CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/00

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE	Second Appellant
CAPE METROPOLITAN COUNCIL	Third Appellant
OOSTENBERG MUNICIPALITY	Fourth Appellant
versus	
IRENE GROOTBOOM	
AND OTHERS	Respondents

Heard on : 11 May 2000

Decided on : 4 October 2000

JUDGMENT

YACOOB J:

A. *Introduction*

[1] The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman

dignity, the achievement of equality and the advancement of human rights and freedoms."[1] This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

[2] The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

[3] The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

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1 See section 1(a) of the Constitution.

[4] Mrs Irene Grootboom and the other respondents[2] were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.[3] The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water (albeit

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2 The respondents are 510 children and 390 adults. Mrs Irene Grootboom, the first respondent, brought the application before the High Court on behalf of all the respondents.

3 The judgment of Davis J in which Comrie J concurred is reported as *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

transported) would constitute the bare minimum."[4] The appellants who represent all spheres of government responsible for housing[5] challenge the correctness of that order.

[5] At the hearing of this matter an offer was made by the appellants to ameliorate the immediate crisis situation in which the respondents were living. The offer was accepted by the respondents. This meant that the matter was not as urgent as it otherwise would have been. However some four months after argument, the respondents made an urgent application to this Court in which they revealed that the appellants had failed to comply with the terms of their offer. That application was set down for 21 September 2000. On that day the Court, after communication with the parties, crafted an order putting the municipality on terms to provide certain rudimentary services.

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4 Id at 293A.

5 The first appellant is the Government of the Republic of South Africa (the national government); the second is the Premier of the Province of the Western Cape representing the Western Cape Provincial Government (the Western Cape government); the third appellant, the Cape Metropolitan Council (the Cape Metro) is the supervisory tier of local government in the area; and the fourth appellant is the Oostenberg Municipality (the municipality) which is a further tier of local government. All the appellants are organs of government.

[6] The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas.[6] Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the "coloured labour preference policy." In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.[7] The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100 000 units in the Cape Metro at the time of the inception of the interim Constitution in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements

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6 The background to this policy was set out fully in the majority judgment of this court in *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) paras 41-47.

7 In 1985 when the coloured labour preference policy was finally abolished, it became possible for African people to acquire 99-year leasehold tenure in the Western Cape (this form of tenure had been established in the rest of the country in 1978). The following year the government abandoned its policy of influx control

providing for minimal shelter, but little else.

in its entirety.

[7] Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. It lies on the edge of the municipal area of Oostenberg, which in turn is on the eastern fringe of the Cape Metro. The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month.[8] About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.

[8] Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust."

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8 The figures appear from a needs assessment of the Wallacedene community compiled in December 1997 on behalf of the municipality.

[9] They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others. The eviction proceedings were renewed in March 1999. The respondents' attorneys in this case were appointed by the magistrate to represent them on the return day of the provisional order of eviction. Negotiations resulted in the grant of an order requiring the occupants to vacate New Rust and authorising the sheriff to evict them and to dismantle and remove any of their structures remaining on the land on 19 May 1999. The magistrate also directed that the parties and the municipality mediate to identify alternative land for the permanent or temporary occupation of the New Rust residents.

[10] The municipality had not been party to the proceedings but it had engaged attorneys to monitor them on its behalf. It is not clear whether the municipality was a party to the settlement and the agreement to mediate. Nor is it clear whether the eviction was in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.[9] The validity of the eviction order has never been challenged and must be accepted as

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[9] Section 4(6) provides:

> "If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."

Section 4(7) provides:

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available

correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.

[11] The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the respondents' attorney wrote to the municipality describing the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents. The respondents were not satisfied with the response of the municipality[10] and launched an urgent application in the High Court on 31 May 1999. As indicated above, the High Court granted relief to the respondents and the appellants now appeal against that relief.

> by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

10 The municipality responded on 27 May 1999 stating that it had supplied food and shelter at the Wallacedene Community Hall to the respondents and that it was approaching Western Cape government for assistance to resolve the problem. The respondents, however, considered that the Community Hall provided inadequate shelter as it could only house 80 people.

[12] In the remainder of this judgment, I first outline the reasoning adopted in the High Court judgment. Consideration is then given to the right of access to adequate housing in section 26 of the Constitution and the proper approach to be adopted to the application of that section. This is followed by evaluation of the housing programme adopted by the state in the light of the obligations imposed upon it by section 26. The respondents' claim in terms of the rights of children in section 28 of the Constitution is thereafter considered. Finally, the respondents' arguments concerning the conduct of the appellants towards them will be examined.

B. *The case in the High Court*

[13] Mrs Grootboom and the other respondents applied for an order directing the appellants forthwith to provide:

> (i) adequate basic temporary shelter or housing to the respondents and their children pending their obtaining permanent accommodation;
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> (ii) or basic nutrition, shelter, healthcare and social services to the respondents who are children.[11]

The respondents based their claim on two constitutional provisions. First, on section 26 of the Constitution which provides that everyone has the right of access to adequate housing. Section

[11] Above n 3 at 280F-G.

26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources. The section is fully considered later in this judgment. The second basis for their claim was section 28(1)(c) of the Constitution which provides that children have the right to shelter.

[14] After conducting an inspection *in loco*, Josman AJ ordered that, pending the final determination of the application, temporary accommodation be provided for those of the respondents who were children and for one parent of each child who required supervision. Appellants furnished comprehensive answering affidavits to demonstrate that the state housing programme complied with their constitutional obligations. On the return day, the matter came before two judges. The High Court judgment consists of two separate parts. The first, under the heading "Housing" considered the claim in terms of section 26 of the Constitution. On this part of the claim the High Court concluded:

> "In short [appellants] are faced with a massive shortage in available housing and an extremely constrained budget. Furthermore in terms of the pressing demands and scarce resources [appellants] had implemented a housing programme in an attempt to maximise available resources to redress the housing shortage. For this reason it could not be said that [appellants] had not taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing."[12]

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12 Above n 3 at 285A-B.

The court rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the programme to provide adequate housing. This submission was based on the provisions of certain international instruments that are discussed later.[13]

[15] The second part of the judgment addressed the claim of the children for shelter in terms of section 28(1)(c). The court reasoned that the parents bore the primary obligation to provide shelter for their children, but that section 28(1)(c) imposed an obligation on the state to provide that shelter if parents could not. It went on to say that the shelter to be provided according to this obligation was a significantly more rudimentary form of protection from the elements than is provided by a house and falls short of adequate housing. The court concluded that:

> "an order which enforces a child's right to shelter should take account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole."

[16] In the result the court ordered as follows:

> "(2) It is declared, in terms of section 28 of the Constitution that;
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> (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;

[13] The International Covenant on Economic, Social and Cultural Rights, and the general comments issued by the United Nations Committee on Social and Economic Rights.

(b) the applicant parents are entitled to be accommodated with their children in the aforegoing shelter; and

(c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;

(3) The several respondents are directed to present under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order;

(4) The applicants shall have a period of one month, after presentation of the aforegoing report, to deliver their commentary thereon under oath;

(5) The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary;

(6) There will be no order as to costs of these proceedings up to the date of this judgment;

(7) The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and replies;

(8) The order of Josman AJ dated 4 June 1999 will remain in force until such time as the further proceedings contemplated by the preceding paragraph have been completed."[14]

C. *Argument in this Court*

[17] After the application for leave to appeal had been granted by this Court but before argument had been filed by any of the parties, the Human Rights Commission and the Community Law Centre of the University of the Western Cape applied to be admitted as *amici curiae*. That application was granted and the *amici* were permitted to present written and oral argument. Mr Budlender of the Legal Resources Centre submitted written argument and appeared on behalf of the *amici* at the hearing. We are grateful to him, the Human Rights

[14] Above n 3 at 293H-294C.

Commission and the Community Law Centre for a detailed, helpful and creative approach to the difficult and sensitive issues involved in this case.

[18] Written argument submitted on behalf of the appellants and the respondents concentrated on the meaning and import of the shelter component and the obligations imposed upon the state by section 28(1)(c). The written argument filed on behalf of the *amici* sought to broaden the issues by contending that all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution. It was further contended on behalf of the *amici* that the children's right to shelter had been included in section 28(1)(c) to place the right of children to this minimum core beyond doubt. Respondents' counsel filed further written contentions in which they supported and adopted these submissions. No objection was taken to the issues having been thus broadened.

D. *The relevant constitutional provisions and their justiciability*

[19] The key constitutional provisions at issue in this case are section 26 and section 28(1)(c). Section 26 provides:

> "(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."

Section 28(1)(c) provides:

"(1) Every child has the right -

. . .

(c) to basic nutrition, shelter, basic health care services and social services".

These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land,[15] to adequate housing and to health care, food, water and social security.[16] They also protect the rights of the child[17] and the right to education.[18]

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15 Section 25(5) provides:

"The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

16 Section 27 provides:

"(1) Everyone has the right to have access to—
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment."

17 Section 28 provides:

"(1) Every child has the right—
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a matter of last resort, in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained person over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years."

[18] Section 29(1) provides:

"(1) Everyone has the right—
(a) to a basic education, including adult basic education, and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are of no inferior to standards at comparable public educational institutions."

[20] While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate,[19] the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment.[20] During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held:

> "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous

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19 Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 *SA Journal of Human Rights* at 451; Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SA Journal of Human Rights* at 464; Davis "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 *SA Journal of Human Rights* at 475; Liebenberg "Social and Economic Rights: A Critical Challenge" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (The Community Law Centre at the University of the Western Cape in association with David Philip Publishers, Cape Town 1995) at 79; Corder *et al A Charter For Social Justice: A contribution to the South African Bill of Rights debate* (University of Cape Town, Cape Town 1992) at 18; Scott and Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* at 1; De Villiers "Social and Economic Rights" in van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (Juta, Cape Town, 1994) at 599; South African Law Commission *Final Report on Group and Human Rights* (Project 58, October 1994) at 179.

20 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para 78.

> paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The 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. At the very minimum, socio-economic rights can be negatively protected from improper invasion."

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.[21] This is a very difficult issue which must be carefully explored on a case-by-case basis. To address the challenge raised in the present case, it is necessary first to consider the terms and context of the relevant constitutional provisions and their application to the circumstances of this case. Although the judgment of the High Court in favour of the appellants was based on the right to shelter (section 28(1)(c) of the Constitution), it is appropriate to consider the provisions of section 26 first so as to facilitate a contextual evaluation of section 28(1)(c).

E. *Obligations imposed upon the state by section 26*

i) *Approach to interpretation*

[21] Section 38 of the Constitution empowers the Court to grant appropriate relief for the infringement of any right entrenched in the Bill of Rights.

[21] Like all the other rights in Chapter 2 of the Constitution (which contains the Bill of Rights), section 26 must be construed in its context. The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements. The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. These elements are discussed later. The third subsection provides protection against arbitrary evictions.

[22] Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

[23] Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

[24] The right of access to adequate housing cannot be seen in isolation. There is a close

relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

[25] Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.[22] The context in which the Bill of Rights is to be interpreted was described by Chaskalson P in *Soobramoney*:[23]

> "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."[24]

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22 See, for example, *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC)*; Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC). For an application of this type of contextual interpretation, see also *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC); *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC).

23 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

24 See also the comments of Mahomed DP in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 43,

ii) *The relevant international law and its impact*

albeit in a different context.

[26] During argument, considerable weight was attached to the value of international law in interpreting section 26 of our Constitution. Section 39 of the Constitution[25] obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane*[26] Chaskalson P, in the context of section 35(1) of the interim Constitution,[27] said:

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25 Section 39 of the Constitution provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum -
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> (a) must promote the values that underlie and open and democratic society based on human dignity, equality and freedom;
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> (b) must consider international law; and
>
> (c) may consider foreign law.
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> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

26 *S v Makwanyane and Another* above n 22 at para 35.

27 Section 35(1) of the interim Constitution provides:

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

> ". . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]."(Footnotes omitted)

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa,[28] it may be directly applicable.

[27] The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant)[29] is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. Article 11.1 of the Covenant provides:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

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28 See sections 231-235 of the Constitution which regulate the application of international law in detail.

29 The Covenant was signed by South Africa on 3 October 1994 but has as yet not been ratified.

This Article must be read with Article 2.1 which provides:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[28] The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.

(b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

[29] The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee).[30] The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant

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30 The committee consists of eighteen independent experts. Its purpose is to assist the United Nations Economic and Social Council to carry out its responsibilities relating to the implementation of the Covenant. See Craven *The International Covenant on Economic, Social and Cultural Rights* (Clarendon, Oxford 1995) at 1 and 42.

guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

> "10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."

[30] It is clear from this extract that the committee considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima*

facie in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

[31] The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a "minimum essential level" that must be satisfied by the states parties. The committee developed this concept based on "extensive experience gained by [it] . . . over a period of more than a decade of examining States parties' reports." The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment "as a means of developing a common understanding of the norms by establishing a prescriptive definition."[31] Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

[32] It is not possible to determine the minimum threshold for the progressive realisation of

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[31] Id at 91.

the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.

[33] The determination of a minimum core in the context of "the right to have access to adequate housing" presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, 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. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core

in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.

iii) *Analysis of section 26*

[34] I consider the meaning and scope of section 26 in its context. Its provisions are repeated for convenience:

> "(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."

Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.[32] The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so as to

[32] See, in this regard, the Certification judgment, above para 20.

limit the inexorable migration of people from rural to urban areas in search of jobs.

[35] The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require

special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

[37] The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."

Reasonable legislative and other measures

[39] What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government.[33] The last of these may, as it does in this case, comprise two tiers.[34] The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government.[35] Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern.[36] A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

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33 See Chapter 3 of the Constitution.

34 See sections 155(1)(b) and (c) of the Constitution as well as section 7(1)(b), read with sections 10B and 10C, of the Local Government Transition Act, 209 of 1993.

35 See schedule 4 of the Constitution.

36 See section 152(1)(b), read with sections 152(2) and 153(a).

[40] Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.[37] Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.[38]

[41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise

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37 See section 214 of the Constitution, and, in particular, sections 214(2)(d) and (f).

38 See sections 100, 139 and 155(7) of the Constitution.

contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A 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. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

[42] The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

[43] In determining whether a set of measures is reasonable, it will be necessary to consider

housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Progressive realisation of the right

[45] The extent and content of the obligation consist in what must be achieved, that is, "the progressive realisation of this right." It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive

realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular.[39] The committee has helpfully analysed this requirement in the context of housing as follows:

[39] The text of Article 2.1 appears at para 27 above.

> "Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[40]

Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.

Within available resources

[46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of

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[40] Para 9 of general comment 3, 1990.

resources. Section 26 does not expect more of the state than is achievable within its available resources. As Chaskalson P said in *Soobramoney*:[41]

> "What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

F. *Description and evaluation of the state housing programme*

41 See n 23 above at para 11.

[47] In support of their contention that they had complied with the obligation imposed upon them by section 26, the appellants placed evidence before this Court of the legislative and other measures they had adopted. There is in place both national and provincial legislation concerned with housing.[42] It was explained that in 1994 the state inherited fragmented housing arrangements which involved thirteen statutory housing funds, seven ministries and housing departments, more than twenty subsidy systems and more than sixty national and regional parastatals operating on a racial basis. These have been rationalised. The national Housing Act provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing. The responsibility for implementation is generally given to the provinces. Provinces in turn have assigned certain implementation functions to local government structures in many cases. All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears to be substantial. There is a single housing policy and a subsidy system that targets low-income earners regardless of race. The White Paper on Housing aims to stabilise the housing environment, establish institutional arrangements, protect consumers, rationalise institutional capacity within a sustainable long-term framework, facilitate the speedy release and servicing of land and co-ordinate and integrate the public sector investment in housing. In addition, various schemes are in place involving public/private partnerships aimed at ensuring that housing provision is effectively financed.

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42 Examples of important legislation in this field include the 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.

[48] "Housing development" is defined in section 1 of the Housing Act as:

> "the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which 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 . . ."

"Housing development project" is defined as "any plan to undertake housing development as contemplated in any national housing programme."

[49] Section 2(1) of the Act sets out the general principles binding on national, provincial and local spheres of government. I set out those principles are that material to the determination of this case. All levels of government must:

> "(a) give priority to the needs of the poor in respect of housing development;
>
> (b) consult meaningfully with individuals and communities affected by housing development;
>
> (c) ensure that housing development—
>
> (i) provides as wide a choice of housing and tenure options as is reasonably possible;
>
> (ii) is economically, fiscally, socially and financially affordable and sustainable;
>
> (iii) is based on integrated development planning; and
>
> (iv) is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance;
>
> . . .
>
> (e) promote—
>
> (i) education and consumer protection in respect of housing development;

(ii) conditions in which everyone meets their obligations in respect of housing development;

(iii) the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;

. . .

(ix) the provision of community and recreational facilities in residential areas;

(f) take due cognisance of the impact of housing development on the environment;

. . .

(h) in the administration of any matter relating to housing development—

(i) respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution;

(ii) observe and adhere to the principles of co-operative government and intergovernmental relations referred to in section 41 (1) of the Constitution; and

(iii) comply with all other applicable provisions of the Constitution."

[50] Over and above these general principles, the Act sets out the functions of the national, provincial and local government in relation to housing. The functions of national government are set out in section 3 of the Act.[43] The function of provincial governments are set out in section

[43] Section 3 provides:

"(1) The national government acting through the Minister must, after consultation with every MEC and the national organisation representing municipalities as contemplated in section 163 (a) of the Constitution, establish and facilitate a sustainable national housing development process.

(2) For the purposes of subsection (1) the Minister must—

(a) determine national policy, including national norms and standards, in respect of housing development;

(b) set broad national housing delivery goals and facilitate the setting of

7 of the Act[44] and the functions of municipalities are set out in section 9 of the Act.[45] The

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provincial and, where appropriate, local government housing delivery goals in support thereof;

(c) monitor the performance of the national government and, in co-operation with every MEC, the performance of provincial and local governments against housing delivery goals and budgetary goals;

(d) assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their duties in respect of housing development;

(e) support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development;

(f) promote consultation on matters regarding housing development between the national government and representatives of—

(i) civil society;

(ii) the sectors and subsectors supplying or financing housing goods or services;

(iii) provincial and local governments; and

(iv) any other stakeholder in housing development;

(g) promote effective communication in respect of housing development.

(3) For the purposes of subsection (2) (a) 'national norms and standards' includes norms and standards in respect of permanent residential structures, but are not limited thereto.

(4) For the purposes of performing the duties imposed by subsections (1) and (2) the Minister may—

(a) establish a national institutional and funding framework for housing development;

(b) negotiate for the national apportionment of the state budget for housing development;

(c) prepare and maintain a multi-year national plan in respect of housing development;

(d) allocate funds for national housing programmes to provincial governments, including funds for national housing programmes administered by municipalities in terms of section 10;

(e) allocate funds for national facilitative programmes for housing development;

(f) obtain funds for land acquisition, infrastructure development, housing provision and end-user finance;

(g) institute and finance national housing programmes;

(h) establish and finance national institutions for the purposes of housing development, and supervise the execution of their mandate;

(i) evaluate the performance of the housing sector against set goals and equitableness and effectiveness requirements; and

(j) take any steps reasonably necessary to—

(i) create an environment conducive to enabling provincial and local governments, the private sector, communities and individuals to achieve their respective goals in respect of housing development; and

(ii) promote the effective functioning of the housing market.

. . ."

[44] Section 7 provides:

"(1) Every provincial government must, after consultation with the provincial organisations representing municipalities as contemplated in section 163 (a) of the Constitution, do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.

(2) For the purposes of subsection (1) every provincial government must—

(a) determine provincial policy in respect of housing development;

(b) promote the adoption of provincial legislation to ensure effective housing delivery;

(c) take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development;

(d) co-ordinate housing development in the province;

(e) take all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development;

(f) when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty; and

(g) prepare and maintain a multi-year plan in respect of the execution in the province of every national housing programme and every provincial housing programme, which is consistent with national housing policy and section 3 (2) (b), in accordance with the guidelines that the Minister approves for the financing of such a plan with money from the Fund.

. . ."

45 Section 9 provides:

"(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

(a) ensure that—

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development.

(2) (a) Any municipality may participate in a national housing programme in

accordance with the rules applicable to such programme by-

(i) promoting a housing development project by a developer;

(ii) subject to paragraph (b), acting as developer in respect of the planning and execution of a housing development project on the basis of full pricing for cost and risk;

(iii) entering into a joint venture contract with a developer in respect of a housing development project;

(iv) establishing a separate business entity to execute a housing development project;

(v) administering any national housing programme in respect of its area of jurisdiction in accordance with section 10;

(vi) facilitating and supporting the participation of other role players in the housing development process.

(b) If a municipality has been accredited under section 10 (2) to administer national housing programmes in terms of which a housing development project is being planned and executed, such municipality may not act as developer, unless such project has been approved by the relevant provincial housing development board.

(3) (a) A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if—

(i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;

(ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the *Provincial Gazette*; and

(iii) such notice of expropriation is published within six months

responsibilities of local government in the Cape Metro, and in particular the relationship between

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of the date on which the permission of the MEC was granted.

(b) Sections 1, 6 to 15 and 18 to 23 of the Expropriation Act, 1975 (Act No 63 of 1975), apply, with the changes required by the context, in respect of the expropriation of land by a municipality in terms of paragraph (a), and any reference in any of those sections—

(i) to the "Minister" and the "State" must be construed as a reference to the chief executive officer of the relevant municipality and the relevant municipality, respectively;

(ii) to "section 2" must be construed as a reference to this subsection; and

(iii) to "this Act" must be construed as a reference to this Act."

metropolitan government on the one hand and municipal government on the other, have been regulated by an agreement entered into between the Cape Metro and the municipalities within its jurisdiction.[46]

[51] It emerges from the general principles read together with the functions of national, provincial and local government that the concept of housing development as defined is central to the Act. Housing development, as defined, seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements. What is more, it endeavours to ensure convenient access to economic opportunities and to health, educational and social amenities. All the policy documents before the Court are postulated on the need for housing development as defined. This is the central thrust of the housing development policy.

[52] The definition of housing development as well as the general principles that are set out do not contemplate the provision of housing that falls short of the definition of housing development

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46 The agreement is entitled "Agreement in respect of the allocation of powers, duties and functions entered into between Cape Metropolitan Council and The Metropolitan Local Councils of Cape Town, Eastern, Heidelberg, Northern, Southern, Tygerberg." This agreement was entered into on 30 September 1996 in accordance with the provisions of the Cape Metropolitan Further Enactment, the Cape Metropolitan Negotiating Forum Agreement and the Local Government Transition Act.

in the Act. In other words there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.

[53] What has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built.[47] Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.

[54] A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing. The programme applies throughout South Africa and although there have been

47 Some 362 160 houses were built or under construction between March 1994 and September 1997, while an overall total of some 637 190 subsidies had been allocated for projects in various stages of planning or development by October 1997.

difficulties of implementation in some areas, the evidence suggests that the state is actively seeking to combat these difficulties.

[55] Legislative measures have been taken at both the national and provincial levels. As we have seen, at the national level the Housing Act sets out the general principles applicable to housing development, defines the functions of the three spheres of government and addresses the financing of housing development. It thus provides a legislative framework within which the delivery of houses is to take place nationally. At the provincial level there is the Western Cape Housing Development Act, 1999. This statute also sets out the general principles applicable to housing development; the role of the provincial government; the role of local government; and other matters relating to housing development. Thus, like the Housing Act, this statute provides a legislative framework within which housing development at provincial level will take place. All of the measures described form part of the nationwide housing programme.

[56] This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. This case is concerned with the situation in the Cape Metro and the municipality and the circumstances that prevailed there are therefore presented.

[57] The housing shortage in the Cape Metro is acute. About 206 000 housing units are required and up to 25 000 housing opportunities are required in Oostenberg itself. Shack counts in the Cape Metro in general and in the area of the municipality in particular reveal an inordinate

problem. 28 300 shacks were counted in the Cape Metro in January 1993. This number had grown to 59 854 in 1996 and to 72 140 by 1998. Shacks in this area increased by 111 percent during the period 1993 to 1996 and by 21 percent from then until 1998. There were 2121 shacks in the area of the municipality in 1993, 5701 (an increase of 168 percent) in 1996 and 7546 (an increase of 32 percent) in 1998. These are the results of a study commissioned by the Cape Metro.

[58] The study concludes that the municipality "is the most critical local authority in terms of informal settlement shack growth at this point in time", this despite the fact that, according to an affidavit by a representative of the municipality, 10 577 houses had been completed by 1997. The scope of the problem is perhaps most sharply illustrated by this: about 22 000 houses are built in the Western Cape each year while demand grows at a rate of 20 000 family units per year. The backlog is therefore likely to be reduced, resources permitting and, on the basis of the figures in this study, only by 2 000 houses a year.

[59] The housing situation is desperate. The problem is compounded by rampant unemployment and poverty. As was pointed out earlier in this judgment, a quarter of the households in Wallacedene had no income at all, and more than two-thirds earned less than R500-00 per month during 1997. As stated above, many of the families living in Wallacedene are living in intolerable conditions. In some cases, their shacks are permanently flooded during the winter rains, others are severely overcrowded and some are perilously close to busy roads. There is no suggestion that Wallacedene is unusual in this respect. It is these conditions which ultimately forced the respondents to leave their homes there.

[60] The Cape Metro has realised that this desperate situation requires government action that is different in nature from that encompassed by the housing development policy described earlier in this judgment. It drafted a programme (the Cape Metro land programme) in June 1999, some months after the respondents had been evicted. It wrote:

> "From the above, it is seen that there is a complete mismatch between demand and supply in the housing sector, resulting in a crisis in housing delivery.
>
> However, the existing housing situation cannot just be accepted, as there are many families living in crisis conditions, or alternatively, there are situations in the [Cape Metro] where local authorities need to undertake legal proceedings (evictions) in order to administer and implement housing projects. A new housing programme needed [sic] to cater for the crisis housing conditions in the [Cape Metro]. The proposed programme is called an 'Accelerated Managed Land Settlement Programme'."

Later in the document, the programme is briefly described as follows:

> "The Accelerated Managed Land Settlement Programme (AMSLP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services.
>
> This programme should benefit those families in situations of crisis. The programme does not offer any benefits to queue jumpers, as it is the Metropolitan Local Council who determines when the progressive upgrading of services will be taken.
>
> The Accelerated Managed Land Settlement Programme (AMSLP) includes the identification and purchase of land, planning, identification of the beneficiaries, township approval, pegging of the erven, construction of basic services, resettlement and the transfer of land to the beneficiaries."

We were informed by counsel during the hearing that although this programme was not in force at the time these proceedings were commenced, it has now been adopted and is being implemented.

[61] The Cape Metro land programme was formulated by the Cape Metro specifically "to assist the metropolitan local councils to manage the settlement of families in crisis." Important features of this programme are its recognition of (i) the absence of provision for people living in crisis conditions; (ii) the unacceptability of having families living in crisis conditions; (iii) the consequent risk of land invasions; and (iv) the gap between the supply and demand of housing resulting in a delivery crisis. Crucially, the programme acknowledges that its beneficiaries are families who are to be evicted, those who are in a crisis situation in an existing area such as in a flood-line, families located on strategic land and families from backyard shacks or on the waiting list who are in crisis situations. Its primary objective is the rapid release of land for these families in crisis, with services to be upgraded progressively.

[62] In devising its programme the Cape Metro said the following:

> "Local government, by virtue of the powers and functions granted to it by national and provincial legislation and policy, needs to initiate, facilitate and develop housing projects. Part of this role is also the identification of vacant land for housing. There are currently a few programmes that are available to finance housing projects, for example, the project-linked subsidy, institutional subsidy and CMIP. None of these programmes deal directly with crisis situations in the housing field. The Accelerated Managed Land Settlement Programme (AMLSP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services."

[63] Section 26 requires that the legislative and other measures adopted by the state are reasonable. To determine whether the nationwide housing programme as applied in the Cape Metro is reasonable within the meaning the section, one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances. It is common cause that, except for the Cape Metro land programme, there is no provision in the nationwide housing programme as applied within the Cape Metro for people in desperate need.

[64] Counsel for the appellants supported the nationwide housing programme and resisted the notion that provision of relief for people in desperate need was appropriate in it. Counsel also submitted that section 26 did not require the provision of this relief. Indeed, the contention was that provision for people in desperate need would detract significantly from integrated housing development as defined in the Act. The housing development policy as set out in the Act is in itself laudable. It has medium and long term objectives that cannot be criticised. But the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.

[65] The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an

integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. That is one of the main reasons why the Cape Metro land programme was adopted.

[66] The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26. The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.

[67] This case is concerned with the Cape Metro and the municipality. The former has realised that this need has not been fulfilled and has put in place its land programme in an effort to fulfil it. This programme, on the face of it, meets the obligation which the state has towards people in the position of the respondents in the Cape Metro. Indeed, the *amicus* accepted that this programme "would cater precisely for the needs of people such as the respondents, and, in an appropriate and sustainable manner." However, as with legislative measures, the existence of the programme is a starting point only. What remains is the implementation of the programme

by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address.

[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

[69] In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier. I come later to the order that should flow from this conclusion.

G. *Section 28(1)(c) and the right to shelter*

[70] The judgment of the High Court amounts to this: (a) section 28(1)(c) obliges the state to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children; (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26; and (c) the state is

bound to provide this rudimentary shelter irrespective of the availability of resources. On this reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c).

[71] This reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are.

[72] The respondents and the *amici* in supporting the judgment of the High Court draw a distinction between housing on the one hand and shelter on the other. They contend that shelter is an attenuated form of housing and that the state is obliged to provide shelter to all children on demand. The respondents and the *amici* emphasise that the right of children to shelter is unqualified and that, the "reasonable measures" qualification embodied in sections 25(5) 26, 27 and 29 are markedly absent in relation to section 28(1)(c). The appellants disagree and criticise the respondents' definition of shelter on the basis that it conceives shelter in terms that limit it to a material object. They contend that shelter is more than just that, but define it as an institution constructed by the state in which children are housed away from their parents.

[73] I cannot accept that the Constitution draws any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in section 28(1)(c) is not qualified by any requirement that it should be "basic" shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in section 28 (1)(c) embraces shelter in all its manifestations. However, it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents.

[74] The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution.[48] Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned.[49] Section 28(1)(c) creates the right of children to basic nutrition, shelter, basic health

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48 These sections are set out in para 19 of this judgment.

49 Section 25(5) mandates the state to foster conditions which enables citizens to gain land on an equitable basis; section 26(2) is concerned with the right to access to adequate housing; section 27(2) with the right to access to health care services, sufficient food and water and social security including appropriate social assistance if people are unable to support themselves and their dependants.

care services and social services. There is an evident overlap between the rights created by sections 26 and 27 and those conferred on children by section 28. Apart from this overlap, the section 26 and 27 rights are conferred on everyone including children while section 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that section 28(1)(c) creates separate and independent rights for children and their parents.

[75] The extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa. The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. Section 28 is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.

[76] Section 28(1)(c) must be read in this context. Subsections 28(1)(b) and (c) provide:

> "Every child has the right —
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services".

They must be read together. They ensure that children are properly cared for by their

parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement.

[77] It follows from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.

[78] This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation,[50] and the prevention of other forms of abuse of children mentioned in section 28. In addition, the state is required to fulfil its obligations to

[50] See section 28(1)(d).

provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. It follows from this judgment that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.

[79] It was not contended that the children who are respondents in this case should be provided with shelter apart from their parents. Those of the respondents in this case who are children are being cared for by their parents; they are not in the care of the state, in any alternative care, or abandoned. In the circumstances of this case, therefore, there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c). The High Court therefore erred in making the order it did on the basis of this section.

H. *Evaluation of the conduct of the appellants towards the respondents*

[80] The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them. This matter was raised in argument, and although not fully aired on the papers, it is appropriate to consider it. At first blush, the respondents' position was so acute and untenable when the High Court heard the case that simple humanity called for some form of immediate and urgent relief. They had left Wallacedene

because of their intolerable circumstances, had been evicted in a way that left a great deal to be desired and, as a result, lived in desperate sub-human conditions on the Wallacedene soccer field or in the Wallacedene community hall. But we must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

[81] Although the conditions in which the respondents lived in Wallacedene were admittedly intolerable and although it is difficult to level any criticism against them for leaving the Wallacedene shack settlement, it is a painful reality that their circumstances were no worse than those of thousands of other people, including young children, who remained at Wallacedene. It cannot be said, on the evidence before us, that the respondents moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a deliberate strategy to gain preference in the allocation of housing resources over thousands of other people who remained in intolerable conditions and who were also in urgent need of housing relief. It must be borne in mind however, that the effect of any order that constitutes a special dispensation for the respondents on account of their extraordinary circumstances is to accord that preference.

[82] All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to

provide adequate housing.

[83] But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.

[84] The national legislature recognises this. In the course of stating the general principles binding on all levels of government, the Housing Act provides that in the administration of any matter relating to housing development, all levels of government must respect, protect, promote and fulfil the rights in Chapter 2 of the Constitution.[51] In addition, section 2(1)(b) obliges all levels of government to consult meaningfully with individuals and communities affected by housing development. Moreover, section 9(1)(e) obliges municipalities to promote the

[51] See section 2(1)(h)(i).

resolution of conflict arising in the housing development process.

[85] Consideration is now given to whether the state action (or inaction) in relation to the respondents met the required constitutional standard. It is a central feature of this judgment that the housing shortage in the area of the Cape Metro in general and Oostenberg in particular had reached crisis proportions. Wallacedene was obviously bursting and it was probable that people in desperation were going to find it difficult to resist the temptation to move out of the shack settlement onto unoccupied land in an effort to improve their position. This is what the respondents apparently did.

[86] Whether the conduct of Mrs Grootboom and the other respondents constituted a land invasion was disputed on the papers. There was no suggestion however that the respondents' circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred. If there had been such a plan the appellants might well have acted differently.

[87] The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

[88] There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place. The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

[89] In these circumstances, the municipality's response to the letter of the respondents' attorney left much to be desired. It will be recalled that the letter stated that discussions were being held with officials from the Provincial Administration in order to find an amicable solution to the problem. There is no evidence that the respondents were ever informed of the outcome of these discussions. The application was then opposed and argued on the basis that none of the appellants either individually or jointly could do anything at all to alleviate the problem. The Cape Metro, the Western Cape government and the national government were joined in the proceedings and would all have been aware of the respondents' plight.

[90] In all these circumstances, the state may well have been in breach of its constitutional

obligations. It may also be that the conduct of the municipality was inconsistent with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. In addition, the municipality may have failed to meet the obligations imposed by the provisions of sections 2(1)(b), 2(1)(h)(i) and 9(1)(e) of the Housing Act. However no argument was addressed to this Court on these matters and we are not in a position to consider them further.

[91] At the hearing in this Court, counsel for the national and Western Cape government, tendered a statement indicating that the respondents had, on that very day, been offered some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism. Counsel for the respondents accepted the offer on their behalf. We were subsequently furnished with a copy of the arrangement which read as follows:

> "1. The Department of Planning, Local Government and Housing (Western Cape Province) undertakes in conjunction with the Oostenberg Municipality to provide temporary accommodation to the respondents on the Wallacedene Sportsfield until they can be housed in terms of the housing programmes available to the local authority, and in particular the Accelerated Land Managed Settlement Programme.
> 2. The 'temporary accommodation' comprises: a marked off site; provision for temporary structures intended to be waterproof; basic sanitation, water and refuse services.
> 3. The implementation of such measures is to be discussed with the Wallacedene community and the respondents."

Although, as indicated earlier, the special position of the respondents was aired during argument, the relief claimed by them was always grounded only in sections 26 and 28 of the Constitution and not on the breach of any statute (such as the Prevention of Illegal Evictions Act, or the Housing Act), the common law or any other provision of the

Constitution. Accordingly, it is inappropriate for this Court to order any relief on grounds other than sections 26 or 28 of the Constitution.

[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.

I. *Summary and conclusion*

[93] This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

[94] I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can,

and in appropriate circumstances, must enforce.

[95] Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

[96] In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

[97] The Human Rights Commission is an *amicus* in this case. Section 184 (1) (c) of the Constitution places a duty on the Commission to "monitor and assess the observance of human rights in the Republic." Subsections (2) (a) and (b) give the Commission the power:

> "(a) to investigate and to report on the observance of human rights;
> (b) to take steps to secure appropriate redress where human right have been violated."

Counsel for the Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the state of its section 26

obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment.

[98] There will be no order as to costs.

J. *The Order*

[99] The following order is made:

1. The appeal is allowed in part.
2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it:

   It is declared that:

   (a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

   (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

   (c) As at the date of the launch of this application, the state housing

programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.

3. There is no order as to costs.

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ concur in the judgment of Yacoob J.

For the first and second appellants: JJ Gauntlett SC, A Schippers and N Bawa instructed by the State Attorney, Cape Town.

For the third and fourth appellants: JC Heunis SC and JW Olivier instructed by De Klerk & Van Gend for the third appellant and Marais Muller for the fourth appellant.

For the respondents: P Hodes SC, I Jamie and A Musikanth instructed by Apollos Smith & Associates.

Attorney for the *amici curiae*: GM Budlender instructed by the Legal Resources Centre.