* mandate required government to make some provision in its policies for citizens in desperate need and increased provincial and local governments' responsibility to implement housing policy. After a few years, government responded to this mandate by creating policies for informal settlements for the first time and also gave more responsibility to local government. In 2007, however, government's housing policies continued to focus on

large scale formal developments rather than interventions that would provide citizens living in informal settlements with basic shelter. This chapter will review government's policy changes since 2000 to evaluate the extent to which these policies fulfill the government's duty with respect to Section 26 as determined in the *Grootboom* judgment.

The final chapter focuses on how housing policies since 2000 have affected living conditions in South Africa, particularly for communities living in informal settlements in the Cape Town area. The case studies of the Delft Temporary Relocation Area (TRA) and the experience of Mitchell's Plain residents in the Freedom Park community proved particularly helpful in this analysis. This chapter argues that the ways in which the Constitutional right to housing has been interpreted has shaped South African housing policy. These policies, in turn, have significantly influenced the living conditions of South Africa's most economically vulnerable citizens.

Thesis Statement

Ultimately, the following questions must be asked: what is the purpose of having a Constitutional right to housing? In South Africa, has the inclusion of a right to housing actually served to improve the living conditions of the most vulnerable members of society? In the end, does the right to housing only exist on paper? This minor dissertation argues that having a constitutionally-defined right to housing has influenced the nature of state interventions. In considering the importance of the right to housing, however, it is important to remember that policy-makers, lawyers and judges, NGOs, and

citizens have different interpretations of the right of access to housing and the extent of government's correlative duty.

On the one hand, the Constitutional right to housing has forced government and the Court to consider government's role in providing housing. As a result of having a constitutional right to housing, a group of citizens was able to bring the *Grootboom* lawsuit and the Court was able to place the onus on government to create and implement programmes for communities in informal settlements. Although the normative content of the Constitutional right remains vague, both in terms of what is meant by "adequate" housing and what government is required to do to be "reasonable," the Court has determined that there are requirements that government must meet to fulfill its obligations under Section 26. In particular, the Court interpreted the right of access to housing as a right which guarantees that government must implement programmes to provide protection from the elements for the most desperate South Africans.

On the other hand, government and the Court have interpreted the right to housing as a right only to the extent to which it is not limited by Section 26(2) which mandates "reasonable" action on the part of government. Although housing policies have changed since 1994 and 2000, it is also important to consider how these policies are implemented. After all, access to housing is not only a right, but also a tangible human need. For citizens in informal settlements, paradigm shifts in housing policies have little or no meaning without perceivable changes in communities.

Perhaps the most important consideration, especially after *Grootboom*, is how government's policies have affected citizens living in informal settlements. NGOs and many citizens view the right of access to housing as involving public participation, but government's overall policy toward informality continues to focus on "eradication" with little to no community engagement. Indeed, recent interviews with officials in Cape Town suggested that government remains wary of engaging in *in situ* housing interventions which would not require relocation but would instead upgrade housing within the settlements. As a result, despite the theoretical shifts in policy, the way in which policies are implemented suggest that the right to housing for informal settlement dwellers remains the right to "wait in queue" rather than have their basic needs met.

Over all, despite the Court's affirmation of socio-economic rights and positive changes in government's policies since 1996, the right to housing has emerged from the state's perspective as a directive principle which should guide government policy but not require that government fulfill specific needs. The Court has confirmed this view and has refused to require specific government action. As a result, despite the *Grootboom* determination, national government's housing policies have continued to focus on large scale developments rather than programmes which would provide access to basic shelter. On the other hand, there is also some cause for optimism because policies at the local and provincial level in Cape Town and the Western Cape province suggest that government may be altering its view of informal settlements in the future as a result of the controversy over the N2 Gateway project. As the quote at the beginning of this

introduction suggested, much of the success of communities in informal settlements depends on their own mobilisation and NGO's active engagement with the housing issue.

University of Cape Town

Chapter 1

Socio-Economic Rights and Duties in the South African Constitution

In analysing the right to housing and subsequent housing policies since 1994, it is important to consider the objections to socio-economic rights and how they were ultimately included in the final South African constitution. Socio-economic rights (so-called “second generation rights”)¹⁵ are those rights which allow an individual to have a decent standard of living and generally include rights to adequate nutrition, housing, health care, education, and social security.¹⁶ Considering the legacies of apartheid in South Africa, many argued that socio-economic rights were crucial to the very legitimacy of the Bill of Rights in the 1996 South African Constitution. As Craig Scott and Macklem stated, a Constitution that only included civil and political rights “projects an image of truncated humanity.” As they explained:

Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life.¹⁷

On the other hand, several South African academics and politicians objected to the inclusion of socio-economic rights in the South African Constitution from the beginning of discussions regarding the transition. Although certain core objections remained, the focus of the debate shifted from the late 1980s to the Certification of the Constitution in 1996. In the late 1980s and the early 1990s, the debate focused on the

¹⁵Human rights have expanded over time to include three “generations” or categories of rights: political and civil rights (“first generation”), social and economic rights (“second generation”), and cultural rights (“third generation”). [Eide, Asbjorn, et al (eds) *Economic, social and cultural rights: A textbook*. (London: Dordrecht, 2001), 16].

¹⁶ Craig Scott and Patrick Macklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in New South African Constitution,” *University of Pennsylvania Law Review*, Vol. 141, No. 1 (Nov., 1992), pp. 1-148, 9.

¹⁷Scott and Macklem, p. 2.

assertion that socio-economic rights are non-justiciable¹⁸ and therefore inappropriate to include as Constitutional rights. By 1992, as the politics of transition made it clear that socio-economic rights would be included in the Constitution in some capacity, the debate began to focus on the problematic question of the state's duty in relation to socio-economic claims. In 1996, the Constitutional Court ("the Court") dismissed the objections that socio-economic rights were intrinsically different from first generation rights and the South African Constitution enshrined a number of socio-economic rights. Even after the Constitution was certified, however, many still disagreed about the extent of the state's correlative duty to fulfill socio-economic rights.¹⁹

Wesley Newcomb Hohfeld's study of the meaning of the word "right" provides a useful framework for this analysis. Hohfeld argued that the word "right" must imply the existence of a correlative duty. For example, the statement that "X has a claim" is meaningless. The statement that "X has a claim that Y must pay him," however, is meaningful because it refers to Y's duty. In the South African case, drawing from Hohfeld's scheme, the question remains: If X has a claim to adequate housing, who has the corresponding duty? If government has this duty, to what extent is it obligated to completely satisfy X's claim for access to adequate housing?²⁰

¹⁸ Justiciability is the extent to which a matter is suitable for judicial determination (i.e., enforceable in courts rather than through policy or other means).

¹⁹ Nicholas Haysom, "Constitutionalism, Majoritarian Democracy, and Socio-Economic Rights," pp. 451-463. (*Southern Africa Journal on Human Rights*. Vol. 8, 1992), 455.

²⁰ RWM Dias, *Jurisprudence*. (London: Butterworths, 1985), p. 2. For further explanation, please consult Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays*, 1919.

In order to understand how the right to housing was later interpreted, one must understand the nuanced way in which the right to housing was included in the Constitution and the important reasons that it was envisioned as a limited right. The objections to socio-economic rights, especially rights like housing which require budgetary commitments from government, are reflected within the language of the South African Constitution itself.

Right of Access or Direct Right?: International Perspectives

The international debate about the definition of human rights in the second half of the 20th century influenced the formulation of the Bill of Rights in the South African Constitution.²¹ In 1948, the Universal Declaration on Human Rights (“UDHR”) adopted an “integrative approach” to the protection of human rights by including both first and second generation rights. Several international covenants since 1952 have enforced an “integrative approach” to human rights. For example, South Africa ratified the Convention on Rights of the Child (1989) and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW, 1979), both of which accepted an “integrative” approach to human rights.²²

Many legal academics opposed this “integrative approach.” They argued that socio-economic rights imposed positive duties on states and were therefore of a “different

²¹ Mandla Seleane, *Socio-economic Rights in the South Africa Constitution: Theory and Practice*. (Pretoria: Human Sciences Research Council, 2001), 35.

²² Karrisha Pillay, *Contextualizing Socio-Economic Rights in Post-Apartheid South Africa*. Thesis Submitted for Master of Laws. (Cape Town: University of Cape Town, 1996), 1.

nature” than traditional political and civil rights.²³ In response to these arguments, the United Nations General Assembly separated civil and political and socio-economic rights by drafting two separate covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (“ICESCR,” 1966).²⁴ This separation was justified by those who opposed socio-economic rights from a theoretical perspective. For example, British political philosopher Maurice Cranston, in “Human Rights, Real and Supposed,” argued that socio-economic rights are not of the same moral importance as political rights and that their inclusion in the UDHR undermined the strength of human rights.²⁵

Jack Donnelly argued that, despite the wide-spread acceptance of the 1948 UDHR, governments are less obligated to enforce and realise second generation rights than they are to enforce traditional first generation rights.²⁶ Donnelly’s statement is reflected in the formulation of rights and duties in the ICESCR. Since this covenant concerns the role of the state in protecting certain human rights, it is of particular importance to the South African debate. Perhaps most importantly, the ICESCR mandated that socio-economic rights are dependent on the state’s resources: Each State

²³Sandra Liebenberg, “Social and economic rights: A critical challenge.” pp 79-96 in Liebenberg, ed. *The Constitution of South Africa from a Gender Perspective*. (Cape Town: David Phillip, 1995), 79.

²⁴ Pillay (1996), 4. The full text of the covenant is available on-line on the website of the Office of the High Commission for Human Rights, http://www.unhchr.ch/html/menu3/b/a_ceser.htm

²⁵ Maurice Cranston, “Human Rights, Real and Supposed, in D.D. Raphael (ed) *Political Theory and the Rights of Man*, (1967), pp. 42-53., p. 51

²⁶ Jack Donnelly and Rhoda E. Howard, eds. *International Handbook of Human Rights*. (New York: Greenwood Press, 1987), 15. Donnelly’s influential work *Universal Human Rights in Theory and Practice*, (Ithaca, New York, USA: Cornell University Press, 2003) is also useful in this analysis.

must act to the “maximum of its available resources” with a “view to achieving progressively the full realisation of the rights recognised in the present Covenant.”²⁷

The ICESCR’s model of “progressive realisation” differentiated states’ duties to enforce socio-economic rights from their duties to enforce civil and political rights. As the General Comment articulated, the concept of progressive realisation “constitutes recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.” As a result, the ICESCR stated that, for socio-economic rights:

[T]he obligation differs significantly from that contained in Article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.²⁸

Therefore, the UDHR and the ICESCR imposed different duties on the state to fulfill socio-economic rights. To refer again to Hohfeld’s scheme, the different duties imposed on the state by these two documents shaped the way in which the correlative rights are formulated. The UDHR, which imposes a direct duty on the state, mandated that an “individual has a right to work.” The ICESCR, on the other hand, stated that a “person has a right *of access* to work.”²⁹ In the end, the ICESCR contended that the state’s duties are more limited in relation to second generation rights than to first generation rights.

²⁷ International Covenant on Economic, Social and Cultural Rights (1966). Accessed Online: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

²⁸ ICESCR, General Comment 3, “The nature of States parties obligations,” (Art. 2, para. 1 of the Covenant), para 9. Fifth Session, 1990.

[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument)

²⁹ Seleone, 32

South Africa's inclusion of socio-economic rights reflected the limitations of the ICESCR model. The Bill of Rights does include some directly applicable socio-economic rights but also reflects previous international examples that justified including socio-economic rights with limited correlative duties for the state. As a result of the way in which the Constitution articulates some socio-economic rights as the "right of access," the correlative duty of the state was limited to providing *access* to certain social goods within its available resources (i.e., the model of "progressive realisation").

Negative or Positive Duties?: The ANC and the National Party

By 1990, many agreed that the new South African Constitution should include a Bill of Rights, many politicians, academics, and legal practitioners objected to the inclusion of socio-economic rights. The South African Law Commission (supported by the former National Party, "NP") and the African National Congress ("ANC") presented antithetical views on the place of socio-economic in the South African Constitution.³⁰ As Bertus De Villiers summarised the disagreement:

This difference does not so much concern the question whether the state should have an obligation towards the poor, but whether the state should be placed under a legal and justiciable obligation or rather a political and moral obligation, to attend to these matters.³¹

The dispute between those who supported and those who opposed socio-economic rights focused on two issues: first, are socio-economic rights justiciable and, second, does the state have a positive duty to enforce these rights?

³⁰ Bertus de Villiers, "Social and Economic Rights," pp 599-628. In Dawid van Wyk et al *Rights and Constitutionalism: The New South African Legal Order*. (Cape Town: Juta & Co., 1994), 599.

³¹ De Villiers, 600.

The ANC's 1988 Bill of Rights included directly applicable socio-economic rights that would require the state to take positive action: for example, the right to work, the right to protection of health, and the right to shelter. These rights had correlative negative as well as extensive positive duties for the state in the form of programmatic schemes to promote social rights. For example, Article 10(4) mandated:

In order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas.³²

The South African Law Commission ("SALC") supported by the National Party ("NP"), on the other hand, argued that the Bill of Rights should only protect first-generation rights.³³ First, the Working Paper 25 (1991) rejected the idea of imposing positive obligations on the state because this was seen as a political decision; therefore, the SALC rejected all social rights. The SALC's 1991 Interim Report had only slightly more sympathy for socio-economic rights. The SALC argued that "social rights differ from first generation rights in the nature of what they protect" and, after reviewing other states that have included socio-economic rights, concludes that "there are not really any practical enforcement mechanisms to speak of."³⁴ Ultimately, the SALC argued that socio-economic rights should be incorporated in a negative form and should not impose a duty on government to take positive action.³⁵

Both the SALC and the ANC viewed socio-economic rights as requiring positive action on the part of the state, but disagreed on the issue of whether this positive duty was

³² John Murphy, "Second Generation Rights in the Bill of Rights Debate in South Africa," pp 30-52. *South African Sociology Review*. Vol 4(2), April 1992, p. 43; De Villiers, 622.

³³ De Villiers, 624.

³⁴ De Villiers, 624.

³⁵ Murphy, 49.

justified. The debate between the ANC and the SALC (and the NP) revealed a fundamental disagreement about the nature and importance of socio-economic rights. The SALC argued that socio-economic rights could only be enforced with negative duties. The ANC, on the other hand, justified programmatic and wide-spread state intervention because they believed these rights were crucial to the new order. Although one might argue that socio-economic rights are critical, the ANC's approach was also problematic. As Murphy anticipated, the ANC's "failure to deal comprehensively with the practicalities of enforcement is likely to be construed as its principle weakness."³⁶

As will be discussed, the South African Constitution reflected a compromise between the opposing positions promulgated by the ANC and the SALC. The South African Constitution includes socio-economic rights that require positive action. However, socio-economic rights are to be fulfilled within a model of "progressive realisation." In the Constitution, the state only has a duty to fulfill socio-economic rights within its available resources, not with extensive programmes like the ANC prescribed.

Directive Principles or Direct Rights?: 1992 South African Journal of Human Rights

In the late 1980s and the early 1990s, the objections to the inclusion of socio-economic rights in South Africa were based on three main assertions: that they are non-justiciable, that they impose positive duties on the state, and that they would undermine the separation of powers by allowing judges to make demands on the legislature's

³⁶ Murphy, 44

budget.³⁷ The 1992 *South African Journal on Human Rights* (“SAJHR”) featured a debate amongst Nicholas Haysom, Etienne Mureinik, and DM Davis, all of whom criticised the SALC’s conclusions.³⁸ This debate reflected consideration of the objections listed above, but also served to shift the main point of contention from the content of socio-economic rights to the questions of how the Constitution should entrench these rights and what government’s duty should be.³⁹

Haysom and Mureinik directly refuted the SALC’s conclusions. Perhaps most importantly, they both explicitly refuted the so-called “positivist argument” (i.e., that first-generation rights only impose negative duties while second-generation rights always impose positive duties). Haysom argued that the distinction between the categories of rights is “blurred at best” because both “categories” of rights necessitate positive action on the part of the state and resource allocations to be meaningful. For example, the right of access to a fair trial (a classic first-generation right) requires state expenditure on courts and prisons.⁴⁰ Mureinik also argued that it is incorrect to argue that no costs are involved in the protection of civil and political rights. He maintained that politicians and judges

³⁷ Etienne Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution,” pp. 464-474, *South African Journal on Human Rights*, Vol. 8, 1992, 467.

³⁸ Nicholas Haysom, “Constitutionalism, Majoritarian Democracy, and Socio-Economic Rights,” (*South African Journal on Human Rights*, Vol. 8, 1992), 451-463; Etienne Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution,” (*South African Journal on Human Rights*, Vol. 8, 1992), 464-474; DM Davis, “The Case Against the Inclusion of Socio-Economic Demands in A Bill of Rights Except as Directive Principles,” (*South African Journal on Human Rights*, Vol. 8, 1992), 475-490.

³⁹ Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socioeconomic Rights.” *South African Journal of Human Rights*, 2004. Accessed On-line at www.law.wits.ac.za/sajhr/2004/pieterse.pdf, p. 389.

⁴⁰ Haysom, 457.

... often make decrees which entail massive expenditure without any regard to the budgetary consequences, particularly by way of enforcing first-generation rights.⁴¹

Furthermore, Haysom argued that some socio-economic rights could be affordable as well as justiciable. For example, the right to instruction to education is both affordable and enforceable by providing for schools and other educational programmes.⁴²

The main point of disagreement between Haysom, Mureinik, and Davis was whether socio-economic rights should be included as directive principles or as directly applicable rights. Many liberal critics supported the idea of directive principles and based their argument on the success of socio-economic rights in the Indian Constitution. As Article 37 of the Indian Constitution states:

The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nonetheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making law.⁴³

The inclusion of directive principles would fundamentally change the state's duty in relation to socio-economic rights and would have resulted in not having socio-economic rights as directly applicable rights in the Bill of Rights.⁴⁴

Overall, Haysom and Davis argued that socio-economic rights should only be included as directive principles, but for different reasons. Haysom suggested that a minimum floor of socio-economic rights should be constitutionalised. However, because

⁴¹ Mureinik, 466.

⁴² Haysom, 457.

⁴³ Murphy, 40.

⁴⁴ Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socioeconomic Rights." (*South African Journal of Human Rights*, 2004), 389. Accessed On-line at www.law.wits.ac.za/sajhr/2004/pieterse.pdf.

the constitution should not distribute social resources, socio-economic constitutional rights should be those that the state can afford. Haysom argued that directive principles solved the potential problems of the affordability of socio-economic rights by enshrining a commitment to socio-economic justice, but not explicitly articulating the government's duty.⁴⁵ Directive principles were recommended by many liberals who agreed with the aims of socio-economic rights, but were not convinced that the government could realise them. De Villiers argued:

The directive principles should not be seen as replacing social and economic rights, but rather as supporting them by placing the state under a constitutional obligation to further certain aims.⁴⁶

Murphy argued that directive principles could “enhance second-generation rights as well as moral values.”⁴⁷

From the radical perspective, Davis argued that socio-economic rights should only be included as directive principles. However, Davis differed from Haysom in his justification of this assertion. Davis argued that overemphasising the importance of rights by “introducing a battery of specific social and economic demands in a constitution is to place far too much power in the hands of the judiciary” which will “erode the possibility for meaningful public participation in the shaping of a societal good.”⁴⁸ The problem with socio-economic claims being included as rights, Davis argued, is not that they are unaffordable, but rather that they are “choice sensitive” issues better left to politics than to the Court. The Court should be able to decide on issues of legal principle,

⁴⁵ Haysom, 461.

⁴⁶ De Villiers, 626

⁴⁷ Murphy, 39.

⁴⁸ Davis, 490.

for example, the death penalty. However, the Court should not be involved in making decisions of policy; he gives the example that the Court should not be empowered to choose between building a hospital or a rugby field with taxpayer money.⁴⁹ In contrast, Haysom argues for directive principles because he believes that the state's duty should be limited to its available resources, Davis argued for directive principles because he believed they would allow the state to *more* actively intervene and would also allow citizens to participate in having their socio-economic concerns met.⁵⁰

Mureinik argued against directive principles because he believed that they were motivated by an effort to recognise socio-economic rights without making them full “constitutional rights.”⁵¹ He contended:

Consequently, to make the economic rights mere interpretive presumptions is plainly to declare them worth less than the first-generation rights.⁵²

Overall, Mureinik argued that socio-economic rights should be included in the Bill of Rights alongside first generation rights. Again refuting the argument that second generation rights were non-justiciable, he argued that the state's duty to fulfill both first and second generation rights is vague but could be determined by the Courts on a case-by-case basis. For example, a first generation right like the freedom of speech is enforced by the Court evaluating the state's actions on the one hand and the rights of the individual on the other. Mureinik concluded that, “if this is the nature of constitutional review, why not apply it to economic rights?”⁵³

⁴⁹ Davis, 478-9.

⁵⁰ Mureinik, 475.

⁵¹ Mureinik, 468.

⁵² Mureinik, 469

⁵³ Mureinik, 470

All three authors, therefore, considered how socio-economic rights should be included in the Constitution with specific reference to what kind of duty these rights would impose on the government. Haysom and Davis argued for directive principles, but disagreed about the extent of the state's duty. While Haysom argued against redistribution, Davis argued that directive principles would allow the state to actively pursue positive action to guarantee socio-economic rights. In a sense, Haysom argued that directly applicable rights would go too far, while Davis argued that directly applicable rights do not oblige the state to go far enough in redistributing social goods. Only Mureinik argued that socio-economic rights should be included in the Constitution as full rights, but he also argued that the level of the involvement of the state is difficult to determine and instead leaves the Court to decide this duty.

1996 Certification of the Constitution

The South African Constitutional Court certified the 1996 Constitution⁵⁴ that included socio-economic rights as full rights that could be brought to court rather than directive principles which would have left socio-economic claims in the hands of the legislature. The 1996 Constitution rejected the argument for directive principles, which could have limited the state's duties to the framework provided by the "equality clause" in Section 9. As Albie Sachs argued:

[T]he problem as I saw it was not simply to prevent the continuation of discrimination, but to ensure that everyone was entitled at least to the minimum

⁵⁴ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC)
<http://www.polity.org.za/polity/govdocs/constitution/cert.html#3F>

decencies of life. There was a connection between the two, but not a complete overlap.⁵⁵

The Certification was a defining moment in the debate over the inclusion of socio-economic rights because the Court explicitly rejected several objections made against socio-economic rights throughout the debate. The Court addressed three objections in particular: that socio-economic rights are not universally accepted, that they would undermine the separation of powers between the Court and the state, and that they are not justiciable.⁵⁶

First, the Court rejected the argument that socio-economic rights could not be included because they are not universally accepted by asserting that the Constitutional Assembly had the power to “supplement the universally accepted fundamental rights with other rights not universally accepted.”⁵⁷ Second, echoing Haysom in the 1992 SAJHR debate, the Court asserted that, although protecting socio-economic rights has budgetary implications, first generation rights also impose positive duties and costs on the state. In summary, the Court stated that

[I]t cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.⁵⁸

Finally, the Court dismissed the argument that socio-economic rights are not justiciable by stating that the argument against the inclusion of socio-economic rights could also be

⁵⁵ Albie Sachs, “The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case,” pp. 131-152. In Jones, Peris and Kristian Stokke (eds). *Democratising Development: The politics of socio-economic rights in South Africa*. (Leiden: Martinus Nijhoff, 2005), 141.

⁵⁶ Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) <http://www.polity.org.za/polity/govdocs/constitution/cert.html#3E>, para. 76, 77, and 78.

⁵⁷ Ex Parte Chairperson of the Constitutional Assembly, para. 76.

⁵⁸ Ex Parte Chairperson of the Constitutional Assembly, para. 77.

leveled against first generation rights. Indeed, enforcing civil and political rights may have budgetary implications without undermining their justiciability. The Court concluded that:

[t]he fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.⁵⁹

The Constitutional Court, therefore, rejected the three major objections against the inclusion of socio-economic rights by asserting that the limitations imposed by socio-economic rights were also imposed by first generation rights. The Court's position in the Certification also suggested a different point of view from the international perspective which imposed a hierarchy between first and second generation rights. Although the language of the Certification suggests that the Court fully accepted socio-economic rights, however, the Court was notably silent in the Certification on the issue of government's duty in enforcing these rights.

Socio-Economic Rights and Correlative Duties in the Final Constitution

The Bill of Rights in the 1993 Interim Constitution contained both first and second generation rights, but only envisioned negative state duties for socio-economic rights. As De Villiers stated, the drafters of the Interim Constitution:

clearly attempted to go about their task in a manner that emphasises the mainly passive role of the state in the protection of rights.⁶⁰

The 1996 Constitution included a Bill of Rights which mandated some level of state action and extended socio-economic rights to include rights to housing, health care, food,

⁵⁹ Ex Parte Chairperson of the Constitutional Assembly, para. 78.

⁶⁰ DeVilliers, 627

water, and social security.⁶¹ A close reading of the way in which these rights are articulated in the 1996 Constitution, however, demonstrates that not all socio-economic rights are conceived of as directly applicable rights and that the state has a limited duty to positively enforce many socio-economic rights. Drawing from Hohfeld's analysis, it is important to emphasise that the way in which a right is formulated directly impacts the state's duty to fulfill this right.

Rights

The debate over the inclusion of socio-economic rights is reflected in the way in which the South African Constitution entrenches second generation rights. Socio-economic rights are included in sections 26 to 29 of the Final Constitution.

There are three groups of socio-economic rights, each of which places different duties on the state. First, there are *qualified* socio-economic rights which impose positive duties on the state, but only promise "access to rights."⁶² As was previously explained, this follows the formulation of socio-economic rights as the right to "access" put forth by the ICESCR.⁶³ For example, Section 26 (1) states that "Everyone has the right to have access to adequate housing."

The second group includes *basic* socio-economic rights which are not qualified to "right to access."⁶⁴ Section 28 (1) (c) states that "[e]very child has the right to basic

⁶¹ Alfred Cockrell, "The South African Bill of Rights and the 'Duck/Rabbit'" *The Modern Law Review*, Vol. 60, No. 4. (Jul., 1997), pp. 513-537 at 529

⁶² Danie Brand, "Introduction to Socio-Economic Rights in the South African Constitution," pp. 1-56 in Danie Brand and Christof Heyns, eds. *Socio-Economic Rights in South Africa*, Pretoria University Law Press, 2005. 1

⁶³ Seleone, 32

⁶⁴ Brand, 1.

nutrition, shelter, basic health care services and social services” and is an example of a basic socio-economic right which is not qualified by “right to access” This group of rights is positioned as “direct” socio-economic rights in that every individual has a right to have X and the state must provide it immediately. This formulation reflects the way in which the UDHR articulates socio-economic rights.

Finally, the third group includes rights with negative state duties rather than access to social goods.⁶⁵ For example, Section 26 (3) forbids arbitrary evictions. These rights do not necessarily require state action and, in a way, reflect the kinds of socio-economic rights that the SALC and others who articulated the “positive” argument would have approved.

Overall, there is no division between enforceable socio-economic rights and directing principles, as in the German Constitution.⁶⁶ This is important in considering the right to housing, which implies both positive and negative duties on the state: Section 26 (2) mandates the state to take measures to achieve progressive realisation while Section 26 (3) forbids the state from performing arbitrary evictions. The failure to divide between direct and qualified socio-economic rights is perhaps problematic because, as Erika De Wet argued, it did not explicitly state the ways in which the state must act to ensure the direct rights as opposed to the qualified ones.⁶⁷

⁶⁵ Brand, 1.

⁶⁶ De Wet, Erika, *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa*. (Durban: Butterworths, 1996), 104.

⁶⁷ De Wet, 100.

Limitations

Two internal limitations within the language of socio-economic rights like housing in the South African Constitution reflected the criticisms leveled against socio-economic rights throughout the debate in South Africa. These internal limitations restrict the rights of the individuals as well as the duties of the state to fulfill socio-economic rights in particular. First, the right of access to housing, health care, food, and social security are all subject to the qualification that the State is obliged to

take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.⁶⁸

This phrase echoes the ICESCR's declaration that socio-economic rights are to be fulfilled to the "maximum extent afforded by available resources."⁶⁹ The duty to realise socio-economic rights "within available resources" reflects the objection against socio-economic rights because they require positive duties on the part of the state.

Secondly, the duty to realise rights within the mode of "progressive realisation" reflects the objection against socio-economic rights that they are not justiciable because they cannot be realised immediately. This allows the government to claim scarcity of resources to justify its failure to fulfill rights, but they are also required to show plans of "progressive realisation," which requires the state to begin to take steps to realise rights and increase the number of people with access to goods.⁷⁰ Overall, therefore, despite the

⁶⁸ South African Constitution, "Bill of Rights," Section 26(2).

⁶⁹ Pillay (1996), 44.

⁷⁰ Christopher Mbazira, *Realising Socio-Economic Rights in the South African Constitution: The Obligations of Local Government*. (University of the Western Cape: Community Law Centre, 2006), 8.

fact that socio-economic rights are included in the South African Bill of Rights, the state has different correlative duties to second rather than first generation rights.

Duties

Government's duties towards the rights enshrined in the Bill of Rights are articulated in Section 7(2) which requires the state to "respect, protect, promote and fulfill the rights in the Bill of Rights."⁷¹ As with the description of rights, duties are also separated into varying degrees. First, "respect" means that the government must not obstruct citizens' opportunity to enjoy their rights; for example, government may not evict citizens without specific, and legal, motivation. Second, "protect" means that the state must intervene to protect citizens from organisations, such as corporations, who could violate citizens' rights. Third, "promote" indicates that the government has a duty to educate citizens about their rights, for example by making information on citizens' rights available to the public.⁷²

The duty to "fulfill" requires the government to take positive steps to ensure the realisation of rights, but this does mean that the state must directly provide the right on demand.⁷³ As the ESCR General Comment (No. 14, para 33) defined it, the duty to "fulfill" requires the state to act to

adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures" so that those who do not currently have access to rights can gain access.⁷⁴

⁷¹ South African Constitution, "Bill of Rights," Section 7(2)

⁷² Mbazira, 6.

⁷³ Mbazira, 4.

⁷⁴ Brand, 19.

Christopher Mbazira argued, “(T)herefore, [these rights] may not be fulfilled immediately without the availability of resources.”⁷⁵

Although the limitation clause in Section 36⁷⁶ limits both first and second generation rights, civil and political rights do not include limitations in their own sections. Section 19(2), for example, gives every citizen the right to free and fair elections. Elections do require the state to make budgetary commitments, but the state’s duty to fulfill the right to free and fair elections is not limited in the Constitution to the available resources of the state. Despite the fact that the right to vote and the right to health care are both enshrined in the Constitution, therefore, government’s duties in relation to political and civil rights is much more extensive than its duties in relation to socio-economic rights.

In analysing socio-economic rights in South Africa, Karrisha Pillay paraphrased Henry Shue’s argument in *Basic Rights* (1980). Shue suggested that state’s obligations in fulfilling rights could be divided into primary, secondary, and tertiary duties.⁷⁷ Primary duties mandate that the state refrain from violating individuals’ rights. Secondary duties obligate the state to create a legal and political framework to allow individuals to realise

⁷⁵Mbazira, 25

⁷⁶ Section 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

{2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁷⁷ Pillay (1996), 23.

their rights. Finally, tertiary duties compel the state to directly fulfill individuals' rights. Unlike the other duties, tertiary duties entitle the individual to claim a benefit from the state and place a duty on the state to use its resources to fulfill these rights.⁷⁸ Drawing from Shue's scheme, in the South African Constitution, most socio-economic rights – including the right to housing – are formulated with having primary or secondary duties rather than tertiary duties which would oblige the state to provide material goods to individuals.⁷⁹

Conclusion

Overall, the limited ways in which some socio-economic rights – like the right to housing – are enshrined reflect the many objections to socio-economic rights in South Africa as well as international covenants like the ICESCR. The Constitutional Court rejected several alternative models that were articulated in this chapter: Entrenching socio-economic rights with only negative duties on the state (SALC), imposing programmatic duties on the state (ANC), and including socio-economic rights only as “directive principles” (Haysom, et al). This chapter has highlighted several important questions that were considered in the South African debate. First, should socio-economic rights be conceived of as a “right of access” or as a direct right? Considering this question related to rights, do socio-economic rights impose a positive duty on the state unlike that imposed by political and civil rights? If so, is the state's duty to fulfill socio-economic rights equal to its duty to fulfill civil and political rights?

⁷⁸ Pillay (1996), 23-24.

⁷⁹ Pillay (1996), 24.

The Court's certification is vague as to the *extent* of the state's duties in relation to socio-economic rights. As Justice Albie Sachs emphasised in 2001, Constitutional Court decisions since 1996 demonstrated that the vague duty of the state in relation to socio-economic rights in the Constitution remains problematic despite attempts to define the extent of this duty in cases brought to the courts and by the legislature.⁸⁰ The next chapter will analyse how the Court articulated both the normative content of the right to housing and the extent of the state's duty to fulfill this right in the landmark *Grootboom* decision in 2000.

⁸⁰ Sachs, 131.

Chapter 2

Claiming a Right to Housing: The Implications of the Court's Approach

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.⁸¹

In 2007, reflecting on this quote from *Soobramoney v. Minister of Health, KwaZulu-Natal* [1998 (1) SA 765, 1997 (12) BCLR 1696 (CC)], former Justice Arthur Chaskalson said: “The irony, of course, is that, despite that language, Mr. Soobramony lost his case.”⁸² Since 1996, the Constitutional Court has been challenged to develop the normative content of the socio-economic rights entrenched in the Constitution and their correlative duties in three key cases: *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765, 1997 (12) BCLR 1696 (CC), *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC), and *Minister of Health and Others v. Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721, 2002 (10) BCLR 1033 (CC).⁸³ In these judgments, the Court demonstrated that the objections to socio-economic rights remained important considerations after the Certification of the Constitution in 1996. A comprehensive analysis of each of these cases is beyond the scope of this minor dissertation; rather, this

⁸¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 CC, para. 8

⁸² Arthur Chaskalson, “History of Socio-economic rights litigation in South Africa,” Lecture on 7th September 2007, Student Seminar for Law and Social Justice (SSLSJ), Hermanus.

⁸³ Although an analysis of the *Soobramoney* and *TAC* cases is beyond the scope of this thesis, it is important to note that both cases also involved the qualified socio-economic right to health. In *Soobramoney*, the first case regarding socio-economic rights, the Court found that the state was not constitutionally obligated to provide expensive medical treatment. However, in *TAC* (2002), the Court found that the state was obligated to provide medication to prevent the mother-to-child transmission of HIV/AIDS because the medication was affordable and could significantly improve the health of the population.

chapter will focus on how the Court interpreted and developed the right to housing in the *Grootboom* decision.

Although legal scholars have extensively evaluated *Grootboom*, few studies have analysed how the decision developed the right to housing and influenced subsequent housing policies. In *Grootboom*, the Court declared that the state has a Constitutional duty to positively act to protect the right to housing and that state policies could not exclude the most vulnerable members of society. The *Grootboom* decision, however, does not specify *what* policy measures the state must implement in order to fulfill the rights of those living in informal settlements, like Irene Grootboom and the other respondents. As the previous chapter argued, the question of the normative content to the right to housing, government's duty in promoting this right, and the Court's role in enforcing it were contentious in the Certification of the Constitution; the *Grootboom* judgment suggests that these issues remain problematic in present-day South Africa. This chapter will both evaluate how the *Grootboom* decision developed the normative content of the right to housing and the state's duty and will also analyse what guidelines the decision created for future policy so that the state could fulfill its duty.

***Grootboom*: Facts of the Case**

In 1998, Irene Grootboom was a member of a community of 900 other individuals which included 590 adults and 310 children who had lived in a squatter camp in

Wallacedene, Kraaifontein, Western Cape for several years.⁸⁴ Although many individuals in this community had applied for subsidised housing from the municipality, they had been on the waiting list for as long as seven years.⁸⁵ As living conditions became more intolerable in their previous settlements due to flooding in 1998, the respondents moved to and occupied an area of land known as “New Rust.”⁸⁶

Although Ms. Grootboom and her community claimed to have believed that the land was vacant at the time of occupation, “New Rust” was privately owned by Jonhass Properties CC and had been earmarked for low-cost housing.⁸⁷ Jonhass Properties CC served Grootboom and her community with an eviction notice under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. On 8th December 1998, the Magistrate’s Court in Kuilsriver ordered Grootboom and her community to vacate “New Rust” by 21st December. However, Grootboom and her community refused to comply with the order because it was granted in the absence of their legal representation.⁸⁸

The respondents and the land owners reached an agreement but the applicants failed to vacate by the date they agreed upon and were forcibly evicted from “New Rust” on 18th May 1999. Ms. Grootboom stated that “Our structures were simply bulldozed

⁸⁴ *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC), para. 4, fnt 2. Online: [http://www.escri-net.org/usr_doc/Grootboom_Judgment_Full_Text_\(CC\).pdf](http://www.escri-net.org/usr_doc/Grootboom_Judgment_Full_Text_(CC).pdf) [Referenced as “Grootboom.”]

⁸⁵ Grootboom, para 8.

⁸⁶ “Irene Grootboom v. Oostenberg Municipality,” Cape Town High Court. Case 6826/99. http://www.escri-net.org/usr_doc/High_Court_Judgment_-_Full_Text.pdf Introduction, 1. [Referenced as “Davis, Grootboom.”]

⁸⁷ Grootboom, para 8.

⁸⁸ Davis, Grootboom. Background, 4.

and there was no opportunity for us to attempt to salvage our personal belongings.”⁸⁹

The applicants were now “truly homeless” and were forced to camp on a sport field near the community centre with only plastic sheeting as shelter.⁹⁰ On 31st May 1999, Grootboom and her community (“the applicants”⁹¹) brought an urgent application to the High Court to require the state to provide adequate basic temporary shelter under Section 26 and sufficient basic social services to the applicants’ children under Section 28.⁹²

In his judgment in *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C), Judge Davis (“Davis J”) rejected the claim under Section 26 because it was not specific about “the nature of the shelter to be provided, to its location, or to which of the respondents should be responsible.”⁹³ However, Davis J did grant the second request under Section 28 because the right of children was not included in the constitution as a qualified right. Davis J argued that children needed parental supervision and that the parents could also claim an entitlement to shelter under section 28(1)(c).⁹⁴

While Davis did not “wish to be prescriptive” about the solution, he stated:

provisionally that tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.⁹⁵

⁸⁹ Davis, Grootboom. Background, 5.

⁹⁰ Davis, Grootboom. Background, 6.

⁹¹ Grootboom and her community were “applicants” in the High Court case but then “respondents” in the Constitutional Court case because government brought the case to the Constitutional Court when it appealed the High Court’s decision.

⁹² Of particular importance to this case, Section 28 guarantees that “every child has the right to”: “family care or parental care, or to appropriate alternative care when removed from the family environment” (Section 28(1)(b)) and to “basic nutrition, shelter, basic health care services and social services.” (Section 28 (1)(c))

⁹³ Davis, Grootboom. “The Relief,” 23.

⁹⁴ Murray Wesson, “Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court.” Online: <http://www.law.wits.ac.za/sajhr/2004/wesson.pdf>, 286-287.

⁹⁵ Davis, Grootboom. “The Relief,” 24.

Davis J's order did not make any statements of this type in regards to Section 26. As Murray Wesson summarised, "The parents were, in other words, granted shelter through the unqualified right accorded to their children."⁹⁶

Constitutional Court Case: Issues for Analysis

In 2000, government appealed⁹⁷ the High Court's decision to the Constitutional Court on the grounds that the right to housing, even under Section 28, is not a right that individuals can directly claim.⁹⁸ The Court's decision in the *Grootboom* case was hailed a victory for socio-economic rights because the Court found the state's housing programme "unreasonable" and explicitly proclaimed that the state has a constitutional obligation to take positive actions to protect the right to housing in Section 26. However, a critical reading of the language in the decision reveals that there are important nuances in the Court's interpretation of this right that influenced the development of later housing policies, especially those directed at informal settlements.

The *Grootboom* decision raised critical questions in the analysis of the constitutional right to housing.⁹⁹ To begin with, it is important to evaluate how the *Grootboom* case defined the normative content of the right of access to housing and to

⁹⁶ Wesson, 287.

⁹⁷ In the appeal to the Constitutional Court, the National Government ("Government of the Republic of South Africa") and the Premier of the Western Cape were the first and second appellants, respectively, and jointly filed their Head of Argument. The Cape Metropolitan Council and Oostenberg Municipality, the third and fourth appellants, also jointly filed their Head of Argument.

⁹⁸ "Third and Fourth Appellants' Head of Argument," filed in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11). Online at http://www.escri-net.org/usr_doc/Heads_of_Argument_3_&_4appellants.doc

⁹⁹ In his decision, Yacoob J analysed two constitutional rights: Section 26 (adequate housing) and Section 28 (the rights of the child). Although the question of children's right to shelter is an important consideration, this thesis will focus on how the Court interpreted Section 26.

consider the “minimum core” argument articulated both in the Respondents’ Head of Argument and by critics of the *Grootboom* decision. Secondly, the *Grootboom* case forced the Court to consider the extent of the state’s duty – in the local, provincial and national spheres of government – in relation to the right to housing. Thirdly, the Court had to determine how the right of access to housing could be enforced while not overstepping the bounds of the separation of powers. Finally, the *Grootboom* judgment forced the Court to elaborate on the purpose of socio-economic rights. In particular, the Court considered whether housing is a constitutional right that allows individuals to demand the immediate fulfillment of basic human needs.

Normative Content of the Right and the Minimum Core

In the “Certification of the Constitution,” the right of access to “adequate” housing and the extent of the state’s duty were left vague. *Grootboom* was the Court’s first opportunity to develop the normative content of the meaning of “adequate” housing and to set a standard for government to realise this right. Although many states have recognised and entrenched the importance of housing as a right,¹⁰⁰ as Scott Leckie argued:

[the right to housing has] yet to sufficiently influence national policy, law and practice on housing rights, and as a result few rights are denied as frequently, on such a scale, and with the degree of impunity as housing rights.¹⁰¹

¹⁰⁰ Scott Leckie, ed, *National Perspectives on Housing Rights*. (The Hague: Martinus Nijhoff Publishers, 2003), 3-4. For a comprehensive list of housing rights, please consult COHRE (2000) Sources No. 4: Legal Resources for Housing Rights: International and National Standards. COHRE, Geneva. The following states included housing rights in their constitutions in the 1990s: Armenia (1995), Belgium (1994), Burkina Faso (1991), Cambodia (1993), Colombia (1991), Congo (1992), Nepal (1990), Pakistan (1990), Paraguay (1992), Poland (1997), Russian Federation (1993), Seychelles (1993), Slovenia (1991), and Vietnam (1992).

¹⁰¹Leckie, 4.

In *Grootboom*, Yacoob J asserted that Section 26(1) “recognises that housing entails more than bricks and mortar”¹⁰² and that “there must be land, there must be services, and there must be a dwelling.”¹⁰³ The respondents and the applicants not only had different understandings of the case of Irene Grootboom and her community but interpreted the meaning of the Section 26 in critically different ways. In their Head of Argument, the national government and the Premier of the province of the Western Cape (“First and Second Appellants”¹⁰⁴) argued that the High Court had misinterpreted a child’s right to shelter as “unqualified in its operation against the State by any considerations of resources whatsoever.”¹⁰⁵

The Court’s vague explanation of adequacy as “entailing more than bricks and mortar” contrasts greatly with the Committee on Economic, Social, and Cultural Rights’ definition of the “right to adequate housing” as requiring seven key criteria: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.¹⁰⁶ Yacoob J refuted the notion of a minimum core for socio-economic rights because he argued that General Comment 3 “does not specify precisely what that minimum core is.”¹⁰⁷

¹⁰² Grootboom, para 35.

¹⁰³ Grootboom, para 35.

¹⁰⁴ In the Grootboom matter before the Constitutional Court, the National and Provincial government were first and second appellants while local governments (Cape Town and municipal) were third and fourth appellants. The national and provincial appellants had a separate head of argument from the local government.

¹⁰⁵ “First and Second Appellants’ Head of Argument,” filed in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11). Online at http://www.escri-net.org/usr_doc/Heads_of_Argument_First_&_Second_Respondents.doc at para 2.

¹⁰⁶ “Housing Rights in International Human Rights Law,” Centre on Housing Rights and Evictions, http://www.cohre.org/view_page.php?page_id=81. Also, “Socio Economic Rights: Housing, Health Care, Food, Water, Social Security,” pp. 566- 598. Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Cape Town: Juta & Co, 1996), 576.

¹⁰⁷ Grootboom, para 30.

Furthermore, Yacoob J argued that, while the United Nation's committee developed the concept and limits of the minimum core through extensive research over a number of years, the Court did not have "comparable information" to set a similar standard.¹⁰⁸

The Court also struck arguments for a minimum core entitlement in both other major cases involving socio-economic rights. In 1997, Sachs J argued in the *Soobramoney* decision that the state must balance between entitlements for everyone so that one person's claim does not undermine others' rights.¹⁰⁹ In 2002, the *TAC* decision proclaimed that it is:

[I]mpossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to socio-economic rights identified in section 26 and 27 on a progressive basis.¹¹⁰

In the end, the Court claimed that the minimum core approach asked the government to do the impossible because the approach does not allow for the consideration of the reality of scarce resources.¹¹¹

In *Grootboom*, Geoff Budlender of the Legal Resources Council, on behalf of the respondents, argued that the Court should follow the requirements of the International Covenant on Economic, Social and Cultural Rights (ICESCR), particularly General Comments 3 and 4 which mandated that socio-economic rights contained a "minimum

¹⁰⁸ Grootboom, para 32.

¹⁰⁹ Soobramoney, para 54.

¹¹⁰ David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence," *South African Journal on Human Rights*, (Vol. 19, 2003), 15 (quoted material). Original language in *Treatment Action Campaign* (Constitutional Court decision) at para. 35.

¹¹¹ Bilchitz (2003), 6.

core.”¹¹² The High Court rejected Budlender’s argument, but Budlender argued that the right to housing was essentially meaningless without this entitlement in his appeal to the Constitutional Court.¹¹³ Budlender objected:

What then does the right mean? It must mean more than the right to wait in a queue for twenty years. That is virtually as good as saying that the right is the right to buy on the open market. What it must mean, at a minimum, is the right to some shelter in the case of crisis.¹¹⁴

In 2001, 2003, and 2007, David Bilchitz, a South African legal scholar and proponent of the minimum core approach, argued that the minimum core is critically important to socio-economic rights because it “gives rights teeth.” The minimum core approach, Bilchitz argued, is based on the mandate that it is not acceptable for someone not to have their basic needs met which is “one of the prime reasons for the protection of socio-economic entitlements in the form of rights.”¹¹⁵ Bilchitz contended that the “Court has not understood the minimum core approach” which he believed the Court viewed as “rigid and absolutist.”¹¹⁶ Bilchitz has instead argued for a “weighted priority view” in which government does not have to provide minimum cores that it cannot afford but does have to justify its attempt to fulfill minimum core needs.¹¹⁷ As Bilchitz stated in 2007, the minimum core approach:

[F]orces us to recognise that it is simply unacceptable for any human being to have to live without sufficient resources to survive and that a state must do everything within its power to improve these living conditions.¹¹⁸

¹¹² Please see Eide, et al, ESC Rights: A Textbook, 1995, 442.

¹¹³ Grootboom, para 14.

¹¹⁴ Geoff Budlender, “Heads of Argument on Behalf of the Amici Curiae,” Grootboom case CC 11/00. Online: http://www.escr-net.org/usr_doc/Heads_of_Arguments_of_Amici_Curiae.doc Budlender, para. 33.

¹¹⁵ David Bilchitz, “Giving Socio-economic rights teeth.” 119 *South African Law Journal* 2002, at 499.

¹¹⁶ David Bilchitz, Lecture: “Poverty and Fundamental Rights.” Cape Town, University of Cape Town Law School, 16 October 2007.

¹¹⁷ Bilchitz (2007), Lecture.

¹¹⁸ Bilchitz (2007), Lecture.

Therefore, although the Court's *Grootboom* decision does suggest that housing is "more than bricks and mortar," the rejection of the minimum core argument reflects that the Court understood the right to housing in the context of Section 26(2), which limited it as a right to what the state could provide. As De Vos paraphrased the Court's interpretation:

the individual has a right, yes, but a right to demand that the state take action to begin to address the housing needs of the individual.¹¹⁹

Although the Court put forth valid arguments against the minimum core, the Court did not develop the normative content of the right to housing in *Grootboom* with an alternate approach.

State's Responsibility and the "Test of Reasonableness"

The question of the extent of government's duty to provide access to housing was also an important consideration in the *Grootboom* decision. As Yacoob J stated:

the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.¹²⁰

Yacoob J identified five factors in his "test of reasonableness." The programme must be reasonably implemented,¹²¹ make appropriate provision for short, medium and long term needs,¹²² must respond to the needs of the most vulnerable,¹²³ and must make housing more accessible to more people over time.¹²⁴ As Currie and van der Waal summarised:

Reasonableness, the Court holds in *Grootboom*, requires the design, adoption and implementation of measures to realise socio-economic rights that are

¹¹⁹ Pierre De Vos, "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in the South African Constitution," *South African Journal on Human Rights*, Vol. 13, 1997 at 271.

¹²⁰ *Grootboom*, para 33.

¹²¹ *Grootboom*, para 42.

¹²² *Grootboom*, para 43.

¹²³ *Grootboom*, para 44.

¹²⁴ *Grootboom*, para 45.

comprehensive, in the sense that they do not exclude those most in need of the protection of the rights.¹²⁵

In the end, Yacoob J found the state's housing programme unreasonable not because of a systematic flaw, but rather because of an omission: there was no "express provision to facilitate access to temporary relief" for people in desperate need.¹²⁶ In particular, Yacoob J found fault with local and provincial government. Although the Western Cape Province claimed that it began to implement the Cape Metro Land Programme in 1999,¹²⁷ Yacoob J stated that, "the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution" in the Cape Metropolitan area.¹²⁸

Despite the possible usefulness of the Court's "test of reasonableness," it does not constitute a comprehensive policy review. Yacoob J did assess some of the provisions of the Housing Act (1997) and found that it was a reasonable programme in many aspects because the programme: aimed to achieve progressive realisation of the right of access to housing,¹²⁹ was a systematic response to the housing crisis,¹³⁰ and demonstrated that the state has taken legislative action at all levels of government.¹³¹ Yacoob J also cited several legislative programmes¹³² already in existence and concluded that the current national housing policy was reasonable because the "budget allocated by national

¹²⁵ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*. (Cape Town: Juta & Co, 1996), "Socio Economic Rights: Housing, Health Care, Food, Water, Social Security," 566- 598 at 580.

¹²⁶ Grootboom, para. 52

¹²⁷ Grootboom, para 60.

¹²⁸ Grootboom, para. 69.

¹²⁹ Grootboom, para 53

¹³⁰ Grootboom, para 54

¹³¹ Grootboom, para 55

¹³² Housing Act, 107 of 1997; the Housing Consumers Protection Measures Act, 95 of 1998; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998; the Development Facilitation Act, 67 of 1995; and the Western Cape Housing Development Act, 6 of 1999.

government appears to be substantial.”¹³³ However, Yacoob J did not interrogate the results of any of these programmes or consider to what extent the state was implementing the policies.

On a positive note, in *Grootboom*, the Court demonstrated a new commitment to finding ways to protect socio-economic rights: Yacoob J argued that the courts are constitutionally bound to ensure that they are protected and fulfilled, a task he stresses “must be carefully explored on a case-by-case basis.”¹³⁴ As Liebenberg argued, *Grootboom* paved the way for future litigation because the “reasonableness” test suggested that government would be “vulnerable to constitutional challenge” if social assistance programmes were not reasonably implemented.¹³⁵ On the other hand, Bilchitz argued that the Court should have judged the state against the results that the state achieved through its policies rather than focus on the state’s failure to have a plan for emergency housing.¹³⁶ The Housing Act 107 of 1997 suggested such a “desired end” when it stated that:

All citizens and permanent residents of the Republic will, on a progressive basis, have access to (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply.¹³⁷

¹³³ *Grootboom*, para 47.

¹³⁴ *Grootboom*, para 20.

¹³⁵ Sandra Liebenberg, “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa,” *South African Journal on Human Rights*, Vol. 17, 2001 at 246.

¹³⁶ Bilchitz (2002), 498.

¹³⁷ Bilchitz (2002), 496.

Although this “desired end” is limited by the clause “on a progressive basis,” the fact that it specifically outlines the basic requirements of adequate housing could have been used as a standard to which to hold government’s policies and their results.

The *Grootboom* judgment’s “test of reasonableness” influenced two changes in future housing policy. First, the judgment stated that government must adopt “reasonable measures to provide relief for people in desperate need”¹³⁸ but does not make clear what the state must do to fulfill basic needs. If the court had accepted a minimum core to the right to housing, the state would have a more definite standard of the extent of its duty.

For example, as Bilchitz articulated:

Instead of merely being implored to be ‘reasonable,’ the state would have been required to ensure that people have ‘effective protection from the elements and basic services, such as toilets and running water.’¹³⁹

Secondly, the “test of reasonableness” found that the government’s housing programme failed to “make reasonable provision within its available resources for people in the Cape Metropolitan area”¹⁴⁰ but did not criticise national government’s policy as an entity. The *Grootboom* order, therefore, mandated that Cape Town and the Western Cape Provincial government had to change their strategy but did not put a similar obligation on national government.

The Role of the Court

Although the Court demonstrated a new commitment to enforce social and economic rights in *Grootboom*, *Yacoob J* also refused to directly require the state to

¹³⁸ *Grootboom*, para 99

¹³⁹ Bilchitz (2002), 500.

¹⁴⁰ *Grootboom*, para 99

complete specific actions. Yacoob J unequivocally stated that the Court “considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.”¹⁴¹

Overall the Court has argued that it does not have the right to make decisions that would have budgetary implications for the legislature. In the 1997 decision in *Soobramoney*, the Court stated that it would be “slow to interfere with rational decisions taken in good faith by the political organs and medical authorities.”¹⁴² As former Justice Arthur Chaskalson stated in 2007:

Courts must not take over government. There is a distinct difference between taking over and holding the government accountable. It is very difficult when the political will is lacking, but all the courts can do is to evaluate if progress is consistent with the Constitution.¹⁴³

Furthermore, Chaskalson argued, the Court could not “force the government to increase taxes” and should rather “have a constraining role” in these kinds of decisions.¹⁴⁴ In 2001, Cass R. Sustein from the University of Chicago also praised the South African court’s approach in *Grootboom* as a model for how the principles of administrative law could serve the interests of socio-economic rights. Considering the *Grootboom* judgment, Sustein argued:

We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.¹⁴⁵

¹⁴¹ *Grootboom*, para 41.

¹⁴² *Soobramoney*, para 29

¹⁴³ Arthur Chaskalson, “History of Socio-economic rights litigation in South Africa,” Lecture on 7th September 2007, Student Seminar for Law and Social Justice (SSLSJ), Hermanus.

¹⁴⁴ Chaskalson, 2007.

¹⁴⁵ Cass R. Sustein, “Social and Economic Rights? Lessons from South Africa.” (*Constitutional Forum*, Vol. 11, 2001), 123.

Despite Yacoob J's refusal to directly evaluate government's decision, however, one could argue that the Constitution does imbue the Court with the authority to interpret the Constitution and therefore makes the Court responsible for determining the state's obligations.¹⁴⁶ In fact, Section 167(3) of the Constitution states that the crucial role of the Court is to identify general principles that specify what government must do to fulfill its obligations.¹⁴⁷ The Court has developed the content of the state's duty in cases regarding first generation rights. For example in *August v Electoral Commission* (1999 (3) SA 1 (CC)), the Court specified the State's obligations in enforcing the right to vote (Section 19(3)).¹⁴⁸ In Paragraph 16 of the *August* decision, Sachs J held that

[T]he right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process.¹⁴⁹

In this decision, therefore, the Court was clear that the State must ensure the secrecy of the ballot by completing specific tasks in order to meet its constitutional obligation.¹⁵⁰

The Court also developed the right to dignity and then tested Government action against this standard in *Dawood v Minister of Home Affairs* (2000 (3) SA 936 CC) and in *Harksen v Lane NO* (1998 (1) SA 300 (CC)), which was focused on the right to equality.

Furthermore, in *Bernstein v. Bester* (1996 2 SA 751 CC), Ackermann J considered the rationale behind the protection of the right to privacy in order to determine not only what

¹⁴⁶ Bilchitz (2002), 487.

¹⁴⁷ Section 167(3): The Constitutional Court

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

¹⁴⁸ Bilchitz (2002), 487 fnt 21.

¹⁴⁹ Bilchitz (2002), 487 fnt 21.

¹⁵⁰ Bilchitz (2002), 487 fnt 21.

government must do but *why* they must fulfill this right.¹⁵¹ As Bilchitz argued, the Court could use a similar approach to litigate socio-economic rights which would involve both giving content to the right and articulating standards for government's obligations in relation to this right.¹⁵²

Enforcement and Court Orders

In the *Grootboom* order, Yacoob J replaced the order of the High Court, which suggested a "bare minimum," and declared that the state must provide programmes like the Accelerated Managed Land Settlement Programme for those who are "living in intolerable conditions or crisis situations."¹⁵³ The South African Human Rights Commission would monitor and report on the government's implementation of this order. The Court order does not impose any time limit on government's actions in developing a programme to meet short-term needs.¹⁵⁴

The Court's refusal to direct government in cases involving socio-economic rights has sometimes meant that government failed to act in order to fulfill its constitutional duty. Considering the outcome in the *Grootboom* case, Geoff Budlender said in 2007 that "[t]he Court judgment in *Grootboom* and *TAC* is progressive, but the Court order leaves it up to someone else."¹⁵⁵ Karrisha Pillay investigated the implementation of the order in *Grootboom* and found that the government had not implemented the Court's

¹⁵¹ Bilchitz (2003), 14.

¹⁵² Bilchitz,(2002), 487.

¹⁵³ *Grootboom*, para 99 (2)

¹⁵⁴ Karrisha Pillay, "Implementing *Grootboom*: Supervision Needed" (2002) 3 ESR Review 13. Online: <http://communitylawcentre.org.za/ser/esr2002> at 14.

¹⁵⁵ Budlender, 2007.

order two years later. Pillay criticised the order because it failed to contain time frames and because the Court did not supervise the implementation of the order. The Human Rights Commission's Report, Pillay found, failed to explain what "steps were taken to change the national housing programme to bring it in line with *Grootboom*."¹⁵⁶ Pillay concluded that:

[T]here has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate need or crisis situations.¹⁵⁷

For example, by 2003, the provincial government in the Western Cape had only implemented a very limited crisis housing programme and national government had not yet provided a programme for those in desperate need.¹⁵⁸

Rather, government responded after the *Grootboom* decision with a series of *ad hoc* measures that were not followed by a comprehensive policy review or change in strategy. The implications of the state's failure to act to improve living conditions for Ms. Grootboom's community were reflected in the Select Committee on Public Services' 2005 Report. The Committee found that, in the short run, the Provincial Government (the Department of Local Government and Housing) provided the Oostenburg municipality with approximately R878,000 in 2001 to waterproof the shacks, provide temporary taps and toilets, and to fund the building of an ablution facility in Grootboom's community. Furthermore, the Provincial Government and the City of Cape Town agreed

¹⁵⁶ Udesh Pillay, Richard Tomlinson and Jacques du Toit. *Democracy and delivery: Urban policy in South Africa*. (Cape Town: HSRC Press, 2006), 2.

¹⁵⁷ Pillay (2006), 14.

¹⁵⁸ Bilchitz (2003), 25.

to take joint responsibility and the National Government allotted them funding under the Flooding Relief project.¹⁵⁹

Despite these initially promising measures, however, the Committee found in 2005 that the “Grootboom community still finds themselves in the condition they were prior Constitutional Court’ declaratory order of 4 October 2000.” In particular, the Committee found that the twenty permanent toilets and the two taps installed were in an “appalling state due to lack of maintenance and supervision by the City of Cape Town” and also found that there had been a breakdown in communication between the City of Cape Town and Ms. Grootboom’s community “about the true intention of the former with regard to housing development and service delivery in Wallacedene.”¹⁶⁰ Overall, the Committee was critical not only of the failure of the local and provincial government to implement changes, but also of the fact that the community seemingly had no way to criticise the results of government’s policy changes.

Guidelines for Future Policies

Elisabeth Wickeri argued that the *Grootboom* decision is a “powerful tool” for community advocates fighting state evictions because *Grootboom* forced government to

¹⁵⁹ Report of the Select Committee on Public Services on a Fact-Finding Mission to the Wallacedene Informal Settlement, Kraaifontein, in the Western Cape. 14 June 2005. Online: <http://www.pmg.org.za/docs/2005/comreports/050629scpservicereport.htm>

¹⁶⁰ Select Committee on Public Services on a Fact-Finding Mission to the Wallacedene Informal Settlement, Kraaifontein, in the Western Cape, 2005.

develop a national programme for housing assistance in emergency circumstances.¹⁶¹

Liebenberg also argued that *Grootboom* was a useful tool for social policy activists because it mandated that policies must be properly implemented and that policies cannot forget the most desperate.¹⁶² The Court's order in *Grootboom*, however, did not stipulate what the state must do on a larger scale to better fulfill its constitutional duty. As this chapter has argued, the *Grootboom* decision did not set a standard for the state to meet nor did it hold the state accountable for its future policies. As Bilchitz argued in 2007:

The Court needs to give a clear idea of what rights entitle people to have. Overall there is a need for greater specificity in court orders. Government needs to set goals and targets, to develop a real programme of realisation.¹⁶³

As the next chapter will further explain, although government created policies to provide for the most desperate as a result of *Grootboom*, the policies for informal settlements are often a continuation of the national government's housing policy at the time of the *Grootboom* decision.¹⁶⁴

One could also argue that the government's efforts must be followed up by action "on the ground" in order to have a real impact. Geoff Budlender argued for a minimum core approach in both *Grootboom* and the *TAC* case. In 2007, however, Budlender argued that the crucial step in the housing issue was not about the courts but rather about

¹⁶¹ Elisabeth Wickeri, "Grootboom's Legacy: Securing the Right of Access to Adequate Housing in South Africa?" (Center for Human Rights and Global Justice Working Paper, Economic Social and Cultural Rights Series, 5 November 2004), 6. Online: www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf

¹⁶² Liebenberg (2001), 256.

¹⁶³ Bilchitz, 2007.

¹⁶⁴ Pillay (2006), 2.

the failure of non-governmental organisations (NGOs) to mobilise around housing issues.

As Budlender stated:

It is still a mystery to me why housing activists didn't build on *Grootboom*. It was a very progressive judgment that no one took hold of to use because there was no social movement on the ground.¹⁶⁵

Budlender argued that the Court's agreement on the notion of rationality and equality should give activists and lawyers sufficient tools to move socio-economic rights forward.

For example, one could not bring a case to the Court with the argument that Reconstruction and Development Programme (RDP) housing is not adequate. Budlender is of the view that if you "come with the argument that a community hasn't received anything, then the Court has something to say."¹⁶⁶ Chaskalson agreed with Budlender's claim that rights like access to housing are a political question and a call for mobilisation.

As Chaskalson stated:

It is more effective when people drive this process. Courts are important but these are more effective when there is a political movement behind them, which is why the TAC decision has been so successful.¹⁶⁷

Although one might argue that the Court should have accepted the argument of the minimum core to the right to housing in *Grootboom*, it is also important to consider what can be done to better fulfill the right to housing in the future. As the fourth chapter of this minor dissertation argues, civil society and NGOs are critical actors in holding government responsible and in shaping how policies are implemented in communities.

¹⁶⁵ Geoff Budlender. Lecture: "Law By Other Means," Student Seminar for Law and Social Justice (SLSJ), Hermanus, 07 Sept 2007.

¹⁶⁶ Budlender, 2007.

¹⁶⁷ Chaskalson, 2007.

What is the Purpose of Socio-economic Rights?

The *Grootboom* mandate was hailed as a tremendous step forward for socio-economic rights in South Africa. Pierre de Vos, for example, argued that *Grootboom* mandated substantive equality and fairness in social assistance in future government programmes.¹⁶⁸ Yacoob J stressed the need to take socio-economic rights seriously, stating that they are “expressly included in the Bill of Rights; they cannot be said to exist on paper only.” Furthermore, Yacoob J declared that state policy must take account of the fact that those who can afford to pay for housing are in a different position in terms of their need for the right than those who are not able to pay for it.¹⁶⁹

The Constitution was envisioned as a transformative document that would improve society, as articulated in Section 7 of the Bill of Rights. As de Vos articulated:

The Constitution explicitly rejects the social and economic *status quo* and sets as one of its primary aims the transformation of society into a more just and equitable place.¹⁷⁰

De Vos argued that the Court has used the vision of an egalitarian society as the guiding principle in socio-economic cases. In the *Soobramoney* case, the “Court did not delve deeply into meaning of right,”¹⁷¹ but De Vos argues that *Grootboom* is an example of transformational constitutionalism that “confirms that the Bill of Rights is a transformative document.”¹⁷²

¹⁶⁸ Pierre De Vos, “Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness.” *South African Journal on Human Rights*, (Vol. 17, 2001), 258.

¹⁶⁹ *Grootboom*, para 36.

¹⁷⁰ De Vos (2001), 260. For more on transformational constitutionalism, please consult Klare, “Legal culture and transformative constitutionalism,” *South African Journal on Human Rights* (Vol. 14, 1998).

¹⁷¹ Craig Scott and Philip Alston, “Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney*’s legacy and *Grootboom*’s promise.” *South African Journal on Human Rights* (Vol 16. 2001), 256. Online: <http://www.law.wits.ac.za/sajhr/contents2000.html>

¹⁷² De Vos (2001), 268.

On the other hand, as Bilchitz and others¹⁷³ have argued, without establishing a minimum core, socio-economic rights do not have much of a concrete transformative effect on society. Michelman and Andre van der Walt argued for the needs-based approach to welfare rights.¹⁷⁴ In particular, they criticised the Court's approach in *Grootboom* which viewed the "target evil" as relative deprivation and therefore view government's role as decreasing inequality. Michelman argued that this approach undermines the meaning of having socio-economic rights enshrined in the Constitution. Citing *Grootboom*, Michelman contended that the Court's equal protection approach focuses

on the structural problem of a person's relative position on the socio-economic ladder vis-à-vis others, rather than on the concrete problem of such a person's actual hardship and deprivation.¹⁷⁵

Instead, Michelman argues for a "minimum protection approach" which protects everyone against severe deprivation.¹⁷⁶ Danie Brand argued that the Court's interpretation of the right suggests that Government's only failure was to provide for people in desperate need in this specific case rather than to question why such severe deprivation existed in the first place.¹⁷⁷ Although a minimum core is perhaps not necessary to developing the right of access to housing, the Court's ruling in *Grootboom* does suggest that the Court views the right to housing and other socio-economic rights as

¹⁷³ RE Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights" (Vol. 16, 1994) *Human Rights Quarterly* 693; G van Bueren "Allieviating Poverty Through the Constitutional Court," *South African Journal on Human Rights*, (Vol 15, 1999).

¹⁷⁴ Danie Brand, "Introduction to Socio-Economic Rights in the South African Constitution," pp. 1-56 in Danie Brand and Christof Heyns, eds. *Socio-Economic Rights in South Africa*. (Pretoria: Pretoria University Law Press, 2005), 35.

¹⁷⁵ Brand, 35, quoting from Michelman, "Protecting the Poor."

¹⁷⁶ Brand, 36, quoting from Michelman, "Protecting the Poor."

¹⁷⁷ Brand, 36.

requiring different standards than first generation rights and is less willing to intervene on their behalf. While De Vos and Liebenberg are correct that future social assistance programmes had to be more “equitable” after *Grootboom*, what was also clear is that the right of access to housing was not a right of access to basic human needs but rather a right to have access to a “reasonable” government programme. As Brand articulated, this approach was problematic for both theoretical as well as practical reasons:

[T]he Court’s current answer to the question ‘What are socio-economic rights (and, to be more precise, its enforcement of those rights) for?’ could quite plausibly be ‘The assurance that government, in attempting to alleviate poverty and hardship, will act in a manner consistent with good governance, and only that.’¹⁷⁸

Conclusion

In *Grootboom*, the Court clearly stated that the state must intervene to protect the right to housing of the most vulnerable members of society. However, the Court refused to set standards to the right and rather conceived of the right of access to housing as limited to what the state was willing to achieve. The Court put forth valid arguments against the minimum core, but did not articulate an alternative approach to developing the normative content of the right to housing. Furthermore, the Court found the state’s policy unreasonable not because the state has failed to implement its policy, but rather because it omitted an important programme.

The previous chapter argued that the most important objection to including socio-economic rights was that they required a budgetary commitment. In many ways, the limitations placed on the Court’s interpretation in *Grootboom* reflect these objections,

¹⁷⁸ Brand, 37.

especially in the Court's failure to define a minimum core or to require the state to hold itself to its own standards. As the next chapter will argue, the Court's interpretation of the right to housing in the *Grootboom* decision resulted in a change in housing policies at a national and local level since 2000. However, the policies which have come as a result of *Grootboom* reflect the limited interpretation to the right to housing the Court gave in this case as well as the limited standard of the state's duty as articulated in the Court's order.

University of Cape Town

Chapter 3

Housing Policy and Informal Settlements after *Grootboom*

Government is doing nothing, or it's doing the wrong things. It's a constitutional right. It's not a privilege.

- Mzonke Poni (Site QQ Resident, Khayelitsha)¹⁷⁹

The previous chapter argued that, in the *Grootboom* judgment, the Constitutional Court (the “Court”) was hesitant to develop the normative content of the right to housing or to specifically define government’s duty as it had in cases involving “first generation” rights. The Court’s order did not explicitly stipulate what government must do in order to fulfill its constitutional obligations.¹⁸⁰ However, the Court was clear that government’s policies would be unreasonable – and therefore unconstitutional – if they failed to make any provision for the most vulnerable members of society.¹⁸¹ Cathi Albertyn identified one of the key consequences of the judgment:

What seemed clear after *Grootboom* was that housing policies based on the idea of long waiting lists for access to formal housing without securing the lives of the poor in the interim were possibly unconstitutional.¹⁸²

Despite the “test of reasonableness” in the *Grootboom* judgment, the standard by which government’s policies are judged “possibly constitutional” remains vague in present-day South Africa and has resulted in few changes in housing provision for communities living in informal settlements since 2000.

¹⁷⁹ Mzonke Poni, Interview, Development Action Group Leadership Workshop, Simonstown. 23 September 2007

¹⁸⁰ *Grootboom*, para. 94-96.

¹⁸¹ Marie Huchzermeyer and Aly Karam, *Informal settlements: a perpetual challenge?* (Cape Town: University of Cape Town Press, 2006), Forward, vii.

¹⁸² Huchzermeyer and Karam (2006), vii.

The *Grootboom* judgment influenced housing policy in two important ways. First, the *Grootboom* judgment created a mandate that the state must have a short-term strategy to address the needs of the most vulnerable members of society. In particular, after *Grootboom* it was necessary for government to develop policies to manage informal settlements since there were no housing policies focused on informal settlements before 2000. Secondly, the *Grootboom* decision made all spheres of government responsible for implementing housing policies whereas, before *Grootboom*, the national government had the majority of the responsibility both for developing policies and implementing them.¹⁸³

The *Grootboom* judgment focused on housing policy initiatives in the Western Cape. This chapter, therefore, will analyse housing strategies for informal settlements in the Western Cape, particularly Cape Town, since 2000. It will examine how the *Grootboom* mandate influenced government housing policy, from all spheres of government, to promote the right of access to housing for the residents of informal settlements similar to those of Irene Grootboom's community. On the one hand, since 2000, government has articulated strategies to improve the conditions for those living in informal settlements and some Cape Town communities have experienced an improvement in their living conditions since 2000. On the other hand, the main thrust of government's policies and the majority of funding at both the local and national level remained similar in 2007 to the policies in place when Grootboom's community engaged in its illegal occupation in 1998. The next chapter will examine this ambiguous legacy at a local level by comparing two different housing developments that were underway in Cape Town in 2007.

¹⁸³ Huchzermeyer (2006), vii-viii.

Growth of Informal Settlements in Cape Town

“Informal settlements” can be defined as settlements that the urban poor have developed through unauthorised occupation of land and are different from “slums,” which do not involve unauthorised occupation. Informal settlements are usually characterised by shelter that the poor have built for themselves and residents often live in overcrowded areas lacking basic services.¹⁸⁴ In South Africa, informal settlements began under the apartheid regime, especially after 1962 when the former regime enforced influx control for Africans and coloured people in the Western Cape. Despite the constant threat of forced removals, African people continued to move to the Western Cape in large numbers and, in the absence of formal housing, created informal settlements throughout the Cape peninsula.¹⁸⁵

As a result of rapid migration, the geographic size of Cape Town has increased by 40% since 1985 and, as the “State of Cape Town Report” in 2006 found, “most of the urban growth in the past 20 years has also been *ad hoc*.”¹⁸⁶ In Cape Town alone, the number of people living in informal settlements has increased from 23,000 households in 1993 to approximately 120,000 families in 2007.¹⁸⁷ In total, approximately 30% of households (almost one million people) in Cape Town live in inadequate housing,

¹⁸⁴ Huchzermeyer, 2006, Introduction 2006, 3

¹⁸⁵ Grootboom, para 6

¹⁸⁶ City of Cape Town, Intergrated Development Plan (IDP), “State of Cape Town 2006: Developmental Issues in Cape Town,” Executive Summary, 4. Online:

http://web.capetown.gov.za/eDocuments/State_of_Cape_Town_2006_712200610345_359.pdf

¹⁸⁷ Emille van Heyningen, *Planning Socio-Economic Districts*. (City of Cape Town, 2007), 10. Online: http://web.capetown.gov.za/eDocuments/Planning_Districts_Socio-Economic_Analysis_2007_16102007115629_359.pdf

including informal settlements,¹⁸⁸ and approximately 14% of all housing is classified as informal housing.¹⁸⁹

Cape Town has attempted to collect information about people living in informal settlements since 1995, but there is still a lack of comprehensive data.¹⁹⁰ The increase in the housing backlog is in part attributable to the fact that approximately 48,000 people move into Cape Town each year, most of whom are undereducated and poor Xhosa speakers from the rural Eastern Cape.¹⁹¹ In 2004, the City of Cape Town commissioned a study to collect data in order to facilitate “the provision of temporary and rudimentary services in order to maintain an acceptable degree of health and hygiene.”¹⁹² This survey was conducted in Langa, Khayelitsha, and Brown’s Farm and found that the majority of residents were young, poorly educated, and suffered from high disease levels, high employment rates, and hunger.¹⁹³ The survey also found that “grossly unhygienic conditions prevailed due to the lack of adequate sanitation” and that housing was the most important priority for residents who responded to the survey.¹⁹⁴

¹⁸⁸ City of Cape Town (2006), 14.

¹⁸⁹ City of Cape Town (2006), “Section 4.5 Integrated Human Settlements,” 43.

¹⁹⁰ Michael Barry and Heinz Rüther, “Data Collection Techniques for Informal Settlement Upgrades in Cape Town, South Africa.” *URISA Journal*. (Volume 17, no. 1), 43. Online: <http://www.urisa.org/files/Barryvol17no1-5.pdf>

¹⁹¹ Barry and Rüther, 43.

¹⁹² City of Cape Town, “Study on the Social Profile of Residents in Three Selected Informal Settlements in Cape Town.” (City of Cape Town: 2005), 1. Online: <http://www.capetown.gov.za/wcmstemplates/sdigis.aspx?clusid=477&catparent=7185&IDpathString=6952-6980-7185>.

¹⁹³ City of Cape Town (2005), 34-64.

¹⁹⁴ City of Cape Town (2005), 67.

National Government: Towards Breaking New Ground (2004)

The majority of analysis of South African housing policy has focused on the 1994 White Paper and the subsequent Housing Code (1998) and national housing policy (2000). Fewer studies have analysed the changes in housing policy since 2000 and how the *Grootboom* judgment shaped these policies. It is important to note the variety of criticisms leveled at the government's approach to the housing question and to emphasise that housing is a complex issue.

Although a full analysis of national government's housing policies is beyond the scope of this minor dissertation, it is important to highlight several areas of criticism. The first national housing policy, articulated in the Reconstruction and Development Programme (RDP) and the 1994 White Paper on Housing, were criticised as being too conservative to lead to substantive change because the ANC adopted the Growth, Employment, and Redistribution (GEAR) economic policy in 1994. Michael Blake, for example, was critical of this approach because GEAR tied housing policy with macroeconomic development and thus limited the vision for the future of housing in South Africa.¹⁹⁵ In addition, Phillip Harrison argued that the conservative goals of the GEAR agenda restricted the transformative effect of housing policy. As a result of the conservative financing mechanisms and other national government policies, Harrison

¹⁹⁵ Firoz Khan and Petal Thring, *Housing policy and practice in post-apartheid South Africa*. (Sandown, South Africa: Heinemann Press, 2003), 1; Patrick Bond, *Elite transition: from apartheid to neoliberalism in South Africa*. (Scottsville: University of KwaZulu-Natal Press, 2005), 89-92.

maintained that South Africa's housing policies resulted in "fragmented cities" that have perpetuated the geographic divisions created by apartheid.¹⁹⁶

In addition, many analysts like Patrick Bond criticised the 1994 White Paper and its infamous goal of "one million houses in five years" of creating a paradigm of "quantity over quality." This meant that houses were built quickly rather than as part of a comprehensive plan to build adequate housing which would include, for example, access to metropolitan areas and infrastructure.¹⁹⁷ Bond also criticised the housing finance mechanisms created in government policies and the overall structure of GEAR because it made housing unaffordable to the majority of South Africans who earn less than R 2, 500 per month.¹⁹⁸ Marie Huchzermeyer and Firoz Khan criticised national government's housing policies for the "gap between theory and practice" which, despite government's promises, has not significantly changed the division of land and other resources. Huchzermeyer, Khan, and others have also highlighted government's inability to deliver housing and services which, they argue, has resulted in citizens questioning the legitimacy of national government's professed transformative goals.¹⁹⁹

At the time that Irene Grootboom brought her case to the Constitutional Court, there was no specific national policy on informal settlement management. National government argued that informal settlements were the result of a shortage of housing

¹⁹⁶ Philip Harrison and Marie Huchzermeyer. *Confronting fragmentation: Housing and urban development in a democratising society*. (Lansdowne: University of Cape Town Press, 2003), Introduction.

¹⁹⁷ Bond, 2005.

¹⁹⁸ Bond, 2005

¹⁹⁹ Marie Huchzermeyer, *Unlawful occupation : informal settlements and urban policy in South Africa and Brazil*. (Trenton, NJ, USA: Africa World Press, 2004); Khan and Thring, 2003.

delivery and argued that the national housing policy, which focused on creating housing, would “solve the problem of informal settlements” over time.²⁰⁰ From 1994 to 2003, the national policy focused on the subsidised delivery of housing as articulated in the 1994 White Paper on Housing and the 1998 Housing Code.²⁰¹ The South African government has been successful in building houses. For example, the Department of Housing reported in March 2007 that it has delivered more than 2 million houses in the past thirteen years.²⁰² In addition to building houses, national government, from 1994 on, focused on three important aspects of urban policy which, government argued, addressed the needs of urban poverty and would help to decrease informality: “one city, one tax base” (re-demarcating municipalities and support delivery to the poor); developmental local government; and municipal mass delivery of free housing and services.²⁰³

Although government had enacted the semblance of a national urban policy from the mid-1990s, however, there was no policy directed to ameliorating conditions in informal settlements before 2004. As Colin Marx wrote in 2003:

Despite the predominance of informal settlements and growing housing backlogs, there has been no concerted state effort to deal comprehensively with supporting informal settlements in the post-apartheid period.²⁰⁴

²⁰⁰ Nicholas Graham, “Informal settlement upgrading in Cape Town: Challenges, constraints, and contradictions within local government,” in Marie Huchzermeyer, *Informal settlements: a perpetual challenge?* (Cape Town: University of Cape Town Press, 2006), 231-249 at 233.

²⁰¹ Udesb Pillay, Richard Tomlinson, and Jacques du Toit. *Democracy and delivery: Urban policy in South Africa*. (Cape Town: HSRC Press, 2006), 16.

²⁰² Department of Housing, “Housing Statistics at March 2007.” Department of Housing webpage. Online: <http://www.housing.gov.za/default.htm>

²⁰³ Pillay, et al, 2-3.

²⁰⁴ Colin Marx, “Supporting Informal Settlements,” in Khan, Firoz and Petal Thring, *Housing policy and practice in post-apartheid South Africa..* (Sandown, South Africa: Heinemann Press, 2003), 299-320 at 299.

The Court issued the *Grootboom* mandate in 2000, but informal settlements only received national attention in 2003 when Housing Minister Bridget Mbandla commissioned a study which sought to understand the reason for the increase in the number of informal settlements. The report of this study, the “Support for Informal Settlements” (2004), argued that informal settlements were “products of failed policies” and that support needed to

[G]o beyond traditional approaches that have tended to concentrate on improvement of housing, infrastructure, and the physical environment.²⁰⁵

In September 2004, the Department of Housing unveiled the *Breaking New Ground: Comprehensive Plan for Sustainable Development of Human Settlements* (“BNG”) policy. Of particular importance to this minor dissertation, the BNG policy was the first time that national policy introduced a programme specifically geared towards informal settlements, in this case the Informal Settlement Upgrading Programme (“ISUP”).²⁰⁶ The new ISUP programme increased the existing subsidy, rewarded public involvement, and included a provision for *in situ* (on-site) upgrade rather than only “greenfield” development.²⁰⁷ On the other hand, despite the provision for *in situ* upgrading, the BNG plans called for eradicating informal settlements by 2014. This ambitious goal has justified government’s strategy to create more housing quickly, which, in turn, has led to more “greenfield” developments rather than *in situ* upgrading which often takes more time and allows for “benign” informality during the development

²⁰⁵ Huchzermeyer (2006), 43.

²⁰⁶ Graham, 231.

²⁰⁷ “Greenfield” development is defined as housing developments created on new, open land. This is as opposed to “brownfield” development which occurs by upgrading existing housing, often informal housing in settlements. Catherine Cross, “Breaking new ground” at the grassroots level. Power Point. Online: www.wits.ac.za/informalsettlements/Catherine%20Crossppt.

process.²⁰⁸ Government's goal of "eradicating" informal settlements as articulated in BNG reflects international developmental goals. The United Nations Millennium Development Declaration of 2000 brought informal settlements – or "slums" – to the forefront of developmental agendas. One of the Millennium Development Goal (Target 11) was to achieve a "significant improvement in the lives of at least 100 million slum dwellers" by 2020.²⁰⁹ Lindiwe Sislulu, who replaced Minister Mbandla in June 2004, said that "this government has indicated its intention to moving towards a shack-free society."²¹⁰

On 15 May 2004, Federation Internationale de Football Association (FIFA) announced that South Africa won the bid for the 2010 World Cup, which added to the motivation to transform all "visible" informal settlements into formal housing.²¹¹ The national government's goal to eradicate informality significantly influenced the City of Cape Town's housing strategy, especially because the N2 highway was selected as a site for a pilot project in the upgrade programme under BNG. In draft stages the new policy differentiated between "visible" and non-visible settlements and, while this was not included in the final version of the programme, it informed the N2 Gateway project.²¹² As the next chapter will argue, however, this kind of development in recent years in Cape Town has required relocation and does not fulfill the state's constitutional obligation to provide a flexible programme to meet the basic needs of citizens in informal settlements.

²⁰⁸ Khan and Thring, 93.

²⁰⁹ Huchzermeyer and Karam (2006), 2.

²¹⁰ Huchzermeyer and Karam (2006), 44.

²¹¹ Huchzermeyer and Karam (2006), 45 quoting President Mbeki (2004).

²¹² Huchzermeyer and Karam (2006), 6.

Local Government: Cape Town

It is important to consider all three spheres of government in analysing the right to housing because they all have some constitutional responsibility in relation to Section 26.²¹³ In the Constitution, “housing” is listed in Schedule 4, which lists the “functional areas of concurrent national and provincial legislative competence.”²¹⁴ Both the national and provincial governments, therefore, have a constitutional duty in relation to the right to housing. The Constitution also allows national government to task local government to administer housing matters under Section 156(4).²¹⁵

Much of the literature on informal settlement upgrading in South Africa focuses on national policy or on the project level but, as Graham and Pillay have emphasised, the literature has often ignored local policy design and interpretation.²¹⁶ From 1994-2004, local governments were only involved in implementing housing policy and not in policy formulation. Although the 1995 and 2000 local government elections focused on the need for “developmental local government,” the national government did not enable local governments to fulfill this mandate.²¹⁷ The national housing policy clearly did not

²¹³ Section 40(1) stipulates that “government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.” It is important to note that these are not envisioned as “tiers” or “levels” but rather as independent “spheres.” Therefore they will be considered separately in this chapter. Chapter 3, “Cooperative Government.”

<http://www.info.gov.za/documents/constitution/1996/96cons3.htm>

²¹⁴ “Schedule 4, Functional Areas of Concurrent National and Provincial Legislative Competence,” South African Constitution. Online: <http://www.info.gov.za/documents/constitution/1996/96conssec4.htm>

²¹⁵ Section 156(4) reads that: “The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.”

<http://www.info.gov.za/documents/constitution/1996/96cons7.htm#156>

²¹⁶ Graham, 232.

²¹⁷ Pillay, et al, 5.

provide for basic services for informal settlements and the local government had no policy to deal with informal settlement provision before 2004.²¹⁸

As Pillay stated in 2006, “Responsibility for urban policy appears to be shifting to the cities.”²¹⁹ The *Grootboom* decision drew attention to local government’s constitutional responsibility to provide for those living in informal settlement communities. Local government now has a political mandate (under BNG) as well as a legal obligation (from *Grootboom*) to do something for those living in informal settlements even if the overall policy continues to build formal housing.

At a local level in Cape Town, the City’s attitude towards informal settlements changed between 2002 and 2004 due to both the *Grootboom* decision and the fact that the ANC came to power in the City Council (October 2002) and the provincial government (2004). As Graham wrote in 2004:

One of the new priorities to emerge in Cape Town, in line with the new priorities of the national Department of Housing, was the ‘eradication’ of informal settlements through upgrading.²²⁰

In Cape Town, two major upgrading programmes were initiated after *Grootboom*: the City of Cape Town’s Emergency Servicing of Informal Settlements Project (ESIS, 2003) and the N2 Gateway Project (2004).²²¹ While the former programme focuses on the goals of upgrading informal settlements, the latter has proved problematic because it requires the continuation of waiting lists and relocation.

²¹⁸ Graham, 233

²¹⁹ Pillay, et al, 17.

²²⁰ Graham, 233.

²²¹ Smit, 111.

The Cities Alliance, an initiative of the World Bank/UN-Habitat has also promoted upgrading and has supported the government's new programme.²²² In theory, this approach requires government to include community members rather than simply attempting to eradicate the settlement.²²³ The City of Cape Town, however, continues to see such so-called "greenfields" developments – which build formal housing on empty land – as more effective than "brownfields" developments which require working with a community to upgrade their structures.²²⁴ In terms of strategy, Nicholas Graham characterised Cape Town's informal settlement interventions as *ad hoc* and noted the on-going failure to develop a strategic policy.²²⁵

In the *Framework for Upgrading Informal Settlements*, the City of Cape Town said that the ESIS Project is the first phase of the three-phase incremental upgrading plan. The goals of the ESIS were to provide: A potable water supply within 200m of every dwelling, a minimum level of sanitation defined as one "container" toilet for every four dwellings, sewage collection once a week, and refuse collection once a week.²²⁶ In the 2004 Framework for upgrading informal settlements in Cape Town, only eight of the City's 170 settlements were earmarked for full services to be provided as the second and third phases of the ESIS Project. This was, in part, because the City argued that it was only required to intervene in settlements deemed "upgradable" which, as Graham, argued

²²² Huchzermeyer and Karam (2006), 41.

²²³ Marx, 300.

²²⁴ Huchzermeyer (2004), 3.

²²⁵ Graham, 238.

²²⁶ Graham 234.

was a term “sufficiently vague to justify the relocation of most settlements in the City, if so desired.”²²⁷

Cape Town’s ESIS Project has been relatively successful in providing basic services. On 26 May 2004, the Mayor of Cape Town said that all of the informal settlements in the City would receive services by the end of June and, indeed, 90% of “upgradable” settlements received basic services by the deadline.²²⁸ In 2005, the last settlements received basic services and the City began to plan for the second and third stages of the long-term upgrading programme which would provide for permanent services, tenure, and housing. This is at the moment the only strategy for informal settlements in Cape Town, but it is in line with the objectives of the national Department of Housing’s Informal Settlement Upgrading Programme under BNG.²²⁹

Another change in local policy since *Grootboom* is that all municipalities are now required to submit Integrated Development Plans to monitor local government’s fulfillment of its constitutional duty.²³⁰ Cape Town’s IDP for 2007/2008 identified seven strategic areas on which the City will focus, two of which are shared economic growth and development and sustainable urban infrastructure and services. In terms of housing, the City stated that its primary responsibility was to provide service infrastructure for housing.²³¹ In the IDP, Cape Town government articulated its five year plan for the city

²²⁷ Graham, 241.

²²⁸ Graham, 241.

²²⁹ Graham, 236.

²³⁰ Pillay, 15.

²³¹ City of Cape Town, Mayor’s Introduction, “Integrated Development Plan: 5 Year Plan for the City.” (Cape Town. 2007) Online: <http://www.capetown.gov.za/idp/default.asp>

which will focus on facilitating “infrastructure-led economic growth that will promote job creation and meet residents’ needs for jobs, housing, and safety and security.”²³² In terms of concrete goals, the City stated that it would measure its own success by how efficiently it was able to provide universal access to basic services (water sanitation, electricity, solid waste removal)²³³ and by how many new housing opportunities it provided per year.²³⁴

Despite these promising objectives, however, the City has not been able to meet its own goals in basic service provision in informal settlements. A City of Cape Town study conducted in 2007 found that the programme still allotted vastly unequal provision of essential services such as electricity, toilets, and water. For example, in Mitchell’s Plain and Khayelitsha, 43.74% of households lived in informal dwellings compared to the Cape Town average of 18.90%. Furthermore, in Mitchell’s Plain and Khayelitsha, households were twice as likely to not have access to electricity, flush toilets, potable water, or refuse removal as the rest of Cape Town on average.²³⁵ As the State of Cape Town report in 2006 stated, the City of Cape Town cannot meet demands in housing or in

²³² City of Cape Town, “Integrated Development Plan: 5 Year Plan for the City.” (Cape Town, 2006) Online: <http://www.capetown.gov.za/idp/default.asp>. Introduction, p. 7

²³³ Integrated Development Plan: 5 Year Plan for the City,” City of Cape Town, Online: <http://www.capetown.gov.za/idp/default.asp>. Section 2.3, “Corporate Scorecard Indicator Definitions for 2007 – 2012,” at 20.

²³⁴ Integrated Development Plan: 5 Year Plan for the City,” City of Cape Town, Online: <http://www.capetown.gov.za/idp/default.asp>. Section 2.3, “Corporate Scorecard Indicator Definitions for 2007 – 2012 IDP” at 23.

²³⁵ Emille van Heyningen, “Planning Socio-Economic Districts.” Table 10: Service Level Index, City of Cape Town, 2007.

the provision of basic services; one of the city's main goals for 2007-2008 is still to "ensure that citizens have equitable access to basic municipal services."²³⁶

Views on Eradicating Informality

The theoretical shift toward upgrading informal settlements rather than eradicating them reflects the Court's interpretation of the right to housing in *Grootboom* in which Yacoob J stated that the state must have short term as well as long term plans to provide for the most desperate. Despite the changes in policy, however, there appears to be insignificant change in the overall implementation of informal settlement policy. This is in large part due to how officials view government's duty to provide housing and also what they believe people are entitled to have in the short run.

The majority of housing policy at a national, provincial, and local level has assumed that informal settlements have emerged as a result of a lack of housing. Government has often responded to growing informality with plans to "eradicate" or "reduce" informal settlements rather than upgrade them.²³⁷ This approach is problematic for several reasons, as Ted Bauman articulated, it is:

assumed that the authorities regard *any* housing outcome as better than the *status quo*. In other words, for poor people living in informal settlements, a cement block structure with a tap and toilet, no matter how small or poorly located, is an improvement.²³⁸

The idea that formal housing is necessarily better than informality – no matter how inferior the quality of the former – remains a main point of dispute between government

²³⁶ State of Cape Town 2006: Developmental Issues in Cape Town, Section 4.5 Integrated Human Settlements, 44.

²³⁷ Huchzermeyer (2004), 3.

²³⁸ Khan and Thring, 94.

and the intended beneficiaries of housing. Furthermore, as the Delft example in the next chapter illustrates, many citizens in informal settlements argue that their rights to housing are denied when government only focuses “greenfield” development and relocation.

As Huchzermeyer, Bauman and others found in their review of Metropolitan practices in Cape Town in 2004, city councilors had “fairly reactionary attitudes towards informal settlements” and preferred the “slum clearance model.” Furthermore, they found that ANC councilors who represented informal settlements did not support *in situ* upgrading because they want to see “proper houses” delivered.²³⁹ As Huchzermeyer and Bauman stated in 2004:

The lack of progressive informal settlement support practice in South Africa therefore appears to be first and foremost a matter of interpretation, of how options are *perceived and exercised* by officials and political structures in our cities.²⁴⁰

The idea that government officials are opposed to upgrading, despite the articulated policy initiatives, was confirmed by Nick Graham in his structured interviews with forty local government officials in Cape Town in 2004. Graham found that officials believed that the City’s Mayoral Executive Committee “still adopts slum clearance as the preferred model” and that the common view was that “as long as shacks remain, a settlement remains ‘informal’ and therefore unacceptable.”²⁴¹ Overall, Graham found that there was little political support for the *in situ* policy laid out in IDP and that there is a need for

²³⁹ Marie Huchzermeyer, Ted Baumann, and Salah Mohamed. “Informal Settlement Practice in South Africa’s Metropolitan Cities. (Pretoria: Department of Housing, 2004). Online: <http://web.wits.ac.za/NR/rdonlyres/EE3A24E4-6534-4E70-B5DA6C222B5321EF/0/BackgroundReport3Cities60904nomaps.pdf>, 70.

²⁴⁰ Marie Huchzermeyer, Ted Baumann, et al. “Study into supporting informal settlements: Main Report.” (Pretoria: Department of Housing, 2004) Online: <http://web.wits.ac.za/NR/rdonlyres/133A14D0-CAA0-4969-B152-616A09B103BF/0/MainReportFINAL6904.pdf>

²⁴¹ Graham, 238.

a concrete plan for strategic upgrading at the City level.²⁴² More recently, in an interview in August 2006, Steven Erasmus, Director of Informal Settlement Management, stated that the City currently sees relocation and “greenfield” developments as the favorable methodology for reducing settlements.²⁴³ All of these studies demonstrate, therefore, that support for *in situ* upgrading rather than greenfields development in Cape Town is much less than one might assume by reviewing changes in local government’s housing policies.

Western Cape Department of Local Government and Housing

The housing backlog and the number of informal settlements in Cape Town continue to increase despite *Grootboom*’s mandate to help vulnerable groups. The Department of Local Government and Housing’s (“DLG&H”) Annual Report 2006/7 serves as a useful source of information to understand where the priorities of the local and provincial government’s lie in present-day Cape Town. This section draws from a meeting with representatives from the DLG&H on 9th November 2007 in which they received questions from the public regarding the information in their Annual Report.

On the one hand, the DLG&H reported promising results in 2006/7 and articulated a renewed commitment to upgrading informal settlements and working to increase basic service provision.²⁴⁴ In their Annual Report, the DLG&H reported to have serviced 18,543 sites and added 16,042 housing units. Furthermore, DLG&H reported having made good use of the Emergency Housing Programme to move people away from

²⁴² Graham, 245.

²⁴³ Warren Smit, “The Freedom Park Story: A Case Study of the Upgrading of an Informal Settlement in Cape Town.” Unpublished document. (Cape Town: Development Action Group, September 2007), 6.

²⁴⁴ “Upgrading” refers

life-threatening conditions: indeed, the programme served to help 37,334 people in desperate situations.²⁴⁵ The sub-programmes in the DLG&H's annual report also reflected a promising shift towards *in situ* programmes which, Graham had argued in 2004, were not a priority at the local level in 2004. For example, Sub-programme 2.2.12, Upgrade of Informal Settlements Programme (UISP) funded 29 upgrade projects in 2006/2007 whereas they only supported ten upgrading projects in 2005/2006. In total, this meant that 11,387 households were upgraded in 2006/2007.²⁴⁶

Furthermore, in its annual meeting the DLG&H claimed that it would pursue a strategy in 2008 which focused on short term goals of providing basic services and a renewed emphasis on upgrading. As Shanaaz Majiet, Head of Department, said in a Department of Local Government and Housing Meeting on 9th November 2007:

We have developed a new way of thinking in this department and now focus on bringing *isidima*, or dignity, to informal settlements. We are not just in the business of building houses, definitely not RDP houses, but about providing dignity in the form of sanitation and water.²⁴⁷

Richard Dyantyi, the provincial Minister of Local Government and Housing, articulated a need to “think outside the box” and said that he had been affected by visits to local areas in which “hundreds of people do not have proper ablution.”²⁴⁸ Central to the DLG&H's new strategy is the Western Cape Sustainable Human Settlement Strategy (2007) which

²⁴⁵ Western Cape Housing Development Fund, “Isidima: Enabling Dignified Communities,” Annual Report 2006/2007. (Cape Town: Western Cape Housing Development Fund, 2007), 2. Online: http://www.capegateway.gov.za/Text/2007/10/wchdf_2007.pdf

²⁴⁶ Western Cape Housing Development Fund, 21.

²⁴⁷ Shanaaz Majiet, Head of Department, Department of Local Government and Housing, Annual Meeting, Cape Town, Parliament Building. 9th November 2007.

²⁴⁸ Richard Dyantyi, the provincial Minister of Local Government and Housing, Department of Local Government and Housing, Annual Meeting. Cape Town, Parliament Building. 9th November 2007.

articulates how the *isidima* strategy will “come to life.” In this document, DLG&H articulated its strategy which it sees as a road map that, as the Annual Report stated:

Sets out the manner in which projects and programmes that are needed will be delivered in fulfilling Government’s promise of creating ‘a home for all in the Western Cape.’²⁴⁹

In order to complete the shift to a “development state” approach, the DLG&H identified three major shifts in focus: The shift from housing construction to “sustainable human settlements,” to sustainable resource use, and to real empowerment.²⁵⁰ Majiet claimed to have a “comprehensive implementation plan” to ensure that these shifts are not mere political rhetoric but rather result in tangible results “on the ground.” For example, she cited the Neighborhood Development Fund in Langa which would “unlock socio-economic opportunities” for citizens in the area.²⁵¹

Majiet also stressed the need to be selective and to focus on priorities. She said that upgrading informal settlements was “much more effective” than “greenfield development” and that the DLG&H would focus on building partnerships with communities. Majiet stated that it had begun to identify high risk areas where flooding and fires were common and that their immediate goal was to provide sanitation in the most desperate areas immediately where “people can’t wait until 2010.”²⁵² Therefore, at a provincial level, there seems to be some forward movement towards accepting upgrading and short term strategies to fulfill basic rights.

²⁴⁹ Western Cape (2007), 1

²⁵⁰ Western Cape (2007), 3

²⁵¹ Majiet, DLG&H Annual Meeting, 9th November 2007.

²⁵² Majiet, DLG&H Annual Meeting, 9th November 2007.

Despite these comments from provincial government officials and the positive figures quoted earlier in this chapter from the Annual Report, however, other facts presented in the Annual Report revealed that the majority of funding still goes into long-term housing strategies in the form of “project linked subsidies.” The Annual Report reflected that the majority of subsidies that the DLG&H approved were Project linked subsidies (Sub-programme 2.2.3): In total, the department approved 7,139 project-linked subsidies, with 25 projects “approved within the defined urban edge.”²⁵³ Despite the increase in upgrading projects, therefore, it is important to note that the DLG&H still allocated the majority of funding to greenfields developments in 2007. DLG&H only approved 2,873 subsidies for People’s Housing Process (PHP) (Sub-programme 2.2.3) which was a decrease from 3042 in 2005/6.²⁵⁴

Dyantyi emphasised, however, the DLG&H’s efforts are part of an on-going struggle to improve service provision to the most vulnerable. Despite the efforts of the department to prioritise and deliver services, Dyantyi stressed that one should not

think this department is completely settled with *Grootboom*. Even with the law in its present state, people’s lives must continue to get better [to fulfill our requirement].²⁵⁵

Although the Annual Report reflected that the Western Cape Province still focused its funds on project linked subsidies and “greenfields” projects, therefore, it is also important to recognise that the DLG&H was motivated to change its strategy in the future to address the needs of citizens living in informal settlements in particular.

²⁵³ Western Cape (2007), 19.

²⁵⁴ Western Cape (2007), 19.

²⁵⁵ Dyantyi, DLG&H Annual Meeting, 9th November 2007.

Conclusion

The policy changes articulated in this chapter were influenced by the Court's determination in *Grootboom* that the national government's long-term plan to deal with informal settlements by delivering formal housing was not an adequate response to the Constitutional right of access to adequate housing.²⁵⁶ In *Grootboom*, the Court accepted government's housing programmes and policies at face value instead of interrogating whether these programmes were meeting government's stated goals.

The *Grootboom* judgment, however, did force all spheres of government to create some policies for informal settlements which did not exist before 2000. Government had to pursue most of the policy changes without much clarification from the Court as to how they could better fulfill their duty in relation to the right of access to housing.

Considering the policy changes since 2000, however, how has government developed its definition of the right of access to adequate housing? In many ways, government has changed its overall approach to informal settlements in a way that suggests, on paper, that the right of access to housing does involve an entitlement to a right to shelter at a minimum and, at a maximum, to public participation.

As this chapter has argued, despite the policy changes and the successes, in practice the government continues to focus on long-term goals rather than on fulfilling the basic needs of those living in informal settlements. In Cape Town, despite the limited success of providing access to basic services, the focus is on building new housing rather

²⁵⁶ Marie Huchzermeyer, "Housing rights in South Africa: Invasions, evictions, the media and the courts in the cases of *Grootboom*, *Alexandra* and *Bredell*." (*Urban Forum*, 2003, Vol. 14 1) 80-107.

than working in communities *in situ*. At the provincial level in the Western Cape, although some funds have been allocated to upgrading, the majority of funds are allocated to project-linked subsidies which are to be used for greenfields development. This analysis demonstrated that – even by the limited standards created in the *Grootboom* judgment – the government’s current policies for informal settlements are not comprehensive, flexible, or inclusive in a way that fulfills informal settlement residents’ right of access to housing.

As Graham, Huchzermeyer, and Bauman argued, local officials still view large scale housing development, like the N2 Gateway Project, the pilot for the 2004 BNG programme, as a more efficient way to spend government’s resources. However, as Professor David Dewar Department of Architecture, Planning and Geomatics, University of Cape Town, stated: “The task of the state is to assist the levels of shelter and service of households rather than to try and totally eradicate informal settlements.”²⁵⁷ On the other hand, the positive changes made after *Grootboom* should also be noted. As the previous section of this chapter argued, the DLG&H in the Western Cape’s new strategy of *isidima* sounds promising in theory. Of course, as with the other policies cited in this chapter, the problematic aspect is often that policies like *in situ* – which guarantee the right to basic shelter in the short term – are not central to the overall strategy. The next chapter will focus on the issues of Cape Town specifically and will present a case study of an upgrade project in the informal settlement in Cape Town. This case study illustrates both the potential for change as well as the problems still facing informal settlements like those of Ms. Grootboom.

²⁵⁷ City of Cape Town (2006), Developmental Issues in Cape Town, “Contributors,” 45.

Chapter 4

Policy in Practice: Communities in Cape Town's Informal Settlements

Informal settlements are not mere physical sites for redevelopment or relocation – they are a culmination of communities' struggles, resourcefulness and efforts to find a foothold in the urban space economy.

Nigel Tapela, Operations Manager, Development Action Group²⁵⁸

The *Grootboom* mandate influenced the Informal Settlement Upgrade Programme (“ISUP”) in the Breaking New Ground (“BNG”) policy. This programme articulated a more comprehensive national housing policy that would better allow the state to fulfill its duty to promote the right to housing of citizens living in informal settlements, like Irene Grootboom and her community. After *Grootboom*, local governments were charged with creating a plan to facilitate housing and service provision in their Integrated Development Plan (IDP) and in local housing initiatives. However, as the previous chapter argued, despite *Grootboom* and subsequent policy changes, national, provincial and local governments have continued to allocate the majority of their housing budget to developer-led initiatives that require citizens to remain on long waiting lists for housing.²⁵⁹ On the other hand, some communities in Cape Town have seen positive change in their living conditions since 2000.

The *Grootboom* judgment found that government has a responsibility to provide shelter in the short run for those who were dislocated by its long term strategy to create

²⁵⁸ City of Cape Town (2006), “Contributors,” 46.

²⁵⁹ Warren Smit, “The Freedom Park Story: A Case Study of the Upgrading of an Informal Settlement in Cape Town.” Unpublished document. (Cape Town: Development Action Group, September 2007), 30.

formal housing.²⁶⁰ This chapter will compare the experiences of Freedom Park and the Temporary Relocation Area (TRA) in Delft, two communities in Cape Town.

In November 2007, Freedom Park, a community in the Tafelsig area of Mitchell's Plain, continued its upgrading project and remains one of the few *in situ* community-led housing processes in the Cape Town area. Freedom Park and other informal settlements in Cape Town demonstrate that community involvement and the help of civil society can result in communities living in informal settlements realising their rights to housing. Delft, on the other hand, serves as an example of the negative impact of current housing policy regarding informal settlements which focuses on the need to "eliminate" informality. This chapter will argue that the way in which Section 26 was analysed in *Grootboom* suggests that government's strategy in Delft is unconstitutional. In addition, these case studies demonstrate that, as both legal scholars and politicians have argued in previous chapters, mobilisation on the ground and the engagement of civil society are crucial to realising the promise of the policy changes made since *Grootboom*.

Delft Temporary Relocation Area

The potentially negative consequences of government's current housing policy – which continues to focus on mass housing delivery rather than engaging with communities – can clearly be seen in the problems with the N2 Gateway project and the residents who have been relocated to Delft. The problem with the government's current focus in informal settlement policy is that it will require relocation, which is extremely problematic as the armed protest in Delft demonstrated in September 2007. In many

²⁶⁰ Huchzermeyer and Karam (2006), Introduction, vii, quoting Cathy Albertyn.

ways, government's actions are incongruent with the professed goals of the 2004 policy.²⁶¹

In September 2004, the National Minister of Housing announced that BNG would be the new housing strategy and that the N2 Gateway Project in Cape Town would be the pilot project. The N2 Gateway Project would provide housing for informal settlement residents along the N2 freeway, the most visible informal settlements in the Cape Town area. Government selected Joe Slovo informal settlement in Langa, one of the fastest growing and densest settlements in Cape Town, as the site to begin the implementation of the N2 Gateway Project.²⁶²

As the previous chapter explained, Cape Town's Emergency Housing Programme was the result of the *Grootboom* mandate for the provision of temporary housing in "emergency" situations in 2004. The N2 Gateway Project was the first project in Cape Town to require the use of a "temporary relocation area." ("TRA").²⁶³ TRAs were implemented to provide temporary housing for residents so that they could be relocated while formal housing was being built.²⁶⁴ After the fire in Joe Slovo informal settlement on 15 January 2005, the City of Cape Town used the Emergency Housing Programme to fund the first phase of TRAs.²⁶⁵

²⁶¹ Huchzermeyer and Karam (2006), 33.

²⁶² Helen Macgregor, et al, "Living on the Edge: A Study of the Delft Temporary Relocation Area." (Cape Town: Development Action Group, 2007), 5. Online: <http://www.dag.org.za/docs/research/delftreport.pdf>

²⁶³ Macgregor, et al. 4.

²⁶⁴ Macgregor, et al, 4.

²⁶⁵ Macgregor. et al, 5. The Emergency Housing Policy funded the building of 500 TRA units in Langa and 2,000 TRA units in Delft.

The provision of TRA housing in these areas required that the majority of Joe Slovo residents would be relocated from Langa to Delft.²⁶⁶ The relocation of families from the Joe Slovo settlement area of Langa to Delft provides an unfortunate example of the problems inherent in the way in which government has continued “greenfield” housing interventions. From February to May 2007, the Development Action Group (DAG) conducted a survey of 141 households relocated to Delft. In these surveys, DAG found that 68% of households were “unhappy” about the relocation to Delft because there was a lack of access to public transport and limited employment opportunities. Furthermore, households were “unhappy” about the relocation because it had disrupted the social support networks that they had developed while living in Langa.²⁶⁷ Although 54% of the households surveyed were satisfied with the houses themselves, residents were resentful about the way in which the relocation had taken place and the area to which they were relocated.²⁶⁸

The Langa and Delft TRAs and the Emergency Housing Policy in the Western Cape raised concerns about the role of temporary housing in responding to disasters. Joe Slovo residents were forbidden from resettling in their previous homes after the fire and instead had to live in communal tents for several months. The DAG study concluded that the Emergency Housing Policy was “contradictory to the underlying principles of Breaking New Ground” because it undermined individuals’ access to adequate housing.²⁶⁹

²⁶⁶ Macgregor, et al, 8.

²⁶⁷ Macgregor, et al, 16.

²⁶⁸ Macgregor, et al, 19.

²⁶⁹ Macgregor, et al, 27-28.

Experiences in Delft

On 10th September 2007, two thousand remaining residents of Joe Slovo informal settlement launched a violent protest and forced authorities to close the N2 Highway. Earlier that week, these residents had demonstrated outside Parliament to demand that government end the practice of relocating Joe Slovo residents to Delft. Provincial housing minister Richard Dyantyi argued that the relocations were necessary to complete the N2 Gateway project and claimed that “[d]evelopment will continue and cannot be thwarted by narrow individual interests.”²⁷⁰

DAG, on the other hand, concluded that the Langa and Delft TRAs, as test cases of the new Emergency Housing Policy in the Western Cape, demonstrated the problems inherent in using the TRA and relocation model as a response to emergency housing and emphasised the importance of community participation in future housing policy.²⁷¹ Indeed, international best practice indicates that upgrading of informal settlements should focus on social and economic development rather than just on building structures.²⁷² In the case of the Delft relocations, government did not consider how people’s lives would be affected by the removal nor did they consult the citizens who would be removed. As one resident included in the DAG survey stated, “We just came because we were instructed to do so.”²⁷³

²⁷⁰ Murray Williams and Henri Du Plessis, “Protest Chaos Shuts N2,” 10 September 2007, *Cape Argus*.
Online: <http://www.capeargus.co.za/>

²⁷¹ Macgregor, et al, 27.

²⁷² SA Social Investment Exchange, “Upgrading the Freedom Park Settlement,” On-line:
<http://www.sasix.co.za/projects/view/HCD-WC-MAY-0001>

²⁷³ Macgregor, et al, 26.

On 01 October 2007, World Habitat Day, DAG hosted a site visit in the TRA and held a public forum meeting for Delft residents who had been removed from Langa to share their experiences with leaders from other informal settlements. During the site visit, Delft residents cited many problems they experienced living in the community since being relocated in 2005: lack of basic service provision, problem with health (especially overcrowding in the hospital), inadequate house size, and a lack of community participation in the overall planning of the TRA project.²⁷⁴

In the public meeting following the site visit, two residents presented their own views on the relocation and their current lives in Delft. Nomthunzi Bika was forced to move from Langa to Delft in 2005. In her presentation, Bika criticised the government for not communicating with residents that the relocation would not be temporary. Bika also articulated disappointment because, she claimed, that the residents relocated to Delft had not been told that they would not be able to return to Langa and that they would have to contribute to the houses in Delft.²⁷⁵ As Bika stated:

The biggest shock was that we were also told that we must contribute to get houses here in Delft. Many cannot find work here, so I don't know how they will pay.²⁷⁶

Thembakazi Booi, another Delft resident who presented at the meeting, emphasised the problems that residents faced in Delft, especially the inadequate provision of water, toilets, and refuse collection. She described the toilets as a “breeding ground

²⁷⁴ Presentation at “World Habitat Day” event, Delft community centre, 01 October 2007.

²⁷⁵ Nomthunzi Bika, presentation at “World Habitat Day” event, Delft community centre, 01 October 2007.

²⁷⁶ Bika, 01 October 2007.

for sickness, especially for the children.”²⁷⁷ Furthermore, Booi stated that many citizens who had been relocated to Delft were discontent because they were “not consulted about moving to Delft.” Also, reflecting the responses in DAG’s survey in Delft earlier in 2007, Booi stated that she had suffered loss of income and opportunity as a result of the relocation. Furthermore, Booi articulated that she was frustrated with the fact that government did not consider the needs of the citizens they forced to move to Delft and did not create the necessary infrastructure to allow citizens to work and live decent lives.

As Booi stated:

Government can’t just do with us what they want. Let the government first build factories, clinics, and roads and then move people in.²⁷⁸

Bika’s and Booi’s presentations, therefore, demonstrated that they were dissatisfied not only with the quality of the service provision in Delft, but perhaps more importantly with the way in which government conceived of and implemented the relocation to the TRA. They both perceived of their right of access to housing as involving some form of public participation rather than forcing citizens to follow government’s orders in the hope of one day receiving formal housing.

The audience at World Habitat Day consisted primarily of leaders and residents in informal settlements, many of whom expressed concern about the future of their communities if this policy of relocation to TRAs was adopted in future Cape Town housing developments for communities living in informal settlements. As Dawn Knipe from Ravensmead stated after touring the housing provided in Delft, “They will give this

²⁷⁷ Thembakazi Booi, presentation at “World Habitat Day” event, Delft community centre, 01 October 2007.

²⁷⁸ Booi, 01 October 2007.

to my community over my dead body.”²⁷⁹ In addition to the lack of transport and opportunities for employment, audience members expressed concerns about the lack of trees, the lack of gutters and the fear of flooding, the lack of toilets, and overcrowding in schools and hospitals.

“Paul” from Gugulethu (name withheld) argued that the basic problem was that the current housing policies required relocation which broke up communities. He also expressed frustration that government seemed not to respect the needs or rights of the citizens that were forced to move to Delft. As Paul stated:

Here you have someone staying in a shack. Why can't you let this person stay here? We have been moved forever, that's always government's solution.²⁸⁰

After living through apartheid, Paul stated that he had hoped to experience better living conditions as a result of the rights articulated in the new Constitution, especially the right of access to housing. As Paul stated:

I grew up in a period where there was the law of the jungle. In the olden days, people were chucked out and all their stuff was left at the gate. This new law is a beautiful thing, but it needs to help the poor. We need a choice. People have a right to determine what they want and communicate this to the government. We won't get all of our terms and demands, but they must know what we want.²⁸¹

As Mzonke Poni, an informal settlement leader from Khayleitssha, reflected, part of the problem was that the so-called temporary housing was not temporary: In fact, Poni stated that in his conversations with people who had been relocated to Delft, he found that many people had been living in Delft in conditions which they identified as worse than the

²⁷⁹ Dawn Knipe, Interview, World Habitat Day event, 01 October 2007, Delft community center.

²⁸⁰ “Paul,” from Gugulethu, Interview, World Habitat Day event, 01 October 2007, Delft community center.

²⁸¹ “Paul,” from Gugulethu, Interview, World Habitat Day event, 01 October 2007, Delft community center.

shacks they had previously occupied. Poni said that he believed the government would continue with this strategy despite the living conditions in the TRA. Poni stated:

Sooner or later it will become a dumping site for people. They are moving people from bad to worse. This was not explained to people. In Joe Slovo they had four rooms with a toilet and now they must squat in one room? Did they choose where they are living? If it is temporary, why are people living here for four years?"²⁸²

As these comments by residents living in informal settlements reflect, it was critical not only that government provide access to adequate housing but also that citizens were included in the decisions about housing provision. In relocating citizens to Delft, which suffered from a lack of basic service provision, citizens believed that government had violated their rights because the move had undermined their social networks and severely limited their employment opportunities.

Freedom Park: *In Situ* Upgrade

Freedom Park is an informal settlement in Mitchell's Plain, a suburb about 40 km from Cape Town. The community now includes 493 families after 193 families were added to the original 300 families who occupied the land in 1998. Freedom Park residents, like the majority of citizens in Mitchell's Plain, suffer from poverty: The unemployment rate is 40% and about half of the population lives below the poverty line.²⁸³

Like Grootboom's community, the community leaders in Freedom Park illegally occupied land in Cape Town. Unlike Grootboom's community, however, they were able

²⁸² Mzonke Poni, Interview, World Habitat Day event, 01 October 2007, Delft community center.

²⁸³ SA Social Investment Exchange, "Upgrading the Freedom Park Informal Settlement." Online: <http://www.sasix.co.za/projects/view/HCD-WC-MAY-001>

to successfully negotiate with local government and to build formal housing for their community without having to be relocated. Freedom Park's experience also contrasts greatly with that of Joe Slovo residents who were relocated to Delft. As Warren Smit wrote in 2007:

The story of Freedom Park is important because it shows how a community can, in the face of overwhelming odds, be successful in the struggle for a better life.²⁸⁴

The citizens of Freedom Park began their struggle for land and housing as a community in 1998 when a number of Tafelsig residents who had been living in overcrowded housing decided they would occupy land in Mitchell's Plain. Although this land had been set aside by the City as the site for a future school, it had remained vacant and had become a site of crime. The residents met with the local ward councilor before the occupation, but had not seen results or changes in their housing situation. In response, they took matters into their own hands.²⁸⁵

On 29 April 1998, the Cape High Court granted an eviction order. In the order, Conradie J authorised the Deputy Sheriff, the police, and the South African National Defence Force to "eject respondents and to demolish and remove any illegal structures." In response, the community formed the Tafelsig People's Association ("TPA") and the Legal Resources Centre ("LRC") represented the TPA in their appeal of the eviction order. Hlophe J of the Cape High Court postponed the hearing and the Cape Town Municipality agreed to a mediation process under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act.²⁸⁶

²⁸⁴ Smit, 5.

²⁸⁵ Smit, 10.

²⁸⁶ Smit, 11-12.

Mary Simons, an academic at the University of Cape Town (UCT), was appointed the mediator for the negotiations which continued from 1998 through to 2003. The City refused to provide services while in mediation with the TPA. As a result, residents were responsible for their own water and refuse removal, which became sources of serious health risks in the community.²⁸⁷ The mediator's report was not released until 31 January 2001. Simons concluded that the community's occupation of the land had indeed been illegal, but she argued that "a strong argument could be made for the illegality of government policy."²⁸⁸ Noting the situation people had faced before settling in Freedom Park – often as backyard dwellers or having to move often – Simons explained that some viewed Tafelsig as "offering the possibility of a permanent home free of the violence and abuse" that they had experienced in their previous accommodation.²⁸⁹ Simons wrote:

Each person I interviewed chose to live in this informal settlement in rudimentary shelter without water, sanitation and power.²⁹⁰

Indeed, despite the lack of basic services, Simons reflected that many of these residents found these conditions preferable to where they had previously lived in backyards or in rented accommodation in overcrowded rooms.²⁹¹

The City reversed the eviction order against Freedom Park on 21 June 2001. As Smit noted, the *Grootboom* judgment was important to the resolution of this conflict.

Smit wrote:

²⁸⁷ Smit, 15.

²⁸⁸ Mary Simons, "Second Interim Report of Mediator, Mary Simons in the Matter between The Residents of Freedom Park, Tafelsig, Mitchell's Plain and the City of Cape Town," 1.

²⁸⁹ Simons, 4-5.

²⁹⁰ Simons, p. 4.

²⁹¹ Mary Simons, personal email, 01 Feb 2008.

As a result of the mediator's recommendations, the report assessing the health risk, and the *Grootboom* judgment, on 4 June 2001 the City of Cape Town resolve that 'rudimentary services to enhance and improve the health conditions,' be provided for Freedom Park.

"Rudimentary services" was interpreted to mean one toilet for every four dwellings, ten communal standpoints for water, and weekly refuse collection.²⁹² However, in order to stay on the land, the community had to agree to allow residents from Hyde Park, who had lost their homes in a recent fire, to be included in their People's Housing Process. Freedom Park and three other housing projects were part of the City's Urban Renewal Programme in Mitchell's Plan.²⁹³ In 2006, the Niall Mellon Township Initiative offered to partner with Freedom Park and to provide additional funding to the subsidy so that the homeowners would receive a 42 square meter house as well as a geyser and solar water heaters.²⁹⁴

Experience in Freedom Park

Lesar Rule was one of the original occupants of Freedom Park and has lived in the community since the occupation in 1998. Rule said that she moved to Freedom Park because she was "sick and tired of living in a room with other people."²⁹⁵ Rule has negotiated with local government in order to gain control of the land since the original land invasion in 1998. She said that these on-going negotiations have been a learning experience both for her community and for the local government, in particular squatter control and local councilor. As Rule stated:

²⁹² Smit, 16.

²⁹³ Smit, 19.

²⁹⁴ Smit, 23.

²⁹⁵ Lesar Rule, Interview, 5th November 2007, Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town.

In the beginning [the government leaders] weren't helpful. They didn't know how to work with the community on a grassroots level. They saw themselves in the role of our 'bosses,' so we had to teach them how to liaise with local community members.²⁹⁶

She described the local government as being "very stern when it came to decisions" and had the attitude that the community "had to abide by their orders." Rule said that "we came back to them and said, 'Listen here, this is a partnership.'"²⁹⁷

Through the ups and downs of the negotiation process, Rule said that the on-going community involvement was crucial to the results that Freedom Park was able to achieve in the end. As Wahieba Naidoo stated:

Our priority was getting services. We spoke on behalf of Freedom Park in the Urban Renewal meetings and eventually we got taps and toilets. If we hadn't done that, then nothing would have happened.²⁹⁸

In 2000, after two years of negotiations, Rule said that all the government had provided was a few stand pipes and a toilet. However, Rule stated that, "Once the government realised what was going on, we proved to them that we wanted to be heard." Rule believed that the negotiation process is crucial for other communities to replicate because "government normally just gives people what they think we want."²⁹⁹ As Smit stated, "The agreement to upgrade was a part of this ongoing struggle, not a necessary conclusion."³⁰⁰

²⁹⁶ Rule, Interview, 5th November 2007.

²⁹⁷ Lesar Rule, Interview, 5th November.

²⁹⁸ Wahieba Naidoo, Interview, Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town. 17th October 2007.

²⁹⁹ Rule, Interview, 5th November 2007.

³⁰⁰ Smit, 30.

The experience of Freedom Park and interviews with key leaders in the negotiation process demonstrated the importance of upgrading to residents. The issue of community was crucial to the project. As Patricia Christensen stated, “I know who is in my community” and also indicated that there was a consensus in the community that people wanted to build a neighborhood consisting of people they knew and could trust.³⁰¹

As Rule and Naidoo stated, it was important for citizens that they were consulted in the process. They both indicated that they believed that government would not have fulfilled their right of access to housing if there had not been some space for their active participation. In meetings with the Steering Committee regarding the design of homeowners’ education classes, residents not only identified their housing rights as “owning a house,” but also as a right to water, electricity, security, infrastructure, clinics, public transport, and facilities. Residents identified their responsibilities as paying for the house and for other expenses such as water and electricity, keeping the area clean, and obeying laws. Overwhelmingly, they believed that government had an obligation to provide housing, but also articulated that they as citizens must fulfill their responsibilities in return.³⁰²

Despite the lack of housing policy governing informal settlements, Freedom Park demonstrates that community participation and civil society mobilisation can prove a determining factor in the government’s meeting housing needs. In terms of policy

³⁰¹ Patricia Christensen, Interview, 17th October 2007, Freedom Park Steering Committee Office. Tafelsig, Mitchell’s Plain, Cape Town.

³⁰² Meeting with Steering Committee regarding Homeowners’ Education, 08 October and 10 October 2007. Freedom Park Steering Committee Office. Tafelsig, Mitchell’s Plain, Cape Town.

strategies, considering the on-going situation in Delft, Rule said that the *in situ* process, despite how long it has taken, was:

much better than relocation. It is very important that people living in informal settlements come forward in a decent and honest way to make themselves heard by government in a legal way.³⁰³

Rule advised people to get organised with a democratically elected leadership group and to “stand firm” in negotiations with government in order to see results. As Rule stated:

We want to show other communities in the Western Cape that they need to do this by legal means. People used to make fun of our community living like we did before the houses, but now everyone wants to live here. Now people just don’t believe what they see. It’s not about having a house; it’s about making a home.³⁰⁴

The experience of residents in Freedom Park demonstrated that many citizens viewed their right of access to housing as including the right to services, to community, and to having some voice in the decision-making process.

Although they did not believe that government should be required to “give” them a house, community leaders did believe that both they and government had responsibilities in solving the housing issue. Overall, the Freedom Park leaders’ reflected that they believed the right of access to housing, while not a direct right, did require that government work with communities to provide some kind of basic shelter provision to residents living in informal settlements.

The contrasting experiences of the citizens in Delft and in Freedom Park demonstrates the importance of citizen participation and the value of *in situ* upgrading as

³⁰³ Rule, Interview, 5th November 2007.

³⁰⁴ Rule, Interview, 5th November 2007.

opposed to relocation in fulfilling citizens' perception of their right to housing. As Khan and Thring wrote, informal settlement upgrading is a "highly politicised intervention" that enables "benign forms of informality to serve delicately balanced socio-economic shelter roles over time."³⁰⁵ As previous chapters have argued, however, the Court and government have been reluctant to support intervention and rather support policies for large scale redevelopment, in contrast to how the state's duty was defined in *Grootboom*.

The demand for housing continues in Cape Town and the rest of South Africa. There has been significantly less mobilisation around the housing issue in the years since 1994. Reference to this is made by legal scholars and politicians and is noted in previous chapters. As DAG Chairman Ralph Freese noted in the 2006/2007 DAG Annual Report, "In our twentieth year, it is sobering to note that of the NGOs alongside which DAG has worked, most have disappeared or diminished."³⁰⁶ Freese argued that many NGOs have failed to change through time to remain relevant to their communities and to survive financially. Overall, Freese argued that NGOs, which once were organisations motivated to mobilise citizens for political change, now "shy away from the politics of development."³⁰⁷

The experience of Freedom Park also suggests that the role of civil society is not only to mobilise citizens, although that is important, but also to provide guidance and support to residents who may otherwise not know how to gain access to government.

³⁰⁵ Khan and Thring, 103.

³⁰⁶ Ralph Freese, "Chairman's Report." Development Action Group, "Annual Report, 2006/2007." (Cape Town: DAG, 2007), 4.

³⁰⁷ Freese, 4.

Both Rule and Naidoo emphasised that their partnership with DAG allowed them to learn skills to be more efficient in their negotiations with government. As Rule explained, before attending DAG's informal settlement leader workshops, "I wouldn't have had the guts to talk with the city. I didn't even know who my councilor was back then."³⁰⁸

Naidoo, who also negotiated with the Housing Department, stated that "We got what we wanted out of the project, but it was a lot of work."³⁰⁹

Conclusion

Despite the fact that there was no government policy geared towards informal settlements until 2004, therefore, the Freedom Park community was able to negotiate with local government to remain in their community. As Smit wrote in 2007

The struggle for the upgrading of Freedom Park occurred within a policy context in which the lack of an informal settlement upgrading programme was a glaring omission.³¹⁰

This experience suggests that, although policy and laws are important, communities can organise themselves. Indeed, as the Delft situation shows, without directed community action, government has continued its policy with regards to informal settlements – big developers and forced relocation – that had been the official policy at the time of the *Grootboom* decision.³¹¹

Freedom Park also provided insight into how citizens in informal settlements viewed their rights and the government's duty. It was clear that leaders did not view the

³⁰⁸ Rule, Interview, 5th November 2007.

³⁰⁹ Naidoo, Interview, 17th October 2007.

³¹⁰ Smit, 29-30.

³¹¹ Smit, 30.

on-going large scale developments, like the N2 Gateway project, as fulfilling their rights. Rather, they believed that government had a duty to fulfill their basic needs in the short term and in their current location. Indeed, they took action to achieve this end. Freedom Park demonstrated that people not only viewed themselves as being responsible for being good residents, but that they also believed that government had a duty to fulfill people's basic needs. The leaders in this community argued that their participation was crucial to their success in the development process and articulated that they did not believe that government would have provided them with housing *in situ* without their active role in negotiations. As Rule stated in her site tour with the Niall Mellon volunteers:

Some of the people hide their emotions because they want to keep their pride. I think what you are doing is marvelous. You are really putting our government on the spot. They make promises they can't deliver and here you are building our houses.³¹²

Non-governmental organisations, like DAG, are crucial in mobilising people around issues involving socio-economic rights. Freedom Park's connection to DAG throughout the process also indicates that NGOs can play an important role not only in working in communities, but also in assisting communities to challenge government to pursue policies that will help to fulfill people's housing needs in the short run. Freese, DAG's Chairman, envisioned an important role for civil society in creating more complex analysis and long-term solutions to challenge the short-term solutions proposed by government.³¹³ Therefore, despite the government's reluctance to implement the policies it articulates in *in situ* upgrading, both civil society and people themselves do

³¹² Lesar Rule, Tour of Building Site with Irish Volunteers, Tafelsig, Mitchell's Plain, Cape Town. 5th November 2007.

³¹³ Freese, 4.

have some agency, and can have success, in mobilising and negotiating with government to fulfill the right to shelter for the most economically vulnerable members of society.

University of Cape Town

Conclusion

South Africa's Right of Access to Housing in Theory and Practice

This minor dissertation began with an ostensibly simple question, namely: What impact has the constitutional right to housing had on South African housing policy? As the previous four chapters have argued, however, the Constitutional right to housing has been interpreted in a variety of ways which reflect diverging views both on the normative content of the right and what duty it imposes on the South African government. Each chapter has attempted to highlight the important debates about the right to housing and the different opinions of government's correlative duty in relation to this right. This conclusion will summarise what these conclusions show about how the right of access to housing has been interpreted in South Africa since the early 1990s.

Analysing the Development of the Right to Housing: Different Perspectives

The first chapter highlighted the debates over including socio-economic rights in the Constitution. In the end, the limited way in which some socio-economic rights are enshrined and the limited scope of the state's duty reflect the many objections to socio-economic rights throughout the debate in South Africa. In particular, the Court's Certification of the Constitution was vague with respect to the *extent* of the state's duties in relation to socio-economic rights. The way in which socio-economic rights like housing were articulated demonstrated that the state's duty to enforce second generation rights is limited by the language in the Constitution.

The second chapter argued that the Court's interpretation of the right to housing in the *Grootboom* decision reflected the objections raised against the inclusion of socio-economic rights in the Constitution. Although the Court put forth valid arguments against the notion of a minimum core, Yacoob J did not articulate an alternative approach to developing the normative content of the right to housing. Overall, the Court in *Grootboom* was reluctant to clarify or develop the normative content of the right to housing and the meaning of government's reasonable duty, both crucial issues to determining the course of future litigation and legislative action. In failing to create a supervisory order or to engage in a comprehensive policy analysis, the Court suggested that the right to housing was fulfilled by the state simply having a policy in place, even if the programme failed to fulfill the government's own goals as stated in the Housing Act (1997).

The third chapter analysed how policy has actually changed after the *Grootboom* decision to include policies for informal settlements at a local level, in this case the City of Cape Town. Even after *Grootboom*, the state did not take action to amend its policy for the most desperate in society until 2004 and since then has implemented this policy with varying degrees of support. The only standard for government policy provided by the *Grootboom* judgment was that the policy must be "reasonable" in the sense that it comprehensive, flexible, and inclusive. However, despite the policy changes since 2000, the government continues to focus on long-term goals rather than the immediate, short-term needs of those living in informal settlements. The DLG&H in the Western Cape suggested that it will attempt other strategies besides "eradication" in the future, but the

national, provincial, and local agenda still focuses government's resources on "greenfields" development which will not fulfill needs in the short run for communities in informal settlements.

The final chapter compared the experiences of the Delft Temporary Relocation Area (TRA) with the experience of Freedom Park residents in Mitchell's Plain who were, in 2007, continuing with their People's Housing Process Upgrade. This chapter argued that *in situ* upgrading, which gradually improves the housing environment for communities in informal settlements while providing for their basic needs in the short-term, most aligns with the *Grootboom* mandate. The important conclusion to note in this chapter is that communities could be successful in realising their own housing rights even in the absence of comprehensive housing policy. However, success depends on long-term commitments from the citizens as well as NGO's support and active engagement.

Defining a Right to Housing and the State's Duty

As this minor dissertation has described, there are many different conceptions both of the right to housing and what government must do to fulfill its obligation in relation to this right. The Constitutional Assembly and the Court in *Grootboom* saw the right of access to housing as a right limited by Section 26(2), which limited the normative content of the right to what government was able to afford over time. Overall, housing and other socio-economic rights were seen as not imposing as much of an obligation on government as first generation rights. The Court's interpretation of the right to housing was not that an individual has a right to basic shelter but rather that government must

have some kind of reasonable programme for society's most vulnerable, like Irene Grootboom and her community, who live in informal settlements.

Despite the changes in policy which suggest that the state has changed its strategy since *Grootboom*, several analysts argued that in reality the state focuses its resources on the same kind of top-down policies they engaged in at the time Grootboom and her community occupied the land in 1998. In 2004, however, the new policies at the national and local levels suggested that progress would be made in terms of upgrading informality. The problem was that this upgrading often took the form of "eradication" and still left communities without the basic requirements of shelter. On the other hand, the interviews with citizens living in informal settlements suggested that they believe that government has a duty to provide basic shelter. The Freedom Park experience suggested that people living in informal settlements defined their right to housing as including the provision of basic services and had little confidence that government would provide these without their directed efforts.

In the end, having a right to housing in the Constitution has forced the Court and all spheres of government to consider the living conditions the most vulnerable members of society, which it would not have been obligated to do without the constitutional provision. The Court and government, however, have often interpreted the right to housing in a way that suggests that it is a directive principle which should guide government policy rather than as a "full right" that entitles people to have access to basic needs of survival. The *Grootboom* decision and later housing policy initiatives suggest

that the state is still focused on long-term policies rather than assisting people in realising basic housing rights to shelter and protection from the elements. This brings us back to the question of the purpose of socio-economic rights. Is the right to housing merely an aspiration or a “paper” right, or does it actually serve to improve policies? This minor dissertation has argued that, while the right to housing has influenced the creation of policy, it has not been reflected in how policies have been implemented. The goal of “housing the nation” in large scale developments through project linked subsidies has taken priority over providing access to basic shelter for the most economically vulnerable which, this minor dissertation argued, could better be assured through *in situ* upgrading.

To again quote Geoff Budlender on the meaning of the right to housing: “It must mean more than the right to wait in a queue for twenty years.”³¹⁴ *Grootboom* affirmed that the right to housing obliges the state to take action, but government’s current policies and implementation suggest citizens have a right to benefit from “reasonable” government programs, but not to have access to housing or even basic shelter. To return to Hohfeld’s argument, the meaning of the word “right” has limited meaning without a corresponding duty on the part of the state.³¹⁵ Indeed, as this minor dissertation has argued, as long as the state’s duty to provide housing remains unclear – both in terms of the extent of its duty and how it must provide housing – the right of access to housing will continue to have a “hollow ring.”³¹⁶

³¹⁴ Geoff Budlender, “Heads of Argument on Behalf of the Amici Curiae,” para 33. *Grootboom* case CC 11/00. Online: http://www.escri-net.org/usr_doc/Heads_of_Arguments_of_Amici_Curiae.doc.

³¹⁵ RWM Dias, *Jurisprudence*. (London: Butterworths, 1985), p. 2. For further explanation, please consult Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays*, 1919.

³¹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 CC, para. 8.

Bibliography

Secondary Sources (Document-based research)

Bailey, Candice. "Plan for transit areas to help those waiting for homes," *Cape Argus*. 31 July 2007.

Barry, Michael and Heinz Rüther. "Data Collection Techniques for Informal Settlement Upgrades in Cape Town, South Africa." *URISA Journal*. Volume 17, no. 1, 2005. Online: <http://www.urisa.org/files/Barryvol17no1-5.pdf>

Bilchitz, David. "Giving Socio-economic rights teeth." *South African Law Journal*. Vol. 119, 2002.

Bilchitz, David. "Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-economic Rights Jurisprudence." *South African Journal on Human Rights*. Vol. 19, 2003.

Blake, Michael. *Housing for all in South Africa: an review of the meaning of the right to adequate housing, with specific reference to the government's national housing subsidy scheme*. Cape Town: National Association of Democratic Lawyers, 1999.

Bollyky, TJ. "R if C>P+B: A Paradigm for Judicial Remedies of Socio-economic Rights Violations." *South African Journal on Human Rights*. Vol. 18, 2002.

Bond, Patrick. *Elite transition: from apartheid to neoliberalism in South Africa*. Scottsville: University of KwaZulu-Natal Press, 2005.

Botha, Henk , André van der Walt, and Johan van der Walt. (eds) *Rights and democracy in a transformative constitution* . Stellenbosch, South Africa: SUN Press, 2003.

Brand, Danie. "The Proceduralisation of South African Socio-economic Rights Jurisprudence, or 'What are Socio-economic Rights for?'" In Botha, Henk, André van der Walt, and Johan van der Walt. (eds) *Rights and democracy in a transformative constitution*. Stellenbosch, South Africa: SUN Press, 2003.

Brand, Danie and Christof Heyns, eds. *Socio-Economic Rights in South Africa*. Pretoria: Pretoria University Law Press, 2005

Budlender, Geoff. "Heads of Argument on Behalf of the Amici Curiae," Grootboom case CC 11/00. Online: http://www.escri-net.org/usr_doc/Heads_of_Arguments_of_Amici_Curiae.doc.

Charlton, Sarah and Caroline Kiharto, "Reaching the poor? An analysis of the influences on the evolution of South Africa's housing programme" in Pillay, Udesch, Richard Tomlinson and Jacques du Toit. *Democracy and delivery: Urban policy in South Africa*. Cape Town: HSRC Press, 2006, pp 252-282.

City of Cape Town, "State of Cape Town 2006: Development Issues in Cape Town." (2006) On-line at

http://web.capetown.gov.za/eDocuments/State_of_Cape_Town_2006_712200610345_359.pdf
City of Cape Town, "Study on the Social Profile of Residents in Three Selected Informal Settlements in Cape Town." (City of Cape Town: 2005). Online:
<http://www.capetown.gov.za/wcmstemplates/sdigis.aspx?clusid=477&catparent=7185&IDpathString=6952-6980-7185>.

City of Cape Town. "Integrated Development Plan: 5 Year Plan for the City," 2007. Online:
<http://www.capetown.gov.za/idp/default.asp>

City of Cape Town, Intergrated Development Plan (IDP), "State of Cape Town 2006: Developmental Issues in Cape Town," Executive Summary, 4. Online:
http://web.capetown.gov.za/eDocuments/State_of_Cape_Town_2006_712200610345_359.pdf

Cockrell, Alfred. "The South African Bill of Rights and the 'Duck/Rabbit'" *The Modern Law Review*. Vol. 60, No. 4., 1997.

"Constitution of the Republic of South Africa, 1996," (Act 108 of 1996). South African Government Information. Online: <http://www.info.gov.za/documents/constitution/index.htm>

Cranston, Maurice. "Human Rights, Real and Supposed, in D.D. Raphael (ed) *Political Theory and the Rights of Man*, (1967).

Craven. *The International Covenant on Economic, Social and Cultural Rights*. Oxford: Clarendon Press, 1995.

Cross, Catherine. "Breaking new ground" at the grassroots level. Power Point. Johannesburg: University of the Witswatersrand. Online:
www.wits.ac.za/informalsettlements/Catherine%20Crossppt.

Currie, Iain and Johan de Waal, *The Bill of Rights Handbook*. (Cape Town: Juta & Co, 1996), "Socio Economic Rights: Housing, Health Care, Food, Water, Social Security," pp. 566- 598.

Davis, DM. "The Case Against the Inclusion of Socio-Economic Demands in A Bill of Rights Except as Directive Principles," pp. 475-490. *Southern Africa Journal on Human Rights*. Vol. 8, 1992.

Department of Housing, "Housing Statistics at March 2007." Department of Housing webpage. Online: <http://www.housing.gov.za/default.htm>

Department of Local Government and Housing. "Isidima, the Western Cape Human Settlement Strategy." On-line: www.capecapetown.gov.za/eng/your_gov/325/pubs/public_info/I/162394

Department of Local Government and Housing. *Annual Report, 2006/2007*. Cape Town: Western Cape Provincial Department of Local Government and Housing, 2007.

De Villiers, Bertus. "Social and Economic Rights," 599-628. In van Wyk, Dawid et al *Rights and Constitutionalism: The New South African Legal Order*. Cape Town: Juta & Co., 1994.

De Vos, Pierre. "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness,." *South African Journal on Human Rights*, Vol. 17, 2001.

De Vos, Pierre. "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in the South African Constitution." *South African Journal on Human Rights*, Vol. 13, 1997.

De Wet, Erika. *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa*. Durban: Butterworths, 1996.

De Villiers, Bertus. "Social and Economic Rights," pp 599-628. In Dawid van Wyk et al *Rights and Constitutionalism: The New South African Legal Order*. Cape Town: Juta & Co., 1994.

Dias, RWM. *Jurisprudence*. London : Butterworths, 1985.

Donnelly, Jack and Rhoda E. Howard, eds. *International Handbook of Human Rights*. New York, USA: Greenwood Press, 1987.

Eide, Asbjorn, et al (eds) *Economic, social and cultural rights: A textbook*. London: Dordrecht, 2001.

Ex Parte Chairperson of the Constitutional Assembly. *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC)
<http://196.41.167.18/uhtbin/hyperion-image/J-CC123-96>

"First and Second Appellants' Head of Argument," filed in *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46, 2000 (11). Online:
http://www.escc-net.org/usr_doc/Heads_of_Argument_First_&_Second_Respondents.doc

Freese, Ralph. "Chairman's Report." *Development Action Group, Annual Report, 2006/2007*. Cape Town: Development Action Group, 2007.

Graham, Nicholas. "Informal settlement upgrading in Cape Town: Challenges, constraints, and contradictions within local government," 231-249. In Marie Huchzermeyer and Aly Karam. *Informal settlements: a perpetual challenge?* Cape Town: University of Cape Town Press, 2006.

Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC). Online:
[http://www.escc-net.org/usr_doc/Grootboom_Judgment_Full_Text_\(CC\).pdf](http://www.escc-net.org/usr_doc/Grootboom_Judgment_Full_Text_(CC).pdf)

"Irene Grootboom v. Oostenberg Municipality," Cape Town High Court. Case 6826/99. Online:
http://www.escc-net.org/usr_doc/High_Court_Judgment_-_Full_Text.pdf

Harrison, Philip, Marie Huchzermeyer and Mzwanele Mayekiso. *Confronting fragmentation: Housing and urban development in a democratising society*. Lansdowne: University of Cape Town Press, 2003.

Haysom, Nicholas. "Constitutionalism, Majoritarian Democracy, and Socio-Economic Rights," pp. 451-463. *Southern Africa Journal on Human Rights*. Vol. 8, 1992.

"Housing backlog increases despite new homes," Mail & Guardian Online (18 October 2006),
http://www.mg.co.za/articlePage.aspx?articleid=287072&area=/breaking_news/breaking_news_national/

“Houses for Everyone,” South Africa’s official gateway website. Online: http://www.southafrica.info/ess_info/sa_glance/social_delivery/govthousing.htm

“Housing Rights in International Human Rights Law,” Centre on Housing Rights and Evictions, Online: http://www.cohre.org/view_page.php?page_id=81.

“Housing Statistics at March 2007,” Department of Housing webpage. Accessed 07 November 2007, <http://www.housing.gov.za/default.htm>

Huchzermeyer, Marie and Aly Karam. *Informal settlements: a perpetual challenge?* Cape Town: University of Cape Town Press, 2006.

Huchzermeyer, Marie. “Housing rights in South Africa: Invasions, evictions, the media and the courts in the cases of Grootboom, Alexandra and Bredell.” *Urban Forum*, 2003. 14(1): 80-107.

Huchzermeyer, Marie, Ted Baumann, et al. “Study into supporting informal settlements: Main Report.” Pretoria: Department of Housing, 2004. Online: <http://web.wits.ac.za/NR/rdonlyres/133A14D0-CAA0-4969-B152-616A09B103BF/0/MainReportFINAL6904.pdf>

Huchzermeyer, Marie, Ted Baumann, and Salah Mohamed. “Informal Settlement Practice in South Africa’s Metropolitan Cities. Pretoria: Department of Housing, 2004. Online: <http://web.wits.ac.za/NR/rdonlyres/EE3A24E4-6534-4E70-B5DA6C222B5321EF/0/BackgroundReport3Cities60904nomaps.pdf>, 70.

Huchzermeyer, Marie. *Unlawful occupation: informal settlements and urban policy in South Africa and Brazil*. Trenton, NJ, USA: Africa World Press, 2004.

International Covenant on Economic, Social and Cultural Rights. United Nations, 1966. Accessed Online: http://www.unhchr.ch/html/menu3/b/a_cescr.htm

International Covenant on Social and Economic Rights. General Comment 3, “The nature of States parties obligations.” Fifth Session, 1990. Online: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument)

Jones, Peris and Kristian Stokke (eds). *Democratising Development: The politics of socio-economic rights in South Africa*. Leiden: Martinus Nijhoff, 2005.

Khan, Firoz and Petal Thring, *Housing policy and practice in post-apartheid South Africa*. Sandown: Heinemann Press, 2003.

Leckie, Scott, ed. *National Perspectives on Housing Rights*. The Hague: Martinus Nijhoff Publishers, 2003.

Liebenberg, Sandra. “South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?” *Law, Democracy and Development*, 2002.

Liebenberg, Sandra. “The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in SA.” *South African Journal on Human Rights*, Vol. 17, 2001.

Liebenberg, Sandra ed. *The Constitution of South Africa from a Gender Perspective*. Cape Town: David Phillip, 1995.

Marx, Colin. "Supporting Informal Settlements," Khan, Firoz and Petal Thring, *Housing policy and practice in post-apartheid South Africa*. Sandown, South Africa: Heinemann Press, 2003, Pp 299-320.

Medved, Matt. "Protest about services flares up: Khayelitsha fires burn," *Cape Argus*, p. 5. 31 July 2007

Mbazira, Christopher. *Realising Socio-Economic Rights in the South African Constitution: The Obligations of Local Government*. University of the Western Cape: Community Law Centre, 2006.

Macgregor, Helen et al. "Living on the Edge: A Study of the Delft Temporary Relocation Area." (Cape Town: Development Action Group, 2007), 5. Online: <http://www.dag.org.za/docs/research/delftreport.pdf>

Minister of Health and Others v. Treatment Action Campaign and Others (No 2) 2002 (5) SA 721, 2002 (10) BCLR 1033 (CC)

Mureinik, Etienne. "Beyond a Charter of Luxuries: Economic Rights in the Constitution," pp. 464-474. *Southern Africa Journal on Human Rights*. Vol. 8, 1992.

Murphy, John. "Second Generation Rights in the Bill of Rights Debate in South Africa," pp 30-52. *South African Sociology Review*, Vol 4(2), April 1992.

Pillay, Karrisha. "Implementing Grootboom: Supervision Needed." *ESR Review*. Vol. 3, 2002. Online: <http://communitylawcentre.org.za/ser/esr2002>

Pillay, Karrisha. *Contextualizing Socio-Economic Rights in Post-Apartheid South Africa*. Thesis Submitted for Master of Laws. Cape Town: University of Cape Town, 1996.

Pillay, Udes, Richard Tomlinson and Jacques du Toit. *Democracy and delivery: Urban policy in South Africa*. Cape Town: HSRC Press, 2006.

Pieterse, Marius. "Coming to Terms with Judicial Enforcement of Socioeconomic Rights." *South African Journal of Human Rights*, 2004. Accessed On-line at www.law.wits.ac.za/sajhr/2004/pieterse.pdf.

Robertson, RE. "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights." *Human Rights Quarterly*. Vol. 16, 1994.

SA Social Investment Exchange, "Upgrading the Freedom Park Settlement," On-line: <http://www.sasix.co.za/projects/view/HCD-WC-MAY-0001>

Sachs, Albie. "The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case," pp. 131-152. In Jones, Peris and Kristian Stokke (eds). *Democratising Development: The politics of socio-economic rights in South Africa*. Leiden: Martinus Nijhoff, 2005.

Select Committee on Public Services on a Fact-Finding Mission to the Wallacedene Informal Settlement, Kraaifontein, in the Western Cape. Report, 14 June 2005. Online: <http://www.pmg.org.za/docs/2005/comreports/050629scpservicereport.htm>

Scott, Craig and Philip Alston, "Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and *Grootboom's* promise." *South African Journal on Human Rights*. Vol 16, 2001. Online: <http://www.law.wits.ac.za/sajhr/contents2000.html>

Scott, Craig and Patrick Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in New South African Constitution," *University of Pennsylvania Law Review*. Vol. 141, No. 1, November 1992.

Seleoane, Mandla. *Socio-economic Rights in the South Africa Constitution: Theory and Practice*. Pretoria: Human Sciences Research Council, 2001.

Simons, Mary. "Second Interim Report of Mediator, Mary Simons in the Matter between The Residents of Freedom Park, Tafelsig, Mitchell's Plain and the City of Cape Town."

Simons, Mary. Personal email, 01 Feb 2008.

Smit, Warren. "The Freedom Park Story: A Case Study of the Upgrading of an Informal Settlement in Cape Town." Unpublished document. Development Action Group, September 2007.

Soobramoney v. Minister of Health, KwaZulu-Natal 1998 (1) SA 765, 1997 (12) BCLR 1696 (CC)

Sustein, Cass R. "Social and Economic Rights? Lessons from South Africa." *Constitutional Forum*, Vol. 11, 2001.

van Bueren, G. "Alleviating Poverty Through the Constitutional Court," *South African Journal on Human Rights*. Vol 15, 1999.

van Heyningen, Emille. *Planning Socio-Economic Districts*. Cape Town: City of Cape Town, 2007. Online: http://web.capetown.gov.za/eDocuments/Planning_Districts_Socio-Economic_Analysis_2007_16102007115629_359.pdf

Wesson, Murray, "Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court." *South African Journal on Human Rights*, 2004. <http://www.law.wits.ac.za/sajhr/2004/wesson.pdf>

Western Cape Housing Development Fund. "Isidima: Enabling Dignified Communities," Annual Report 2006/2007. Cape Town: Western Cape Housing Development Fund, 2007. Online: http://www.capegateway.gov.za/Text/2007/10/wchdf_2007.pdf

1994 White Paper, Housing. "Ch. 3: The Current Housing Context," Section 3.1.3 Living Conditions, Existing Housing Stock and Rate of Supply, <http://www.info.gov.za/whitepapers/1994/housing.htm#3>.

Wickeri, Elisabeth. "Grootboom's Legacy: Securing the Right of Access to Adequate Housing in South Africa?" Center for Human Rights and Global Justice Working Paper, Economic Social and Cultural Rights Series, 2004. Online: www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf

Williams, Murray and Henri Du Plessis, "Protest Chaos Shuts N2." *Cape Argus*: 10 September 2007. Online: <http://www.capeargus.co.za/>

Primary Sources (Lectures and Interviews)

Bilchitz, David. Lecture: "Poverty and Fundamental Rights." Cape Town, University of Cape Town: 16 October 2007, UCT.

Bika, Nomthunzi. Presentation at "World Habitat Day" event, Delft community centre, 01 October 2007.

Booi, Thembakazi. Presentation at "World Habitat Day" event, Delft community centre, 01 October 2007.

Budlender, Geoff. Lecture: "Law By Other Means." Hermanus: Student Seminar for Law and Social Justice (SSLSJ), 07 September 2007.

Chaskalson, Arthur. Lecture: "History of Socio-economic rights litigation in South Africa." Hermanus: Student Seminar for Law and Social Justice (SSLSJ), 07 September 2007.

Christensen, Patricia. Interview. 17th October 2007. Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town.

Dyanti, Richard. Provincial Minister of Local Government and Housing, Department of Local Government and Housing, Annual Meeting. Cape Town, Parliament Building. 9th November 2007.

Knipe, Dawn. Interview. 1st October 2007. World Habitat Day event, Delft community center.

Majiet, Shanaaz. Head of Department, Department of Local Government and Housing, Annual Meeting. Cape Town, Parliament Building. 9th November 2007.

Naidoo, Wahieba. Interview. 17th October 2007. Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town.

"Paul" [name withheld]. Interview. 1st October 2007. World Habitat Day event, Delft community center.

Poni, Mzonke. Interview. 23rd September 2007. Development Action Group Leadership Workshop, Simonstown.

Poni, Mzonke. Interview. 1st October 2007. World Habitat Day event, Delft community center.

Rule, Lesar. Tour of Building Site with Niall Mellon Volunteers, 5th November 2007.

Rule, Lesar. Interview. 5th November 2007. Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town.

Steering Committee meeting regarding Homeowners' Education. 08 October and 10 October 2007. Freedom Park Steering Committee Office. Tafelsig, Mitchell's Plain, Cape Town.

University of Cape Town